

**EXPLANATORY MEMORANDUM TO**  
**THE EARLY YEARS FOUNDATION STAGE (LEARNING AND DEVELOPMENT**  
**AND WELFARE REQUIREMENTS) (CORONAVIRUS) (AMENDMENT) (NO. 2)**  
**REGULATIONS 2020**

**2020 No. 939**

**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 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 an early years provider, only where it is not reasonably practicable for that early years provider to comply with the learning and development requirements, the progress check at age 2 and specific elements of the safeguarding and welfare obligations set out in the EYFS, due to legislative prohibitions, requirements or restrictions related to coronavirus (COVID-19). These legislative prohibitions, requirements or restrictions may be applied in either a national or local lockdown. This statutory instrument is introduced to assist the early years sector in these limited circumstances.
- 2.2 These provisions will expire on 31<sup>st</sup> August 2021.
- 2.3 The Early Years Foundation Stage (Learning and Development and Welfare Requirements) (Coronavirus) (Amendment) Regulations 2020 (S.I. 2020/ 444) referred to as “the 2020 Regulations No.1”) disappplied or modified certain requirements of the EYFS because of coronavirus (COVID-19) from 24th April 2020 to 25th September 2020, allowing for a transitional period until 25th November 2020 for staff qualifications requirements. This instrument also allows for the disapplication relating to requiring a Paediatric First Aid (PFA) certificate to continue within the transitional period.

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

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

- 3.1 None.

*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)*

- 3.2 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.

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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)

#### **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 early years 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 The 2020 Regulations No.1 came into force on 24th April 2020 to support early years providers to remain open to vulnerable children and the children of critical workers, at the early stages of the coronavirus outbreak, by disapplying and modifying certain requirements in the EYFS. The relevant period in those regulations will expire on 25th September 2020 (with a two month transitional period for certain welfare requirements). This new instrument is being made to continue the disapplications and

modifications in relation to the next academic year 2020/2021, in order to assist an early years provider as set out in paragraph 7.5.

- 6.5 There will be a new transitional period of 14 days, for early years providers under this instrument, to revert back to the original requirements in the EYFS, after any period of intervention. A “period of intervention” within this explanatory memorandum refers to the period of any prohibitions, restrictions or requirements imposed by regulations or a direction, under the Public Health (Control of Disease) Act 1984 or the Coronavirus Act 2020, in order to control the transmission or incidence of coronavirus, which impacts upon the provider’s ability to comply with certain requirements of the EYFS.

## **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 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. Ofsted intend to begin routine inspections from January 2021.

- 7.5 Changes are required to the EYFS to allow early years providers to continue to provide childcare lawfully and safely to children during any period of intervention in their area. This instrument allows for those changes to be made so that early years providers will not be in breach of the current requirements as set out in the EYFS. Primarily, this involves:
- allowing childcare providers in those affected areas, to use their reasonable endeavours in complying with requirements under Section 1 of the EYFS,
  - disapplying the need to undertake the two year old progress check throughout that period of intervention, and
  - modifying certain requirements relating to qualifications of staff and holding a paediatric first aid certificate.
- 7.6 These changes can only be applied when restrictions or requirements related to coronavirus are in place as set out in paragraph 7.7

***Local or National Lockdown***

- 7.7 The provisions of the original disapplications and modifications during the relevant period in the 2020 Regulations No.1 are due to end on the 25<sup>th</sup> of September 2020, with a transitional period of two months applicable for the qualifications requirements to be included in ratios. Following the designation of Leicester as an area of national intervention and the other subsequent areas that followed, it has become necessary to allow these disapplications, with the exception of the removal of the EYFS Profile assessment, in the event of a period of intervention either on a national or local scale. At all other times the EYFS requirements will apply as usual. As before providers should use either reasonable (or best endeavours in the case of PFA) to deliver the EYFS during these periods of intervention.
- 7.8 Following our monthly reviews of the 2020 Regulations No.1, stakeholders have reported that early years providers have found these changes helpful during this period and this has supported them to remain open. They have welcomed the proposal that disapplications can be applied when prohibitions, requirements or restrictions relating to coronavirus are in place, to ensure childcare can be provided. The effect of these amending provisions is that the relevant disapplication will apply automatically to providers who are prevented to comply with prescribed requirements of the EYFS due to coronavirus related restrictions or requirements (which have been imposed on a geographical area by legislation regulations or a direction) whether these providers are located within the lockdown area or outside it.

