

## EXPLANATORY MEMORANDUM (SUPPLEMENTARY) TO

### THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS PROVISION FREE OF CHARGE) (AMENDMENT) REGULATIONS 2018

2018 No. 146

#### 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 This instrument amends the existing eligibility criteria for the early education entitlement for disadvantaged 2-year olds (2-year-old entitlement).

#### 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 because it only applies to local authorities in England.
- 3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly, if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.
- 3.4 The Department has reached this view because it considers that the primary purpose of the instrument relates to education, which is within the devolved legislative competence of each of the three devolved legislatures: the primary purpose of the subject matter of the instrument is not within Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); the primary purpose of the subject matter of the instrument is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act); the primary purpose of the subject matter of the instrument is within paragraph 5 of Schedule 7 to the Government of Wales Act 2006 and is not within one of the exceptions listed therein nor is it otherwise outside the legislative competence of the National Assembly for Wales (see section 108 of that Act).

#### **4. Legislative Context**

4.1 Provision for the 2-year-old entitlement is made pursuant to the powers under the Childcare Act 2006<sup>1</sup>. Regulations made under that act provide for 15 hours of early education for eligible children. This instrument amends the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014<sup>2</sup> (the “2014 Regulations”). The 2014 Regulations currently specify that families are eligible for the 2 year-old entitlement if they meet the eligibility criteria set out in the Free School Meal regulations, and thereby this includes all families entitled to Universal Credit. The regulations also specify that families are eligible for the 2 year-old entitlement if they are entitled to Working Tax Credit and have an annual income not exceeding £16,190 or a child:

- Who has a statement of special educational needs made under section 324 of the Education Act 1996;
- For whom a EHC plan is prepared under section 37 of the Children and Families Act 2014;
- Who is entitled to disability living allowance under section 71 of the Social Security and Contributions and Benefits Act 1992;
- Who is looked after by a local authority under section 22(1) of the Children Act 1989; or
- Who has been previously looked after by the local authority under section 22(1) of the Children Act 1989 and is no longer so looked after as a result of one of the following orders:
  - An adoption order within the meaning given by section 46(1) of the Adoption and Children Act 2002;
  - A special guardianship order within the meaning given by section 14a(1) of the Children Act 1989;
  - A child arrangements order within the meaning given by section 8(1) of the Children Act 1989 which consists of, or includes arrangements relating to either or both of the following:
    - With whom the child is to live
    - When the child is to live with any persons.

#### **5. Extent and Territorial Application**

5.1 This instrument extends to England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

#### **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.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2006/21/contents>

<sup>2</sup> 2014/1705 - <http://www.legislation.gov.uk/uksi/2014/2147/contents/made>

## **7. Policy background**

### *What is being done and why*

- 7.1 During the early roll-out of universal credit, a decision was taken to add Universal Credit to the list of entitling benefits for the 2-year-old entitlement. This was intended as an interim measure to ensure children of families moving onto Universal Credit in the early pilot areas continued to be entitled to this benefit.
- 7.2 The acceleration of the roll-out of Universal Credit from October 2017 means that many more households will become entitled to the 2 year-old entitlement, whilst this interim eligibility criterion is still in place. To ensure that these benefits continue to be targeted at the families that need it most, this instrument amends the eligibility criteria by applying earnings thresholds under Universal Credit. This is consistent with how the Department for Work and Pensions (DWP) and other government departments have established new criteria for other ‘passported’ benefits.
- 7.3 For the 2-year-old entitlement we are introducing a net earned income threshold of £15,400 per annum under Universal Credit. Eligibility will be verified by using an equivalent monthly check verified from the most recent Universal Credit assessment period. To accommodate fluctuations in income in the months preceding the application, where the most recent assessment period shows that the parent’s income is above the threshold, eligibility will be assessed on the earnings over the previous two, or as appropriate three assessment periods where the data is available.
- 7.4 Once the eligibility criteria are met a child will be entitled to the free entitlement from the term after the child has attained the age of two until the term after their third birthday when they become eligible for the universal fifteen hours of free childcare for all 3 and 4 year-olds.
- 7.5 The Welsh Government’s Social Services and Well-being (Wales) Act 2014<sup>3</sup> (the “2014 Act”), introduced a new legislative definition for looked after children in Wales. We are including the definition for a looked after child in Wales in these regulations to ensure such children are eligible for the free entitlement in early years settings in England.

