EXPLANATORY MEMORANDUM TO

THE CHILDCARE (MISCELLANEOUS AMENDMENTS) REGULATIONS 2017

2017 No. 361

1. Introduction

1.1 This explanatory memorandum has been prepared by 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 ("the Committee").

2. Purpose of the instrument

2.1 This instrument introduces an updated Early Years Foundation Stage (EYFS) statutory framework ("the Document"), and addresses earlier comments by the Committee about some overlap between Regulations and the Document (see paragraph 7.2).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 In response to comments by the Committee in its fifth report of session 2012-13[1] and its third report of session 2014-15[2], this instrument makes changes to The Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (S.I. 2012/938) ("the Welfare Requirements Regulations") to address the overlap between regulations 3(1) and (2) of the Welfare Requirements Regulations and section 3 of the Document, and separates the matters covered by regulation 3(2) from those covered by regulation 3(3) of the Welfare Requirements Regulations. The Committee's comments related to the Welfare Requirements Regulations only. For consistency, however, we have made similar changes to The Early Years Foundation Stage (Learning and Development Requirements) Order 2007 (S.I. 2007/1772) ("the Learning and Development Order"). Further details about these changes are set out in paragraph 7.2.

3.2 This instrument will come into force on 3 April 2017. The department is aware of difficulties that the Secondary Legislation Scrutiny Committee has had in commenting on statutory instruments laid shortly before recess. In this case, unfortunately it would not have been possible to lay the instrument any earlier due to a delay in securing Cabinet Committee clearance for a related policy.

Other matters of interest to the House of Commons

3.3 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 This instrument makes amendments to the following regulations:

[1] www.publications.parliament.uk/pa/jt201213/jtselect/jtstatin/29/29.pdf
[2] www.publications.parliament.uk/pa/jt201415/jtselect/jtstatin/13/13.pdf

- The Early Years Foundation Stage (Learning and Development Requirements) Order 2007 (S.I. 2007/1772)
- The Childcare (Early Years Register) Regulations 2008 (S.I. 2008/974), and
- The Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (S.I. 2012/938).

4.2 These instruments fulfil the Secretary of State's duty under section 39 of the 2006 Act to promote the well-being of young children by specifying learning and development requirements and welfare requirements. The learning and development requirements and the welfare requirements are together to be known as the Early Years Foundation Stage.

4.3 Section 44(1) of the 2006 Act enables the Secretary of State to publish the requirements in a document, and to direct that they are to have effect as specified in the instrument. The amendments made by this instrument give effect to the revised version of the Document.

5. Extent and Territorial Application

5.1 This instrument extends to England and Wales.

5.2 This instrument applies to England only.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

The Document:

7.1 The Document[3], which was first published in 2008, is mandatory for all early years providers. The Document sets the standards that all early years providers must meet to ensure that children learn and develop well and are kept healthy and safe. Section 1 and 2 of the Document covers the learning and development requirements, and section 3 of the Document covers the welfare requirements.

The Committee's comments:

7.2 The Welfare Requirements Regulations include requirements relating to corporal punishment (regulation 7), the provision of information (regulation 8), the approval of the suitability of premises (regulation 8A) and the provision of information relating to disqualification (regulation 9). These requirements are also referred to in section 3 of the Document for the convenience of the reader, as we are aware that most early years providers will only refer to the Document (and not to the Regulations).

7.3 In its fifth report of session 2012-13 and its third report of session 2014-15, the Committee expressed the concerns that there was overlap between regulations 7, 8 and 9 and certain paragraphs of Section 3 of the Document.

[3] www.gov.uk/government/publications/early-years-foundation-stage-framework--2

7.4 In order to address these comments by the Committee, therefore, this instrument omits certain provisions in the Document from being 'welfare requirements', so that there is no legal overlap as follows:

- paragraphs 3.52 and 3.53 of the Document are covered by regulation 7
- paragraphs 3.77 and 3.78 of the Document are covered by regulation 8/8A, and
- paragraphs 3.16, 3.17 and 3.18 of the Document are covered by regulation 9.

7.5 The Committee's report also expressed concern that the drafting of regulation 3 of the 2012 Regulations did not make clear the division between requirements and matters to which regard must be had. This concern is addressed in this instrument by separating the matters covered by regulation 3(2) from those matters covered by regulation 3(3). It does this by providing that provisions that use 'must' in the Document are requirements, and that providers must have regard to provisions that use 'should'.

7.6 As explained above, we have made similar changes to the Learning and Development Order for the sake of consistency even though the Committee's comments related to Welfare Requirements Regulations only.

