

EXPLANATORY MEMORANDUM TO

THE SCHOOL AND EARLY YEARS FINANCE (ENGLAND) REGULATIONS 2017

2017 No. 44

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 The School and Early Years Finance (England) Regulations 2017 (“the 2017 Regulations”) provide how local authorities set their education budgets (the non-schools education budget, the schools budget, the central expenditure and the individual schools budget) and set out how local authorities are to allocate funding from the individual schools budget (ISB) to maintained schools and private, voluntary and independent providers of free early years provision (relevant early years providers) through a locally determined formula.
- 2.2 The 2017 Regulations relate only to the 2017-18 financial year.
- 2.3 To a large degree, the 2017 Regulations make the same provisions as in the School and Early Years Finance (England) Regulations 2015 (“the 2015 Regulations”) but there are some substantive changes relating to expenditure which can be retained centrally by local authorities and in how the early years formula can operate locally.

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 This entire instrument applies only to England.
- 3.3 This instrument applies only to England because it applies only to Local Authorities in England, who determine the budgets of schools and early years providers in England (see regulation 1(3) of the instrument). The instrument does not have minor or consequential effects outside England.
- 3.4 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 The 2017 Regulations are made under chapter 4 of Part 2 of the School Standards and Framework Act 1998 (“SSFA 1998”) which concern the financing of maintained schools). They relate to the 2017-18 financial year and need to be made because the 2015 Regulations apply only up to the end of the 2016-17 financial year. Specifically, the regulations are made under the powers in Sections 45A, 45AA, 47, 46ZA, 47A,

48, 49 and 138, and paragraph 2B of Schedule 14 of SSFA, and section 24 (3) of the Education Act 2002.

5. Extent and Territorial Application

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

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

- 7.1 The Department for Education allocates Dedicated Schools Grant (DSG) to local authorities. This comprises three blocks – for schools, high needs and early years. It is a condition of the DSG that it must only be spent on the schools budget, as prescribed in the regulations made under SSFA 1998. Local authorities then distribute funding to their maintained schools through a locally determined formula. Ministers consulted from 7 March to 17 April 2016 on revised arrangements for schools and high needs funding, and from 11 August to 22 September 2016 for early years funding. The consultations proposed that the existing distribution of funding to local authorities, largely based on historic decisions, would be replaced by national funding formulae from 2017-18 for each of the blocks. Following the consultations, Ministers announced on 21 July 2016 that these major changes to schools and high needs funding would be deferred until 2018-19, but with some new transitional arrangements, particularly relating to central expenditure, taking effect in 2017-18. They also announced on 1 December 2016 that the new early years funding arrangements would come into effect from 2017-18.
- 7.2 As the 2015 Regulations only apply up to the end of the 2016-17 financial year, the Department for Education is making the 2017 Regulations to enable local authorities to determine school budgets for 2017-18.
- 7.3 The main changes compared with the 2015 Regulations are set out below.
- 7.4 The Department has previously provided a grant – the Education Services Grant (ESG) - to local authorities to support their education functions. These functions were set out in the non-schools education budget, as prescribed in the Regulations made under SSFA 1998. The ESG is ending from September 2017, with part of the funding being added to the DSG, which must be spent on the schools budget. As a consequence, the classes of expenditure that were previously funded by ESG have now been added to Schedule 2 of the 2017 Regulations, to enable DSG to be spent on them.
- 7.5 The government announced its intention to make £600m of savings by cutting the ESG in the Spending Review 2015. The first stage of the consultation on the national funding formula (see paragraphs 8.1 to 8.3) asked respondents which duties funded from ESG they believed could be removed from the education system. A small number of respondents recommended ESG duties they thought could be removed from the system and the Department is keeping those suggestions under review. The

consultation also asked if respondents agreed that local authorities should be allowed to retain some of their maintained schools' DSG centrally, with the consent of maintained schools members of the schools forum, to fund the duties they carry out for maintained schools. 62% of respondents agreed with this proposal, 19% disagreed and 19% did not answer the questions. Some respondents disagreed because they did not support the removal of the ESG. Others thought that all funding should be allocated directly to schools, or that there should be a cap on the funding that local authorities could retain. Ministers decided to proceed with their original proposal, as they believed it right that the level of funding to be retained centrally by the local authority should be agreed locally between the local authority and the maintained schools members of the schools forum.

