

**EXPLANATORY MEMORANDUM TO**  
**THE EARLY YEARS FOUNDATION STAGE (LEARNING AND DEVELOPMENT**  
**AND WELFARE REQUIREMENTS) (CORONAVIRUS) (AMENDMENT)**  
**REGULATIONS 2020**

**2020 No. 444**

**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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 This instrument enables the Secretary of State for Education to temporarily disapply and modify certain requirements in the [Statutory Framework for the Early Years Foundation Stage \(EYFS\)](#)<sup>1</sup> for early years providers that are open to vulnerable children and the children of critical workers during the present outbreak of Coronavirus (COVID-19) disease in England (“the coronavirus (COVID-19) outbreak”).
- 2.2 These changes aim to support early years providers to remain open to vulnerable children and the children of critical workers by ensuring sufficient flexibility, for example supporting the ability to easily respond to changes in workforce availability and potential fluctuations in demand while still providing care that is high quality and safe. These provisions will be temporary and will only apply during the coronavirus (COVID-19) outbreak.

**3. Matters of special interest to Parliament**

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

- 3.1 It is not possible in the case of this instrument to comply with the 21-day rule which requires relevant instruments to be laid before Parliament for at least 21 days prior to coming into force. Due to the coronavirus (COVID-19) outbreak, childcare providers are already struggling to comply with certain aspects of the learning and development and safeguarding and welfare requirements such as meeting staff ratios with staff that hold the relevant qualifications. Although Ofsted have paused the majority of inspections during the coronavirus (COVID-19) outbreak they will continue to inspect early years providers that are causing concern. These restrictions need to be urgently addressed so that these childcare providers, open during the coronavirus (COVID-19) outbreak are not in breach of these requirements and accordingly do not risk being subject to Ofsted action as a result of this. It is predicted this situation will rapidly worsen as staffing shortages become more acute. It is essential to address this issue to ensure that childcare providers can continue to care for vulnerable children and the

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<sup>1</sup> The Document can be found at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/596629/EYFS\\_STATUTORY\\_FRAMEWORK\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/596629/EYFS_STATUTORY_FRAMEWORK_2017.pdf)

children of critical workers during the coronavirus (COVID-19) outbreak which is a key government policy

- 3.2 The Department has been closely engaging the childcare sector through stakeholder groups, as well as responding to queries via departmental mailboxes and the coronavirus helpline and is very conscious of the difficulties that the sector is facing and is aware of the urgency of these changes. This includes both the urgent need for childcare providers to be able to care for vulnerable children and the children of critical workers and during the coronavirus outbreak but also ensure the financial viability of providers to be able to remain open during this time.
- 3.3 This instrument was made as soon as practicable after completing the required consultation under the Childcare Act 2006 and following consultations with Ofqual and Ofsted required under sections 42 and 43. It was not possible to begin the consultation any sooner. On 18th March, the Government announced that early years providers and other educational settings were to remain open for vulnerable children and the children of critical workers only at the end of the school day from Friday 20th March. The Government announced social distancing guidance on 16th March, then introduced 'stay at home' rules on 23rd March. The Department was not in a position to assess the extent and impact of the 'stay at home' rules immediately and needed to consult with the sector to understand the impact and practical difficulties early years providers would have in meeting their existing legal duties.
- 3.4 The changes are time limited and apply until 25 September 2020, to be consistent with the review period for the Coronavirus Act 2020 but it will be possible to make amending secondary legislation to bring forward this date if government decided these changes are no longer needed to support the sector due to an alternation to guidelines on self-isolation and social distancing, based on medical and scientific advice. Upon relaxation of coronavirus restrictions, a subsequent statutory instrument would be laid to revoke this legislation and restore the current requirements of the Early Years Foundation Stage Framework, with the exception of the requirement to complete the EYFSP which is cancelled for academic year 19/20.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.5 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

#### **4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England only.

#### **5. European Convention on Human Rights**

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

#### **6. Legislative Context**

- 6.1 The Secretary of State has a duty under section 39 of the Childcare 2006 Act ("the 2006 Act") to promote the well-being of young children by specifying learning and

development requirements (by Order) and welfare requirements (by Regulations). The learning and development requirements and the welfare requirements are together known as the Early Years Foundation Stage (EYFS as above). They are set out in the The Early Years Foundation Stage (Learning and Development Requirements) Order 2007 (S.I. 2007/1772) and The Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (S.I. 2012/938) respectively.

