

**EXPLANATORY MEMORANDUM TO**  
**THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS PROVISION FREE**  
**OF CHARGE) REGULATIONS 2013**

**2013 No. 3193**

**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**

2.1 English local authorities are under a duty to secure early years provision free of charge for young children in their area who are under compulsory school age and of the prescribed description. These regulations prescribe the type and amount of free early years provision and the description of children to benefit from the provision.

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

None

**4. Legislative Context**

4.1 Section 1(2) of the Education Act 2011 substituted a new section 7 of the Childcare Act 2006 (“the 2006 Act”) on 1<sup>st</sup> 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 the description of the young children to whom the early years provision must be made available.

4.2 The 2006 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 31<sup>st</sup> August following the child’s fifth birthday.

4.3 These regulations replace, from 1<sup>st</sup> September 2014, the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2012 (S.I. 2012/2488) (the “2012 Regulations”). Under the 2012 Regulations, a 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, the duty arises 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. Under the 2012 Regulations, those criteria are that the child is either looked after by a local authority (under section 22(1) of the Children Act 1989), or comes 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).

4.4 The main change under these regulations is to extend the eligibility criteria for children aged two. In addition to the eligibility criteria already in the 2012 Regulations, from 1<sup>st</sup> September 2014 a local authority will be under a duty to secure funded early years provision for a young child from the beginning of the term after the child turns two when:

- 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 educational needs made under section 324 of the Education Act 1996;
- the child is entitled to disability living allowance under section 71 of the Social Security Contributions and Benefits Act 1992;
- the child has previously been looked after by the local authority under section 22(1) of the Children Act 1989 and is no longer looked after because one of the following orders has been made:
  - an adoption order within section 46(1) of the Adoption and Children Act 2002;
  - a special guardianship order within section 14A(1) of the Children Act 1989; or
  - a residence order within the meaning given by section 8(1) of the Children Act 1989

4.5 The regulations provide that local authorities must secure for each young child 570 hours of provision over no fewer than 38 weeks of the year. The entitlement arises from the start of the term following the child's third, or if applicable, second birthday. When a two-year-old child meets the eligibility criteria part way through the year following their second birthday, the local authority must secure funded early years provision from the start of the term after the child meets the eligibility criteria.

4.6 Under the 2012 Regulations, prescribed early years provision is provision by an early years provider to whom section 40 of the 2006 Act applies. Section 40(2) of the 2006 Act requires an early years provider to whom section 40 applies to secure that the early years provision meets the learning and development requirements and to comply with the welfare requirements of the Early Years Foundation Stage ("EYFS"), as defined in section 39 of the 2006 Act. Under the 2012 Regulations, the prescribed early years provision excludes 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 that child.

4.7 Under the new regulations, prescribed early years provision is provision by an early years provider to whom section 40(1) of the 2006 Act applies. Section 40(1) of the 2006 Act 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 early years providers providing early years provision at certain schools and who are exempt, in certain circumstances, from the requirement to be registered. This means that prescribed early years provision now includes 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 of the EYFS, or where a provider has made a determination in respect of a particular child that the learning and development requirements do not apply to the child.

4.8 Section 7(3) of the 2006 Act requires that in discharging their duty under section 7(1), English local authorities must have regard to any guidance issued by the Secretary of State.

## **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 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. In September 2010 the Government increased the amount of funded early education each three- and four-year old is entitled to from 475 hours a year to 570 hours a year. This equates to 15 hours a week for 38 weeks of the year. Latest figures published in June 2013<sup>1</sup> show that 96% of three- and four-year-olds benefit from funded early education.

7.2 Funded early education places are available in a wide range of early years providers including maintained nursery schools and nursery classes attached to primary schools, children's centres, independent schools, day nurseries, pre-schools and with childminders. In 2013 just over half of the early education providers who delivered

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<sup>1</sup> Statistical First Release 23/2013: Provision for children under five years of age in England:- January 2013 (published on 27 June 2013

<https://www.gov.uk/government/publications/provision-for-children-under-5-years-of-age-in-england-january-2013>

funded early education places for three- and four-year-olds were in the private, voluntary and independent sector.

7.3 The current regulations require local authorities to meet their duty to secure funded early education through providers who meet the learning and development requirements of the EYFS. Following an independent review of the EYFS in 2010, the Government amended the EYFS exemptions regulations in 2012 to make changes to the arrangements for providers seeking exemptions from the learning and development requirements of the EYFS. Under the new arrangements, high quality independent schools may apply for an exemption from the learning and development requirements for pupils aged three and over. This is in addition to the existing arrangements under which exemptions are available for early years provision which is governed by established principles which cannot be reconciled with the learning and development requirements of the EYFS. The Department has decided to amend the description of prescribed early years provision so that it no longer excludes providers with exemptions, to maximise parental choice and enable parents to take up their child's funded place at an early years provider which best meets their child's needs.

7.4 There is a strong body of evidence from the Effective Provision of Pre-school Primary and Secondary Education (EPPSE) that shows high quality childcare and pre-school provision has positive benefits for children's all-round development. The benefit is particularly strong for those children from more disadvantaged backgrounds.<sup>2</sup> This evidence also suggests that an early start at pre-school (between two and three years) is linked with increased intellectual attainment and being more sociable with other children. The benefits of an early start continue to be evident at the end of Key Stage one. A series of reports have been published and are at: [www.ioe.ac.uk/research/EPPSE](http://www.ioe.ac.uk/research/EPPSE). In spring 2014 the project will report on the influences on student outcomes at age 16 (in year 11).