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

- 7.9 In the event of a period of intervention, early years providers will be able 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 outbreak and ensuring safeguarding of children. This allows settings to use their reasonable endeavours instead to meet the learning and development requirements. This means that, at times 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. It is more important settings are able to remain open, rather than close because they are unable to deliver the statutory learning and development requirements of the EYFS but should do what is reasonable to try to do so.

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

- 7.10 In relation to Section 2, we have removed the requirement for early years providers to complete 2 year progress checks where there is a period of intervention. This has been removed to reduce pressure on settings, for example, where a child's usual key worker may be absent, or a child has recently moved settings. Our supporting guidance is clear that the check should be completed once the child returns to, or joins, the early years setting, including where a child has turned 3 if it is considered appropriate and useful in the provider's professional judgement and in discussion with the child's parents/carers. Providers should still remain alert to any emerging concerns about any child in their care and endeavour to provide or seek additional support, if needed.

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

- 7.11 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 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 when prohibitions, requirements or restrictions relating to coronavirus are in place, whilst ensuring that children are safe and their needs can be met during a period of intervention.
- 7.12 During a period of intervention, 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, for reasons related to prohibitions, requirements or restrictions related to coronavirus.
- 7.13 In the event of prohibitions, requirements or restrictions relating to coronavirus and where it is not reasonably practicable to meet the full requirements, settings may amend their provision as follows. In relation to Section 3 requirements, during the early stages of the coronavirus outbreak, 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. Following further consultation, they have indicated this is still likely to be the case when prohibitions, requirements or restrictions related to coronavirus are in place, or further national lockdown. In order to support the sector to provide childcare when there is a period of intervention, we will disapply this requirement and ask early years 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.

- 7.14 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.
- 7.15 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.
- 7.16 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.

#### ***PFA***

- 7.17 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 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

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

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 has been provided to settings on these points.

- 7.18 The aims of these relaxations of the requirements are to respond to changes in workforce availability and potential fluctuations in demand, however the changes will still ensure children are safe. 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.
- 7.19 From mid-March 2020, many first aid training organisations stopped providing first aid training including courses needed by first aiders to renew first aid certificates and trainers were furloughed. In line with the Health and Safety Executive and their position in extending First Aid at Work certificates during this period, PFA certificate validity was extended to 30th September 2020 for certificates expiring on or after 16th March 2020. Training providers are now making courses available but there continues to be a backlog of PFA training needed. The validity of PFA certificates have been extended until the 25<sup>th</sup> November where the coronavirus outbreak is still preventing requalification training taking place.
- 7.20 The disapplication relating to requiring a PFA certificate will continue during the transitional period, until 25th November 2020. This is due to issues regarding the availability of training, as described above, but also to alleviate situations where new members of staff are joining settings. This is particularly relevant in primary schools where small numbers of staff hold certification. Once the transitional period ends PFA disapplications may only be applied during a period of intervention as set out in paragraph 7.7.

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

- 7.21 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 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
  - the [Hungry Little Minds](#) campaign which features tips and practical activities that parents can do at home with children to support their early learning

## **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 July 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 as this would give providers greater confidence to operate during periods of restrictions. Stakeholders highlighted the need for clear guidance to support providers to understand the regulations. We have involved stakeholders in the drafting of this to ensure guidance is clear.

## **11. Guidance**

11.1 An updated [guidance note](#)<sup>3</sup> for early years providers has been published on the government website. This sets out how these new 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 settings can remain open during the academic year 2020/21 during any period of intervention. Local authorities during the coronavirus outbreak had the burden of placing vulnerable children and children of critical workers where settings were closed. This legislation will support settings to stay open and so should reduce this burden, especially where the period of intervention only allows childcare for vulnerable children and children of critical workers.

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 31<sup>st</sup> August 2021 in order to alleviate burdens on early years providers when prohibitions, requirements or restrictions related to coronavirus are in place.

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 this is likely to be very short term as the check will take place once the child returns to setting, or the setting begins operating as normal. 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

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<sup>3</sup> <https://www.gov.uk/government/publications/early-years-foundation-stage-framework--2/early-years-foundation-stage-coronavirus-disapplications>



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 This instrument includes a statutory review clause to review the effectiveness of the amendments made by this instrument, (in relation to the disapplications and modifications of the EYFS for local or national lockdowns) and has effect for a temporary period until 31<sup>st</sup> August 2021.

### **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 Marc Rooney, 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.