- 6.2 Section 40 of the 2006 Act, places a duty on registered childcare providers and on schools which are exempt from registration, to implement and comply with the EYFS. Section 41 sets out the 7 learning and development areas which must be covered and in relation to each of those areas, the learning and development requirements may specify early learning goals, education programmes and assessment arrangements. Assessment arrangements are covered further in section 42 and that contains consultation requirements with Ofqual and other persons as the Secretary of State considers appropriate. The only formal assessment that takes place in the reception year is the EYFS Profile which has to be completed in the final academic term before the child turns 5 – those results from all early years providers including childminders, academies and independent schools unless they have been granted an exemption, are sent to local authorities who in turn send those results to the Department for Education.
- 6.3 Section 43 provides that regulations can set out the matters relating to safeguarding and the welfare of children. Again, there is a statutory requirement to consult the Chief Inspector and other persons as the Secretary of State considers appropriate. Section 44 provides that changes for the EYFS may be included in a statutory instrument itself or instead the requirements can be included in a separate document (as is the case currently) but that the document would have legal force. Section 44 also provides that Ofsted and early years childminder agencies, in exercising their functions under the 2006 Act, must have regard to factors, standards and other matters prescribed by the instrument including a failure by providers to comply with the EYFS.
- 6.4 Changes are required to the EYFS to allow childcare providers to continue to provide childcare lawfully and safely to vulnerable children and children of critical workers This instrument allows for those changes to be made so that childcare providers will not be in breach of the current requirements as set out in the EYFS. Primarily, this involves:
- allowing childcare providers that are open, to use their reasonable endeavours in complying with requirements under Section 1 of the EYFS,
  - cancelling the EYFS Profile assessment for the academic year 2019/20 (in line with other wider national curriculum assessments),
  - disapplying the need to undertake the two year old progress check throughout the duration of these changes and
  - to modify certain requirements relating to qualifications of staff and holding a paediatric first aid certificate.
- 6.5 Upon relaxation of coronavirus restrictions, a subsequent statutory instrument would be laid to revoke this legislation and restore the current requirements of the Early Years Foundation Stage Framework, with the exception of the requirement to complete the EYFSP which is cancelled for academic year 19/20.

## 7. Policy background

### *What is being done and why?*

- 7.1 The current EYFS became effective in April 2017. Its framework sets the standards for learning, development and care of children from birth to five. This framework is mandatory for all early years' providers in England.
- 7.2 The EYFS is a statutory requirement for over 16,000 primary and infant schools (maintained which receive their funding directly from local authorities, independent which charge fees rather than being funded by the government, non-maintained and academies which are independent from the local authority) 24,000 group-based providers and 39,000 childminders.
- 7.3 Section 1 of the EYFS sets out what providers must do to promote the learning and development requirements of children in their care and to ensure they are ready for school. This includes the seven areas of learning and development which include the three prime areas of learning, communication and language, physical development and personal, social and emotional development as well as the four specific areas of learning, literacy, mathematics, understanding the world and expressive arts and design, the educational programmes and the seventeen early learning goals. These goals summarise the knowledge and understanding children should have gained by the end of the reception year. Section 2 details the types of assessments practitioners should be undertaking including the progress check at age 2 and the assessment at the end of the EYFS, the EYFS Profile, which assesses children's development against the 17 early learning goals. Section 3 details the safeguarding and welfare requirements including the necessary steps providers must take to ensure children are kept safe and well such as appropriate staff to children ratios.
- 7.4 Ofsted and inspectorates of independent schools have regard to the EYFS in carrying out inspections and report on the quality and standards of childcare provision. Ofsted publishes inspection reports at [www.gov.uk/ofsted](http://www.gov.uk/ofsted). Ofsted may issue actions (in respect of any failure to meet a requirement in the EYFS) and/or may issue a welfare requirement notice (in respect of Section 3). It is an offence for a provider to fail to comply with a welfare requirements notice. Early years childminder agencies are also under a duty to have regard to the EYFS in the exercise of their functions. During the coronavirus (COVID-19) outbreak Ofsted have suspended all routine inspections of schools, further education, early years and social care providers however urgent inspections where specific concerns have been raised are still going ahead in order to prioritise the immediate safety of children where necessary.
- 7.5 The outbreak of coronavirus (COVID-19) has created the need to address problems the childcare sector now face in having to continue to comply with the current requirements caused by issues such as decreasing availability of staff and wider challenges such as influxes of new children into settings as other provisions close. Further to the consultation carried out as explained in paragraph 9, we have decided to implement the following policy changes.