7.5 In autumn 2010 the Government announced that it would extend the entitlement to funded early education to the 20% most disadvantaged two-year-olds. These are children who stand to benefit most from a high quality early education place but who are the least likely to access one. Since September 2013 around 130,000 two-year-olds who meet the same criteria used for determining eligibility for free school meals or who are looked-after by the local authority have been entitled to a free place.

7.6 In Autumn 2011 the Government announced that the entitlement would be extended to around 40% of the most disadvantaged two-year-olds from September 2014.

## **8. Consultation outcome**

8.1 From 5<sup>th</sup> July to 15<sup>th</sup> October 2012 the Department for Education consulted on "Extending Free Early Education to More Two-year-olds". The consultation invited views on the eligibility criteria set out in 4.4. A total of 173 responses were received from a

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<sup>2</sup> Sylva, K et al (2008) Final Report from the Primary Phase: Pre-school, School and Family Influences on Children's Development during Key Stage 2 (Age 7-11) EPPE. Research Report DCSF-RR061 DCSF-RR061.pdf

wide range of private and voluntary early years providers, local authorities and national organisations. The Government response to the consultation was published on 2 September 2013 and can be found at:

[www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1845&external=no&menu=3](http://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1845&external=no&menu=3)

8.2 A large majority of respondents (90.5%) agreed with the proposed earnings and benefits criteria. There was widespread agreement that the criteria should target places on children from lower income families. Some respondents commented that not all children who would benefit from an early education place would be eligible under the proposed criteria although many of these respondents agreed with the proposed criteria in principle. The Department will confirm the benefits and earnings criteria for families on Universal Credit at a later date when further details on Universal Credit are available and will amend these regulations accordingly.

8.3 The majority of respondents agreed with the proposal that the entitlement should be extended to two-year-olds with statements of special educational needs, or an Education, Health and Care plan or in receipt of Disability Living Allowance. Some respondents described issues about the identification of two-year-olds with special needs and disability (SEND). Other respondents commented that the level of funding should reflect the higher costs of providing early education. The High Needs Block of the Dedicated Schools Grant provided to local authorities by the Department is available to meet the costs of children's significant or specialist needs. Subject to the passage of the Children and Families Bill, Education, Health and Care (EHC) plans will replace statements from September 2014. EHC plans will be statutory between birth and two years of age. As a result, EHC plans are likely to be more attractive to parents, and more two-year-olds with SEND may have EHC plans than currently have statements. The Department will amend the regulations to include children with EHC plans after the Children and Families Bill receives Royal Assent.

8.4 A clear majority (81%) agreed that children who have been looked after before they reach age of two should be eligible for a funded early education place. Of the respondents disagreeing, half cited that children who have been looked after needed time to bond with their new families. However, early education for two-year-olds is not compulsory and adoptive parents and special guardians may consider that their child would benefit more from settling in with their new family than from early education. These regulations give an entitlement to a funded early education place for children who are no longer looked after by the local authority as a result of an adoption order, special guardianship order or a residence order.

## **9. Guidance**

9.1 There is already statutory guidance for local authorities on early education and childcare, published on 16<sup>th</sup> July 2013 and available at [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). That guidance will be revised to include new elements relating to the extension of the entitlement to

funded early years provision for two-year-olds and is expected to be published in summer 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, or no significant 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, extending the entitlement to funded early education to more two-year-olds will offer opportunities for existing providers in the private, voluntary and independent sector to expand their business and encourage new providers into the market.

10.3 English local authorities will have a statutory duty to secure funded early years provision for around 40% of two-year-olds as well as all three- and four-year-olds in their area. £755m has been allocated to local authorities for 2014-2015 as part of the Dedicated Schools Grant.

## **11. Regulating small business**

The legislation does not apply directly to small business, because, although private, voluntary and independent early years providers will have an important role in providing funded early years provision, the regulations do not require them to deliver funded places and they can choose not to do so.

## **12. Monitoring & review**

12.1 There are two key success criteria for the extension of the entitlement to early education for two-year-olds: increased take-up of funded places by disadvantaged two-year-olds and improved outcomes for children's development. Take-up of funded early education places for two-, three- and four-year-olds will be monitored through the annual Early Years Census and Schools Census. The impact on child outcomes will be monitored through the EYFS profile results for children at age five.

12.2 The Government has also commissioned a major longitudinal study, the Study of Early Education and Development (SEED) which will follow 8,000 two-year-olds from across England through to Key Stage One (age 7). It will find out how early education and childcare can help to give children the best start in life and what is important for high quality childcare provision. This evaluation will provide an up-to-date and comprehensive assessment of the early education model in England, updating evidence from the Effective Provision of Pre-school, Primary and Secondary Education (EPPSE) study. A final report from SEED is scheduled for autumn 2020 when the children are aged seven. Interim

reports will be published describing the position for children and families when the children are aged three, four and five.

**13. Contact**

Stephanie Martin at the Department for Education Tel: 0207 783 8059 or email: [Stephanie.Martin@education.gsi.gov.uk](mailto:Stephanie.Martin@education.gsi.gov.uk) can answer any queries regarding the instrument.