

EXPLANATORY MEMORANDUM TO
THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS PROVISION FREE
OF CHARGE) REGULATIONS 2012

2012 No. 2488

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

English local authorities are under a duty to secure that free early years provision of a prescribed description is available for children of a prescribed description and who are under compulsory school age. The regulations prescribe those matters.

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

None

4. Legislative Context

4.1 Section 1 of the Education Act 2011 substitutes a new section 7 of the Childcare Act 2006 (“the Act”) on 1st September 2013. The new section 7 provides that an English local authority must secure that early years provision of the prescribed description is available free of charge for each young child in their area who is under compulsory school age, and is of the prescribed description. The purpose of these regulations is to prescribe the early years provision to which the duty applies, and to prescribe the description of the young children to whom the early years provision must be made available. These regulations are the first made under this power as substituted.

4.2 The Act provides that early years provision means the provision of childcare for a young child. A young child is a child from birth to the period ending on 31st August following the child’s fifth birthday.

4.3 These regulations replace, from 1st September 2013, the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2008, as amended (S.I. 2008/1724, as amended by S.I. 2010/301) (the “2008 Regulations”). Under the 2008 Regulations, a local authority is under a duty to secure prescribed early years provision for a child from the term starting after the child’s third birthday until the child is of compulsory school age, securing 570 hours over no fewer than 38 weeks in the year. The prescribed early years provision is provision provided by an early years provider to whom section 40 of the Act applies. Section 40 of the Act requires an early years provider to secure that the provision meets the learning and development requirements, and complies

with the welfare requirements, of the Early Years Foundation Stage, as defined in section 39 of the Act. The prescribed early years provision does not include early years provision in respect of which the Secretary of State has made a direction that the provider is exempt from the learning and development requirements, or where an early years provider has made a determination in respect of a particular child that the learning and development requirements do not apply to the child.

4.4 These regulations make no changes to the position in the 2008 Regulations for young children from the age of three, and also make no changes to the description and amount of early years provision which the local authority is required to secure. The main change under these regulations is the introduction of a new statutory duty on local authorities to secure free early years provision for eligible two-year-olds from 1st September 2013. A local authority will be under a duty to secure free early years provision for a child from the term after the child turns two, provided that the child is eligible. In order to be eligible, the child must either be looked after by the local authority (under section 22(1) of the Children Act 1989) or must come within the section which sets out the earnings and benefits criteria used to determine eligibility for free school meals (section 512ZB(4) of the Education Act 1996).

4.5 The regulations stipulate the dates from which the local authority has a duty to secure free early years provision for children of the prescribed description. Regulation 4(3) stipulates the relevant starting dates for two-year-olds who become eligible children part-way through the year following the second birthday. The local authority has a statutory duty to secure free early years provision for these children from the start of the term after they become eligible children.

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, local authorities in England have had a statutory duty to secure free part-time early years provision for all three- and four-year-olds in their area. This is known as the “free entitlement”.

7.2 The Government is extending the free entitlement to include eligible two-year-olds from September 2013. This will be a targeted entitlement with a primary focus on economically disadvantaged two-year-olds. It follows pilots which ran from 2006-2010, in which local authorities secured free early years provision for around 20,000 two-year-olds.

7.3 Around 150,000 (20%) two-year olds will be eligible to access free early years provision from September 2013, the majority of whom will be from workless families (those who meet the earnings and benefits criteria used for free school meals). Extending the free entitlement to them is part of the Government's fairness premium, to drive social mobility and improve life chances. The policy is rooted in evidence of the positive benefits of regular early learning and childcare for children. The Effective Provision of Pre-School Education Project¹ found that high quality early years provision from age two has a significant impact on children's cognitive and social outcomes, particularly for those children from more disadvantaged backgrounds. The evaluation of the pilot phase of free early years provision for two-year-olds also found that high-quality free places benefited children's speech and language attainment at age three, as well as parent-child relationships.² However, the Department for Education's internal analysis has found that economically disadvantaged two-year-olds are less likely to access early years provision: only 43% of the poorest quintile do so, compared to 72% of the richest.