### *Consolidation*

- 7.6 There are no plans for consolidation at present.

## **8. Consultation outcome**

- 8.1 The changes to the regulations give effect to decisions announced following consultation on setting new eligibility criteria for the 2 year-old entitlement. The consultation ran from 4 December 2017 to 15 January 2018. The consultation proposed introducing a net earnings threshold of £15,400 to determine eligibility for the 2 year-old entitlement under Universal Credit.
- 8.2 The responses to the consultation were supportive and the majority (80%) agreed with the proposed threshold. In their comments, many welcomed the overall aims of the policy. A minority (18%) disagreed with the threshold. In disagreeing, some commented that the proposed threshold was too low and should include a wider group of, or all, two-year-olds. Conversely, others felt that the threshold could act as a work

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<sup>3</sup> [http://www.legislation.gov.uk/anaw/2014/4/pdfs/anaw\\_20140004\\_en.pdf](http://www.legislation.gov.uk/anaw/2014/4/pdfs/anaw_20140004_en.pdf)

disincentive, incentivising parents either not to work at all or to limit their working hours. The Government welcomed the high level of support and published its consultation response on 7 February 2018. The response confirmed the Government's intention to proceed and introduce the proposed earnings threshold of £15,400.

## **9. Guidance**

- 9.1 In relation to the 2 year-old entitlement, section 7(3) of the Childcare Act 2006 requires local authorities, in exercising their functions under section 7, to have regard to any guidance given from time to time by the Secretary of State.<sup>4</sup> The Department for Education will work with the Government Digital Service (GDS) to update the on-line information<sup>5</sup> for parents, childcare providers and local authorities to reflect the changes to the eligibility criteria for the early education entitlement for two year-olds. The Department for Education will also amend its Early Education and Childcare Statutory Guidance for local authorities<sup>6</sup> ready for when these regulations come into force on 1<sup>st</sup> April 2018.

## **10. Impact**

- 10.1 A full impact assessment has not been produced for this instrument as no significant negative impact on the private or voluntary sector is foreseen.
- 10.2 For the 2 year-old entitlement the impact on the public sector is that local authorities will be under a duty to secure that free childcare is available to children who are eligible under the revised criteria. Local authorities will be required to ensure that appropriate provision is available for all eligible children and to enter into arrangements with providers to this end.

## **11. Regulating small business**

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.
- 11.2 For the 2 year-old entitlement the legislation does not place requirements directly on those businesses that choose to offer the entitlement. The government's guidance<sup>7</sup> (March 2017) specified that local authorities should ensure that any process to ensure the proper use of public funding should not place undue administrative burdens on providers.

## **12. Monitoring & review**

- 12.1 The Department for Education will hold the threshold constant until Universal Credit is fully rolled out. We will keep the level of the threshold under review and may amend the threshold in future (once the Universal Credit rollout is complete) to ensure those who need the support the most are benefiting.

## **13. Contact**

- 13.1 Please email [earlylearning.fortwos@education.gov.uk](mailto:earlylearning.fortwos@education.gov.uk) should you have any queries regarding this instrument.

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<sup>4</sup> <https://www.gov.uk/government/publications/early-education-and-childcare--2>

<sup>5</sup> <https://www.gov.uk/guidance/2-year-old-early-education-entitlement-local-authority-guide#history>

<sup>6</sup> See footnote 4

<sup>7</sup> <https://www.gov.uk/government/publications/early-education-and-childcare--2>