- 7.6 Regulations 8(5) and 11(6) enable local authorities to retain funding centrally within the schools budget in relation to those education functions that were previously funded by ESG, subject to the agreement of their schools forums. The functions are split between those which broadly relate to all schools, including academies (part 3 of schedule 2), and those which relate to maintained schools only (part 7 of schedule 2). The remaining expenditure that was formerly funded through ESG has been included in part 5 of schedule 2 (medical support) and part 6 of schedule 2 (school improvement).
- 7.7 In the case of part 7 of schedule 2, the expenditure may be deducted after schools' budget shares have been determined, and may be removed only from maintained school budget shares and at a single rate per pupil (per place in the case of special schools and Pupil Referral Units). This would be subject to approval by the relevant maintained school members of the schools forum, representing primary, secondary and special schools and pupil referral units. This builds on an existing procedure (known as de-delegation) currently set out in regulation 11(5) and part 6 of Schedule 2.
- 7.8 Funding for school improvement services has been made subject to the de-delegation procedure. This means that, as with existing de-delegated services primary and secondary maintained school members of the schools forum can vote to approve a local authority proposal to pool funding from maintained school budgets. Special schools and Pupil Referral Units are outside this procedure and would have to individually buy in to the service.
- 7.9 The 2017 Regulations also implement a number of changes to the way in which early years providers' allocations are calculated; there are changes that take effect from 2017-18 in allowable formula factors and a limit on the level of permissible centrally retained expenditure.
- 7.10 Regulation 20(2) and Schedule 3, part 2 set out the factors which local authorities can use in their early years formulae to supplement the base hourly rate. This is a more restricted list of factors than previously allowed, in order to introduce greater consistency across the country. Deprivation (in regulation 15) remains a mandatory factor. From September 2017 local authorities are required to secure the 'extended entitlement' for eligible three and four year old children of working parents.
- 7.11 Regulation 23 has the effect of requiring local authorities to ensure that the proportion of formula funding for three and four year olds taken up by factors other than the base rate is limited to 10% of total allocations to early years providers, so that most

funding is passed through to providers according to the number of hours provided at the setting.

- 7.12 Regulation 22 limits centrally retained expenditure on early years so that funding is passed through directly to providers. It has the effect of requiring local authorities to ensure that at least 93% of the hourly funding rate for three and four year olds allocated by the Department for Education is passed on to providers through the formula, or other funding paid direct to providers. The rationale behind this policy is to maximise the amount of early years block funding that is passed on to providers.
- 7.13 Local authorities will have to retain funding for a Special Educational Needs (SEN) Inclusion Fund (regulation 8(8) and schedule 2, paragraph 30) for early years. This will be targeted at children under compulsory school age with special needs. Expenditure within the fund that is intended to be provided directly to providers will be counted within the 93% requirement.
- 7.14 Regulation 18 sets out arrangements for a new Disability access fund. Local authorities will need to include in the amounts allocated to early years providers an amount of £615 for each three and four year old entitled to disability living allowance.
- 7.15 There are other more minor changes. As part of the transitional arrangements in moving towards a national funding formula for schools, local authorities will no longer be able to use a factor to fund post-16 pupils. This was a legacy from historic funding arrangements. To protect schools which previously received this factor, the amount they received through this factor in 2016-17 will be within the scope of the Minimum Funding Guarantee (schedule 4, paragraph 1(d)(ii)). In addition, local authorities will be able to retain funding centrally for Private Finance Initiative (PFI) costs at post-16 institutions (schedule 2, paragraph 36); this will enable an authority which previously used the post-16 factor for this purpose to continue to fund the extra costs of a school.
- 7.16 Regulation 8(10) sets out that, if a local authority carries forward an overspend on delegated services, then the schools forum must specifically agree for it to be funded from the following year's budget. This is to ensure that the funding of an overspend relating to services provided to maintained schools only is properly considered by the schools forum rather than it being absorbed within an overspend or underspend figure on the schools budget as a whole.
- 7.17 There is a minor change to the operation of the low prior attainment figure for secondary schools. The factor is based on Key Stage Two test results for the pupils at each school, so comprises five years worth of data. To take account of changes to the tests for summer 2016, there will be a national weighting applied to that year's cohort so as not to give a disproportionate effect to the higher numbers shown as not attaining the expected standard this year.

