EXPLANATORY MEMORANDUM TO

THE CHILDCARE (EARLY YEARS PROVISION FREE OF CHARGE) (EXTENDED ENTITLEMENT) REGULATIONS 2016

2016 No. 1257

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 Childcare Act 2016 (the "2016 Act") places a duty on the Secretary of State to secure free childcare for a 'qualifying child of working parents' for 30 hours per week over 38 weeks of the year – or for an equivalent period. These Regulations set out the eligibility criteria for this childcare entitlement (known as the "extended entitlement") and the rules for checking eligibility including provisions relating to information sharing. The Regulations also place a duty on local authorities to secure the free childcare and provide more detail about how local authorities should meet that duty.

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 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of parts of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.

4. Legislative Context

4.1 These Regulations exercise for the first time powers under sections 1(2), (3), (4) and (7), 2(1),(2), (4) and (5) and 4(2) of the 2016 Act.

4.2 Section 1 of the 2016 Act places a duty on the Secretary of State for Education to secure that childcare is available free of charge for 'qualifying children of working parents' for 30 hours a week in each of 38 weeks in any year or the equivalent. This equates to 1140 hours of free childcare per year for each eligible child.

4.3 When assessing whether this duty has been met, the Secretary of State is permitted to take into account any childcare made available to eligible children under section 7(1) of the Childcare Act 2006 (the "2006 Act") (see section 1(6) of the 2016 Act). Currently Regulation 4 of the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014 (SI 2014/2147) made under section 7(1) of the 2006 Act ("the 2014 Regulations") provides that all three and four year olds are

entitled to 570 hours a year of free provision over no fewer than 38 weeks of the year which equates to 15 hours a week for 38 weeks of the year (the "universal entitlement"). Therefore these Regulations set out the rules that will apply to assess whether a qualifying child of working parents is eligible for a further 15 hours of childcare per week over no fewer than 38 weeks of the year.

4.4 These Regulations also mirror the requirements of the 2014 regulations in relation to the description of the early years provider who may deliver the extended entitlement. The intention is to ensure a seamless interface between the universal entitlement and the extended entitlement so that where practically possible and where the parent chooses, the same provider can be funded to deliver both the universal and extended entitlements to an individual eligible child.

4.5 In particular regulations 34(2)(b)(i) and (ii) are identically worded to regulations 2(2)(b)(i) and (ii) of the 2014 regulations. These provisions have the effect of ensuring that public funding for childcare is not made available to an early years provider who does not actively promote fundamental British values or who teaches or promotes creationism. The restrictions reflect a wider policy across the Department of Education of ensuring that fundamental British values are promoted and of ensuring that creationism is not taught in publicly funded education.

4.6 The policy of promoting fundamental British values was first published in 2011 in the Government's Prevent strategy, but has been articulated in similar wording in a number of instruments since[1]. The wording of the second limb of regulation 34(2) (b) ("promoting views or theories as evidence-based") is intended to ensure that providers are able to teach about cultural characters or religious events e.g. Father Christmas or Noah's Ark in an age appropriate way and is simply intended to remove funding from providers that present concepts or ideas as "fact" or "science" where there is no objective basis for doing so.

4.7 Current statutory guidance relating to section 7 of the 2006 Act sets out in more detail how regulations 2(2)(b)(i) and (ii) of the 2014 regulations are to be implemented[2]. The Department intends to publish combined guidance on the section 7 entitlement and the extended entitlement (note the duty placed on local authorities under regulation 39 of these Regulations) and to explain the implementation of regulation 34(2)(b) in similar terms.

4.8 During the passage of the Childcare Bill (in December 2015), the government published a policy statement that set out (at a high-level) the eligibility criteria for the extended entitlement[3]; confirming that local authorities would deliver the entitlement and stressing the importance of high quality and flexible childcare provision. The government also set out its intention to consult on a new funding formula to deliver

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[1] The School and Early Years Finance (England) Regulations 2015, SI 2015/2033; The Non-Maintained Special Schools (England) Regulations 2015, SI 2015/728; The School and Early Years Finance (England) Regulations 2014, SI 2014/3352; Education (Independent School Standards) Regulations 2014, SI 2014/3283; The Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014, SI 2014/2147; Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 2014, SI 2014/1977; Education (Independent School Standards) (England) Regulations 2010, SI 2010/1997.