### *Section 1 of the EYFS Framework – The Learning and Development Requirements*

- 7.6 It has been decided to allow childcare providers to use a “reasonable endeavours” approach in complying with the learning and development requirements in Section 1 of the EYFS in order to balance the need to reflect the practical restrictions as a result of the coronavirus (COVID-19) outbreak and ensuring safeguarding of children. This

change allows settings to use their reasonable endeavours instead to meet the learning and development requirements. This means at times when a provider is struggling with workforce availability or children are being cared for in a different setting, providers can focus on ensuring children are safe and well cared for. This is becoming increasingly important as nursery classes are now frequently merged, so children aged 0-5 are being cared for in the same room. In these cases, it is more important settings are able to remain open, rather than feel the need to close, as they are unable to deliver the statutory learning and development requirements of the EYFS.

#### *Section 2 of the EYFS Framework - Assessment*

- 7.7 In relation to Section 2 we have removed the requirement for childcare providers to complete the EYFS Profile assessment during the academic year 2019/20 and the 2 year progress check for the period that this instrument remains in force. As only a small number of children are currently attending reception classes the majority of children would not be in school for their teachers to complete the EYFS Profile assessment. It is therefore not essential for teachers in schools that are open to complete the assessment for the children that are present. It is also an unnecessary burden on teachers as in many cases reception children will not be being cared for by their usual teacher and so it will be very difficult for accurate judgements to be made. This is in line with other statutory assessments for this academic year as announced by the Secretary of State. For the 2 year progress check this has been removed for similar reasons, to reduce pressure on settings where a child's usual key worker may be absent or a child has recently moved settings. This is also in line with Public Health England's decision to pause the 2 year health visitor check. The department is currently working on how to support both the sector and children that have not been accessing formal education during this time, including those that have not completed assessments.

#### *Section 3 of the EYFS Framework – The Safeguarding and Welfare Requirements*

- 7.8 The safeguarding and welfare requirements in Section 3 ensure that children are kept healthy, safe and secure. They include provisions relating to child protection, suitable people, staff qualification and training, ratios, managing behaviour, the safety and suitability of premises and special educational needs. Our assessment is that it would risk compromising child safety and wellbeing to make any changes to the majority of the requirements set out in this section of the framework. However, there are a small number of requirements relating to staff qualification levels in staff: child ratios and the paediatric first aid requirements that can be relaxed to give providers flexibility to respond to unexpected changes in workforce availability and remain open during the coronavirus (COVID-19) outbreak whilst ensuring that children are safe and their needs can be met.
- 7.9 The current requirement placed on providers to ensure that all people looking after children are suitable to fulfil the requirements of their roles will not be amended. However, a provider may judge a member of staff to be suitable to care for children, without them holding the qualification levels currently specified by the EYFS framework, and that additional flexibility may be needed to respond to situations where regular staff members are absent.
- 7.10 In relation to Section 3 requirements, stakeholders indicated that the requirements for staff working in the sector, to hold full and relevant level 2 qualification in order to be

counted in staffing ratios, could be difficult to maintain where there are large numbers of staff absent due to illness or isolation. In order to support the sector to provide childcare for vulnerable children and critical workers during the period we will disapply this requirement and ask childcare providers in group settings to use ‘reasonable endeavours’ to achieve this, meaning they should use level 2 qualified staff where they are available. It is important that the adult:child ratio numbers remain the same however providers can deploy suitable staff without level 2 qualifications when necessary although it remains the provider’s responsibility to ensure these staff are suitable to fulfil the requirements of their roles and have been DBS checked. The specific requirements for settings where staff hold Qualified Teacher Status and the requirements for maintained nursery schools are set out below.