7.4 By extending the free entitlement to eligible two-year-olds, the Government seeks to address this disparity in access. The extension will significantly expand the provision of free places. Setting out the duty in legislation will mean that it is clear which children are eligible, and should therefore support greater take-up of the free places.

7.5 Private, voluntary and independent (PVI) providers, as well as maintained settings, will be able to provide free places. The quality criteria to be met by providers of free places will be set out in guidance.

7.6 From September 2014, the Government plans to increase further the eligibility for free places, to include around 300,000 (40%) two-year-olds. New eligibility criteria will be required for this, and the regulations will be amended accordingly in due course.

8. Consultation outcome

8.1 From November 2011 to February 2012, the Department for Education consulted on the policy proposals now written into the regulations. In total 423 responses were received. A wide range of providers in the PVI and maintained sectors responded, along with local authorities, national organisations and parents/carers. In addition to the consultation document, the Department for Education held a series of workshops with providers and local authorities over the consultation period. This served to publicise the consultation, and provided a forum for further feedback on the proposals.

8.2 Responses to the proposals were broadly positive. 65% of respondents agreed that the entitlement should be for two-year-olds who meet the same earnings and benefits

¹K. Sylva et al, *The Effective Provision of Pre-School Education Project: Final Report - A Longitudinal Study Funded by the DfES 1997-2004* (2008, DCSF) can be found at: <http://www.education.gov.uk/rsgateway/DB/RRP/u013144/index.shtml>

² Smith, R. et al., *Evaluation of the Early Education Pilot for Two Year Old Children Evaluation*, (2009, DCSF) Research Report RR134.

criteria used for free school meals, and 85% agreed that children who are looked after by the local authority should be eligible. The consultation documents and the Government responses to the discussion phase can be found at:

<https://www.education.gov.uk/aboutdfe/departementalinformation/consultations>

9. Guidance

The statutory guidance on the free entitlement and securing sufficient childcare will be revised to include new elements relating to the two-year-old free entitlement and is expected to be published in spring 2013. It will be available to download from the Department for Education's website: www.education.gov.uk

10. Impact

10.1 The impact on business, charities and voluntary bodies is expected to be positive. Early years providers are not obliged to offer free places to two-year-olds. However, extending the free entitlement will offer business opportunities for providers in the PVI sector to deliver early years provision to more two-year-olds, funded by local authorities. The Government expects that this will encourage existing providers to expand, as well as bringing new providers into the market.

10.2 English local authorities will have a statutory duty to secure free early years provision for eligible two-year-olds, in addition to the free places for three- and four-year-olds. The extension is fully funded. £534m has been allocated for 2013-14 and will be distributed through the Dedicated Schools Grant. Funding will increase to £760m in 2014-15, when the planned increase to include around 40% of two-year-olds is introduced.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

The legislation does not apply directly to small business because, although PVI early years providers have an important role in the free entitlement market, the regulations will not require them to deliver the free entitlement and they can choose not to do so.

12. Monitoring & review

12.1 The Department for Education is carrying out biannual surveys of local authorities in 2012 and 2013, on the number of free places they are delivering for two-year-olds. This will support the Government in assessing local authorities' preparations for the extension to the entitlement.

12.2 There are two key success criteria for the two-year-old free entitlement: the increased numbers of disadvantaged two-year-olds taking up free early years provision (compared to the current baseline), and improved outcomes for children's development. Take-up of free places will be monitored annually through the Early Years Census and Schools Census from 2014. The impact on child outcomes will be monitored through the annual Early Years Foundation Stage Profile results for children at age five. The Government also plans to commission a follow-up to the Effective Provision of Pre-School Education study, to start in Autumn 2012. This will assess the longitudinal impact of the extension of free early years provision to eligible two-year-olds.

13. Contact

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