[2] See paragraphs A424-32 of "Early Education and Childcare: statutory guidance for local authorities" at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351592/early_education_and_childcare_statutory_guidance_2014.pdf

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482517/Childcare_Bill_Policy_Statement_12.03.2015.pdf

the extended entitlement. At report stage in the House of Lords (14th Oct 2015), the Parliamentary Under Secretary of State committed to the Regulations being subject to affirmative debate (the first time the powers are exercised) and this commitment was reflected in a government amendment: see section 4(4) and (5) of the 2016 Act.

4.9 The government wishes to ensure that the process of applying for the extended entitlement should be as smooth as possible. In particular they wish to simplify the process for parents applying for other childcare entitlements administered by other government departments.

4.10 In 2017, Her Majesty's Revenue and Customs (HMRC) intend to phase in a new scheme known as 'Tax Free Childcare' which will offer working families a 20% contribution towards qualifying childcare costs. The Secretary of State confirmed at Second Reading of the Childcare Bill (in the House of Commons) that parents would be able to apply for both Tax-Free Childcare and the extended entitlement through a joint application system being developed by HMRC. To this end, the government tabled an amendment to the Childcare Bill that introduced a new function for HMRC to provide an eligibility checking service for the Department (see section 1(5) of the 2016 Act).

4.11 In order to ensure that a streamlined eligibility checking service can be provided to parents for the extended entitlement and Tax Free Childcare schemes, the eligibility criteria and the eligibility checking process set out in Parts 1 and 2 of the Regulations broadly mirror provisions in the legislation which implements the Tax Free Childcare Policy i.e. the Childcare Payments Act 2014[4] and its associated regulations: the Childcare Payments Regulations 2015 (as amended)[5] and the Childcare Payments (Eligibility) Regulations 2015[6]. A parent will make a declaration via a joint on-line childcare application (JOCA) and HMRC will determine whether parents meet the eligibility criteria for either or both schemes.

4.12 HMRC has the power to impose penalties and assess the amount of that penalty under regulation 28. Regulation 28(6) provides that a penalty under these Regulations is to be treated for the purposes of Part 6 of the Taxes Management Act 1970 (c. 9) (collection and recovery) as if it were tax charged in an assessment and due and payable. The Taxes Management Act 1970 (TMA) deals with the administration and collection of taxes. Section 60 of the TMA which deals with collection and recovery, provides that when a tax becomes due and payable, HMRC can make a demand of that sum from the person who owes that sum. The intention behind regulation 28(6) is that HMRC can use the TMA to enforce the payment of penalties, but the provision is limited to the conditions in the TMA. Regulation 28(6) does not include a power to charge interest. The wording of regulation 28(6) is similar to section 47(5) of the Childcare Payments Act 2014 but it does not replicate section 51 of that Act (which provides for the power to charge interest) clearly demonstrating that the power to charge interest is not automatically included within the scope of regulation 28(6).

4.13 These Regulations also set out the specifics of the local authority delivery model (which closely mirror the 2014 Regulations). In particular, local authorities are required to include provisions in their arrangements with providers that allow them to terminate funding arrangements with a provider who does not meet the minimum

[4] 2014 c.28
[5] S.I. 2015/522
[6] S.I. 2015/448

quality standards specified at regulation 35. In addition the local authority is required under regulation 36(e) to make provision for terminating a contract where, in the reasonable opinion of the childminder agency (CMA), a childminder registered with that agency is not of satisfactory quality. Regulations already provide that a CMA must have in place effective arrangements for assuring itself of the quality of the care and education provided by the childminders registered with it[7] If the agency itself is considered effective by Ofsted, the local authority should use this as an indication that the opinion expressed by the CMA's managing body is likely to be reasonable, although they may ask the CMA for written evidence to support the agency's quality assessment.

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 The Secretary of State for Education has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 are compatible with the Convention rights

7. Policy background

7.1 Since September 2010 eligible two year olds and all three and four year olds have been entitled to 570 hours a year of free early education over no fewer than 38 weeks of the year (which equates to 15 hours a week for 38 weeks of the year). In January 2016 97% of four year olds and 93% of three year olds were taking up a place.

7.2 The government has committed to doubling the amount of free childcare from 15 to 30 hours a week for working parents of three and four year olds from September 2017 (see paragraphs 4.2 and 4.3 above). Additional free childcare will help families by reducing the cost of childcare and will support parents into work or to work more hours, should they wish to do so.