- 7.11 In settings where providers are caring for children aged three and over where a person with Qualified Teacher Status, Early Years Professional Status, Early Years Teacher Status or another suitable level 6 qualification is working directly with the children, providers should use their “reasonable endeavours” to ensure that at least one other member of staff, excluding the member of staff who holds a suitable level 6 qualification, holds a full and relevant level 3 qualification, but meeting this will not be a legal requirement. As there will still be a person with a suitable level 6 qualification working with the children this will ensure there is a member of staff in place that is adequately qualified to ensure the needs of children in their care are met.
- 7.12 In independent schools (including in nursery classes in free schools and academies) caring for children aged three and over where a person with Qualified Teacher Status, Early Years Professional Status, Early Years Teacher Status or another suitable level 6 qualification, an instructor, or another suitably qualified overseas trained teacher, is working directly with the children, providers should use their “reasonable endeavours” to ensure that at least one other member of staff, excluding the member of staff who holds a suitable level 6 qualification, an instructor, or another suitably qualified overseas trained teacher, holds at least a full and relevant level 3 qualification. Meeting this will not be a legal requirement.
- 7.13 In Maintained Nursery Schools and nursery classes in maintained schools caring for children aged three and over providers should use their “reasonable endeavours” to ensure that at least one member of staff is a school teacher as defined by section 122 of the Education Act 2002.<sup>2</sup> In instances where this is not possible, providers should follow the requirements for providers where there is not someone with a suitable level 6 qualification working directly with the children (i.e. there must be at least one member of staff for every eight children, at least one member of staff who holds at least a full and relevant level 3 qualification and providers should use their “reasonable endeavours” to ensure that at least half of other staff hold at least a full and relevant level 2 qualification). Where at least one member of staff is a school teacher, providers should use their “reasonable endeavours” to ensure that at least one other member of staff holds at least a full and relevant level 3 qualification but meeting this will not be a legal requirement.
- 7.14 There is also a requirement for at least one person who has a paediatric first aid (PFA) certificate to be on the premises at all times when children are present. The modifications as a result of these regulations mean this requirement remains in place for children below the age of 24 months, however for children aged 2-5 providers

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<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2002/32/section/122>

should use their ‘best endeavours’ to ensure one person with this qualification is on site when children are present. Where it is not possible for someone with a PFA certificate to be on site providers must undertake a written risk assessment to consider and mitigate the likely occurrence of a serious incident and ensure at least one person with a current First Aid at Work or emergency PFA certification is on site at all times children are on premises, and must accompany children on outings. Providers should also demonstrate they have taken reasonable steps to appoint a suitable person such as from a closed provision or a childminder who is registered to work on non-domestic premises with relevant PFA certification and DBS and/or liaised with the local authority to find a suitable person as described above. They should also secure PFA training, or as a minimum suitable training for staff that include the specific techniques required for the care of young children. Further guidance will be provided to settings on these points.

- 7.15 Valid PFA certificates will be extended for three months where the coronavirus outbreak is preventing requalification training taking place. This is in line with the Health and Safety Executive and their position in extending First Aid at Work certificates during this period and was announced to the sector via updated guidance on the government website.
- 7.16 The aims of these changes are to respond to changes in workforce availability and potential fluctuations in demand, however the changes will still ensure children are safe. The shortage of staff with this certification is causing closure of provision, particularly in schools where the numbers of qualified staff are smaller. The PFA certification will not be relaxed for children below the age of 24 months as the additional training provided in the PFA qualification is most relevant to the youngest of children. This is in recognition of the greater risk factors for babies and young children in this age bracket, including choking risks and different cardiopulmonary resuscitation (CPR) procedures.
- 7.17 There will be a transitional period for the modified requirements of section 2 of the EYFS, relating to qualification requirements only, for two months from the end date of this instrument or the date the instrument is revoked, whichever is sooner. This is to support settings that have remained open during this period to ensure they are able to get relevant staff back in place, for example where staff have been loaned out to other settings or are returning from furlough.

#### *Recovery and long-term plans*

- 7.18 The Department recognises that the disruption caused by the coronavirus (COVID-19) outbreak, including the many children not attending early years provision, may mean that children may progress more slowly than would usually be expected. In order to mitigate against that the Department is supporting parents and all early years and childcare settings to ensure children’s early learning can continue by making resources available including:
- [a list of online educational resources](#) which have been identified by some of the country’s leading educational experts to support learning at home,
  - the BBC enhancing its education provision to include daily lessons starting from 20 April 2020, and
  - the [Hungry Little Minds](#) campaign which features tips and practical activities that parents can do at home with children to support their early learning.