8. Consultation outcome

- 8.1 The changes to the regulations give effect to decisions announced following consultation on revised arrangements for schools, high needs and early years funding. The consultation on schools and high needs funding ran from 7 March to 17 April 2016 and was part of a two stage consultation. It proposed that local authorities would continue to set local funding formulae in 2017-18 and 2018-19 prior to the introduction of a nationally determined school level formula in 2019-20. It proposed some transitional arrangements from 2017-18 in moving towards this. The

consultation also sought views on whether local authorities should be able to retain funding centrally for the functions they provide for maintained schools and which were previously funded by the Education Services Grant.

- 8.2 Ministers announced on 21 July 2016 that the introduction of new school funding arrangements would be deferred until 2018-19, but that some changes such as the removal of the post-16 factor from the list of allowable local formula factors would still go ahead in 2017-18 (62% of respondents agreed with this proposal). The announcement also clarified arrangements whereby local authorities would be able to retain funding centrally for functions previously funded by the Education Services Grant. 62% of respondents agreed with the proposal that authorities could retain funding for duties relating to maintained schools, subject to agreement by the maintained school members of the schools forum.
- 8.3 A full government response to the first consultation was published on 14 December 2016 at <https://consult.education.gov.uk/funding-policy-unit/schools-national-funding-formula2/> and [High needs funding reform - stage 2 - Department for Education - Citizen Space](#).
- 8.4 We have also consulted with an expert group of stakeholders, primarily from local authorities, to ensure that the functions previously funded by the Education Services Grant have been properly distinguished between those which apply to all schools including academies and those which relate to maintained schools only. This has informed the distribution of functions between schedule 2 part 3 and part 7.
- 8.5 The consultation on early years funding ran from 11 August to 22 September 2016. It covered the distribution of funding from central government to local authorities, the distribution of funding from local authorities to providers, meeting the needs of children with special educational needs and disabilities and transitional arrangements. There were 3132 responses and events were held around the country with over 1000 representatives from the sector. The government response to the consultation was published on 1 December 2016 at <https://www.gov.uk/government/consultations/early-years-funding-changes-to-funding-for-3-and-4-year-olds>.
- 8.6 The responses were supportive of the proposals taken forward in these regulations. 68% of respondents agreed that there should be a minimum proportion of funding passed on to providers. 48% agreed with the proposed level of 93% in 2017-18 and 95% thereafter, while 27% considered it was too low and 9% too high.
- 8.7 In relation to the cap on formula factors other than the base rate, 51% of respondents agreed and 25% disagreed. 22% agreed that the cap should be set at 10%, but lower proportions considered that it should be either higher or lower.
- 8.8 89% of respondents agreed that there should be a Disability Access Fund and 78% agreed that local authorities should be required to set up a Special Educational Needs Inclusion Fund.
- 8.9 The other changes introduced by the regulations reflect current practice, as well as updating references to reflect the financial year 2017 to 2018 and other consequential dates.

9. Guidance

- 9.1 The regulations and accompanying guidance will be published on www.gov.uk.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is that relevant early years providers will continue to be funded in respect of the free entitlement for two, three and four year olds through the same formula that the local authority will use to determine the funding of this free entitlement in maintained schools. Early years providers will benefit from the requirement that local authorities should pass on at least 93% of their early years funding to providers.
- 10.2 The impact on the public sector is that local authorities must comply with these regulations when allocating their schools budget and determining budget shares for schools and amounts for early years providers.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses, except for the early years providers referred to in 10.1 and 10.2 above.
- 11.2 The regulation applies to Local Authorities and it is for the Local Authority to determine how they fund their local providers.

12. Monitoring & review

- 12.1 The changes will be monitored through the usual contact which the School Funding Team within the Department for Education has with schools and local authorities. The team will log and review any correspondence from schools and local authorities relating to the instrument.

13. Contact

- 13.1 Conan O'Callaghan at the Department for Education Telephone: 0207 783 8560 or email: Conan.O'CALLAGHAN@education.gov.uk can answer any queries regarding the instrument.