7.3 In some circumstances, non-working households are treated as 'working' and therefore eligible for the extended free entitlement. e.g. where parents are on shared parental leave (regulation 8) or where one parent is paid or entitled to certain benefits linked to incapacity or limited capacity for work or caring responsibilities (regulation 9). The intention behind regulation 9 is that an individual should be considered as in "qualifying paid work" where, as a matter of fact, they meet the relevant threshold for eligibility for the benefit in question. To meet the principle of designing a system that is simple for working parents, the government's intention is that eligibility for the extended entitlement should broadly align with Tax-Free Childcare. Parents will be able to apply for the extended entitlement and Tax-Free Childcare through a joint on-line application (see paragraphs 4.10 and 4.11 above).

[7] Paragraph 16 of Schedule 1 to the Childcare (Childminder Agencies) (Registration, Inspection and Supply and Disclosure of Information) Regulations 2014 (S.I. 2014/1920)

7.4 Building on the success of the existing universal entitlement for three and four year olds the government will deliver this commitment through local authorities. The quality of the entitlement continues to be a priority. Only providers that are subject to the duty to deliver the Early Years Foundation Stage (pursuant to section 40 of the Childcare Act 2006) may deliver the extended entitlement and they must be registered with Ofsted (or be a school that is exempt from such registration pursuant to section 34(2) of the 2006 Act).

Consolidation

7.5 There are no plans for consolidating regulations at present.

8. Consultation outcome

8.1 The requirement that a parent must be in "qualifying paid work" and the description of 'qualifying paid work' were extensively debated during the passage of the Childcare Act 2016 through Parliament.

8.2 The government launched a consultation on 3rd April 2016 which closed on 6th June 2016. The consultation asked respondents for views on elements of the delivery of the extended entitlement and a draft of the Regulations was made available for review and comment by consultees. The relevant elements of the consultation for the purpose of these Regulations are (i) increasing flexibility of the free entitlement to better meet the needs of working parents (ii) improving access to the free entitlement for disabled children and those with additional needs and (iii) making the delivery model more efficient. This was an online consultation, supplemented by extensive informal consultation.

8.3 Prior to the consultation, and during the consultation period, policy officials met key stakeholders and attended a number of events across the country where proposals in the consultation were discussed with local authorities and providers. This consultation also built on findings from our survey of parents in 2015, where over 19,000 people responded. Draft indicative regulations and draft statutory guidance for local authorities were published alongside the consultation document. In total there were 1314 responses to the consultation, the highest proportion were from private and voluntary childcare providers. Responses were also received from childminders, parents, independent and maintained schools and from the majority of local authorities. There were also responses from 66 national organisations, a number of whom represent large groups of providers.

8.4 Respondents did not make any comments specifically about the draft Regulations. However, in response to questions about the impact of the Regulations, overall, most respondents thought there would be an impact on working households, disadvantaged families and childcare providers.

8.5 There was particular concern about the impact the extended entitlement would have on existing early education entitlement for two year olds. Specifically respondents expressed concern that local authorities would prioritise places and funding for the extended entitlement over the existing entitlement to 15 hours of free childcare for the most disadvantaged two year olds. Around a fifth of respondents expressed concern that it could be detrimental to a child's wellbeing to be in childcare for 30 hours a week, particularly if the entitlement was offered between 6am and 8pm. With respect

to children with SEND, respondents were concerned that it would be detrimental for the child to be in childcare for 30 hours a week. Others were concerned about the lack of good quality places and whether the funding rate was too low to accommodate SEND.

8.6 The government acknowledges the important concerns raised by respondents. All three and four year olds and the least advantaged two year olds can already access 15 hours a week of high quality early education to prepare them for school and improve their life chances. Building on this, the Early Years Pupil Premium provides an additional £300 per year for three- and four-year-olds from the lowest income families. Take-up of the 2 year old entitlement has increased and, in January 2016, around 70% of eligible two year olds were taking up a place. Further increasing take-up of places for two year olds remains a priority.

8.7 With respect to disadvantaged families' eligibility for the extended entitlement, the government has made clear that the introduction of 30 hours free childcare is a work incentive and is intended to help low income families back into work or to increase their hours. Entering employment is the best way to lift families out of poverty.

8.8 The government recognises there are issues with the way the funding system currently works to support children with SEND, which is why we have explored further, in our *'Early Years Funding Reform'* consultation, which closed on 22nd September 2016, the funding barriers that exist and the different models for allocating funding including targeted disability access funding and inclusion funding.

8.9 Most respondents did not identify any specific burdens arising from the Regulations themselves. A small percentage of respondents (3%) saw the Regulations as having little or no impact or potentially reducing burdens.