7.19 The Department is working on plans to support children that have not received formal education during this period and transition arrangements for when the situation begins to return to normal.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

9.1 This instrument does not consolidate legislation.

## **10. Consultation outcome**

10.1 We complied with our statutory duties to consult as set out in sections 42 and 43 of the 2006 Act to consult over a 2 week period with key stakeholders. The proposals were shared in March 2020, with a sample of local authorities, Ofsted and Ofqual as well as our stakeholder reference group which includes representatives from nursery and childminder sector groups as well as the largest private nursery providers. The proposals were broadly welcomed by the sector and some amendments were made to the legislation following their advice such as the inclusion of the 'reasonable endeavours' wording. Ofqual had no concerns about the proposals whilst Ofsted felt the proposals reflected a suitable relaxation of the requirements providers must meet without compromising safeguarding and welfare. They also suggested further amendments such as including a transitional period once the full EYFS becomes statutory again and suggested further relaxation of the PFA requirements in primary schools which we have now included in the legislation. We then consulted again with our stakeholder and local authority groups in April on this further change relating to PFA suggested by Ofsted and we received no objections, resulting in this further change to the EYFS being included in this instrument

## **11. Guidance**

11.1 A guidance note for early years providers will be published on the government website. This sets out how these changes will impact settings and can be found alongside EYFS framework to make it clear which elements of the framework have been disapplied during this period.

## **12. Impact**

12.1 There is no, or no significant financial impact on business, charities or voluntary bodies. We expect the regulations to reduce financial burdens on settings as they will not be required to make unnecessary appointments in order to meet ratio requirements for example.

12.2 The impact on the public sector is that schools who remain open during the coronavirus outbreak will be able to stay open with the help of the changes made in this instrument. The impact on local authorities will be the reduced burden in relation to moderating and assessing the EYFS Profile in their areas. Local authorities are currently facing an additional burden in placing vulnerable children and children of critical workers where settings have closed. This legislation will support settings to stay open and so should reduce this burden.



- 12.3 An impact assessment has not been prepared for this instrument. The changes in this instrument have effect for a temporary period up to and including 25 September 2020 in order to alleviate burdens on childcare providers, with the exception of the EYFSP cancellation which is for the academic year 19/20.
- 12.4 An equalities impact assessment was completed for this change. Although there is potential for a negative impact on children with SEND if the 2 year check does not take place as opportunities for early intervention may be missed, the majority of NHS departments are not operating as usual. This means that even if children were referred as a result of the 2 year check they would be unlikely to be able to access support until the coronavirus (COVID-19) restrictions are lifted. The overall impact of this change is therefore deemed to be low. The impact of removing the legal requirement for level 2 qualified staff to be in place was also considered, however the requirement for the requirement for managers to hold level 3 or above is retained as a mitigation, meaning there will be adequate oversight of the care provided, by a skilled practitioner. The change in PFA requirements may disproportionality impact children with disabilities or other health conditions such as allergies, as a provider may deem that their provision is no longer appropriate for children with health conditions. To mitigate this we have supplied accompanying guidance to support settings and will work with local authorities to ensure the guidance around risk assessments is not misinterpreted. We have also consulted with our colleagues with responsibility for SEND in the department. As a result of this the impact of the change is deemed to be low.

### **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to amend the legislation to reduce the regulatory burden on small businesses. Sector organisations representing small businesses were consulted as part of the legislative process to make these amendments.

### **14. Monitoring & review**

- 14.1 The regulations place an obligation on the Secretary of State to review the effectiveness of the amendments made by the regulations, during the period for which they have effect. The approach to monitoring of this legislation is to continue to engage with local authority and stakeholder groups during the coronavirus outbreak to review whether to extend or revoke this instrument.
- 14.2 This instrument does not include a statutory review clause and has effect for a temporary period until 25 September 2020, with the exception of the cancellation of the EYFSP assessments, unless revoked earlier.

### **15. Contact**

- 15.1 Anna Mercy at the Department for Education, Telephone: 07384456617 or email: [anna.mercy@education.gov.uk](mailto:anna.mercy@education.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Susie Owen, Deputy Director for Early Years Quality and Outcomes, at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Vicky Ford Parliamentary Under Secretary of State for Children and Families at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.