8.10 The majority of respondents agreed that flexibility to stretch the 30 hours offer over more than the 38 weeks of the school year would be the most valuable type of flexibility for parents – this has been reflected in the Regulations at regulation 34 which requires local authorities to provide 570 hours of free childcare over no less than 38 weeks in any year. The second most popular type of flexibility was early morning and later into the evening provision. Many written responses raised concerns about the potential impact on a child of being in childcare for a long period. To address these concerns the government will make clear in statutory guidance that the maximum session length of 10 hours a day remains unchanged.

8.11 A high proportion of written responses indicated that there should be no minimum session length. However, a significant number of respondents raised concerns that it would be difficult to deliver quality early education in a short period of time. As set out above in paragraph 7.4, the quality of the entitlement continues to be a priority. Only providers that are subject to the duty to deliver the extended entitlement Early Years Foundation Stage (pursuant to section 40 of the 2006 Act) may deliver the extended entitlement and they must be registered with Ofsted (or be a school that is exempt from such registration pursuant to section 34(2) of the 2006 Act). In addition, we will set out in statutory guidance that there will be no minimum session length for funded provision, although Ofsted registration requirements will still apply where relevant. The government is happy for as many providers as possible to deliver the programme. Indeed we want to encourage a mixed market so there is maximum

choice for parents about where to take up the extended entitlement. Also, we intend to set out in statutory guidance that parents should not split the entitlement across more than two sites in one day. This will prevent the number of transitions for children in one day and protect the wellbeing of the child. This approach will allow parents to use a different combination of providers at different points in the year, reflecting the fact that childcare needs may change between term-time and the school holidays. It will also address concerns from respondents about the number of transitions for children.

8.12 The government response to the consultation was published on 5th November and will be available at the following link: https://www.gov.uk/government/consultations/30-hour-free-childcare-entitlement.

9. Guidance

9.1 There is already statutory guidance for local authorities on early education and childcare which came into effect from 8th September 2014[8]. During the latest consultation, stakeholders were asked for comments and views on further draft statutory guidance relating to the delivery of the extended entitlement. This draft guidance will be amended to reflect the responses to this consultation and will be published in early 2017 (to allow the department to incorporate relevant changes to the guidance as a result of the amendment to the Schools and Early Years Finance (England) Regulations 2015[9]) to inform the rollout of the extended entitlement. Any new statutory guidance will come into force in September 2017.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 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 for the extended entitlement. 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. To assist local authorities to deliver 30 hours, we are funding a national delivery contractor, Childcare Works, to support local authority delivery. While it will be the role of HMRC to issue determinations of eligibility, there will be a role for local authorities to confirm eligibility when parents access their 30 hours – to this end, we are taking steps to adapt the existing eligibility checking system for two year olds to assist local authorities in undertaking this role with minimal burdens. We will also be publishing updated statutory guidance and we are consulting on the introduction of a fairer funding formula to deliver 30 hours.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not place requirements directly on those businesses that choose to offer the extended entitlement. The government's policy statement (December 2015), specified that local authorities should ensure that any process to ensure the proper use

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8 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351592/early_education_and_childcare_statutory_guidance_2014.pdf

9 SI 2015/2033

of public funding should not place undue administrative burdens on providers. The Department has also recently run a £40 million local authority led capital funding bid round to support providers to expand to deliver 30 hours. Local authorities worked with a range of early years providers, from schools to small businesses, to submit project bids.

12. Monitoring & review

12.1 Take-up of the current 15 hour funded entitlement for early education places for three and four year-olds is monitored through the annual Early Years Census and the termly School Census and is published annually in a Statistical First Release (SFR)[10]. The SFR also contains data on providers who deliver funded early education places. The Department will monitor the number and types of providers who deliver the extended entitlement to 30 hours of childcare; the numbers of children taking up their 30 hour entitlement and the number of hours of free provision those children are taking up. The Department also collects data on childcare and early education providers through a biennial survey[11]. The survey collects information on the number and characteristics of providers, the places they deliver and the workforce composition and qualifications. The Department is developing plans to measure the success of the new entitlement once it is in "steady state" following the full rollout of the scheme from September 2017.

13. Contact

13.1 Julie Laughton or Christina Bankes at the Department for Education Telephone: 020 7783 8059 or email: Jobshare.BANKES-LAUGHTON @education.gov.uk can answer any queries regarding the instrument.

[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467070/SFR_36-2015_Main_Text.pdf

[11] https://www.gov.uk/government/statistics/childcare-and-early-years-survey-of-parents-2012-to-2013