Paediatric First Aid (PFA):

7.7 The regulations amend the reference to the Document in the Welfare Requirements Regulations and the Learning and Development Order to refer to the latest version of the Document published on 3 March 2017[4]. That new version of the Document includes a new requirement in respect of Paediatric First Aid qualifications. Paragraph 3.25 of the Document includes a new requirement (by virtue of regulation 3(2) of Welfare Requirements Regulations) that, from 1 April 2017, all new entrants to the early years workforce with full and relevant level 2 or level 3 qualifications must also have either a full PFA or an emergency PFA certificate before they can be included in the required staff:child ratios in an early years setting. Newly qualified entrants who started work between 30 June 2016 and 2 April 2017 must have either a full PFA or an emergency PFA certificate by 2 July 2017. The current legal requirement in the Document is that at least one person who has a current PFA certificate must be on the premises at all times. The aim of this measure is to embed paediatric first aid training into the qualification requirements for new entrants to the early years workforce and thereby, over time, significantly increase the number of staff trained in PFA.

7.8 The new requirement will only apply to newly qualified staff with a level 2 and/or level 3 childcare qualification. However the new requirement will include an exception on equal opportunities grounds that will allow a new member of staff with a disability that prevents them from completing a PFA training course to still be included in the staff:child ratios if otherwise competent to carry out their childcare duties. This is an important adjustment so that disabled staff are not prevented from having a career in early years.

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[4] The updated version of the EYFS is available on the gov.uk website https://www.gov.uk/government/publications/early-years-foundation-stage-framework--2and hard copies of the Document can be viewed at: The Department for Education, Sanctuary Buildings, 20 Great Smith Street, London, SW1P 3BT.

Level 3 Early Years Educator literacy & numeracy qualification requirements:

7.9 The regulations amend the reference in the Document to the Welfare Requirements Regulations and the Learning and Development Order to refer to the latest version of the Document published on 3 April 2017. That new version of the Document includes a broadening of the current requirement in respect of GCSEs in English and maths for level 3 early years educator staff. Paragraph 3.23 of the Document includes a new requirement that staff holding an early years educator qualification must also have achieved a suitable level 2 qualification in English and maths to count in the staff to child ratios at level 3. It is the responsibility of theDepartment for Education to specify what is a suitable level 2 qualification on the Early Years Qualifications List published on GOV.UK. The current legal requirement in the Document is that to count in the ratios at level 3, staff holding an early years educator qualification must also have achieved GCSEs in English and maths at grade C or above. The aim of this measure is to broaden out the requirements to support the recruitment and retention of staff at level 3 whilst retaining a focus on growing a high quality workforce.

7.10 The new requirement will only apply to staff who hold a level 3 early years educator qualification. Staff who hold an early years educator qualification meet the criteria laid down by the Department to be considered full and relevant and count in the level 3 ratios.

7.11 The Department has taken this opportunity with the revised Document to update further footnotes for paragraph 3.23 which includes confirming that the Department is now responsible for defining full and relevant qualifications at levels 2 and 3.

Other amendments

7.12 The department has also taken this opportunity with the revised Document to update references and footnotes, and make clarifying amendments. These include: incorporating into the body of the Document the 'clarification note' which accompanied the 2014 version of the Document; updating references to the latest government guidance; clarifying the learning and development requirements for before- and after-school provision for reception age children; clarifying the ratios in governor run pre-schools (i.e. provision for non-pupils); clarifying the requirements on giving medicines and some minor changes as a result of The Childcare (Miscellaneous Amendments) Regulations 2015 (2015/1562).

Consolidation

7.13 The department does not intend to consolidate the relevant childcare secondary legislation at this stage.

8. Consultation outcomes

8.1 On 15 October 2015, the Department for Education published a public consultation[5] which proposed to increase the number of trained paediatric first aiders by focusing on new entrants to the childcare workforce with full and relevant level 2 and level 3 qualifications. The consultation closed on 10 December 2015 and received 377 responses from a range of stakeholders, including private and voluntary full day and sessional care providers, first aid training providers, childminders and local authorities. 91% (328) of respondents believe that the PFA requirements should be changed or strengthened, and 84% (310) of respondents said the government should

[5] www.gov.uk/government/consultations/paediatric-first-aid-eyfs-statutory-framework-amendments

introduce a mandatory requirement for newly qualified early years staff (with full and relevant level 2 or level 3 childcare qualification) to also hold a current PFA or emergency PFA certificate in order to be included in the required staff:child ratios in an early years setting. An analysis of the consultation responses is available in the government's consultation response, which was published on 1 July 2016, and confirmed that the Government would proceed with making this change.

8.2 On 5 November 2016 the Department published a public consultation[6] on the literacy and numeracy qualification requirements for level 3 early years educator staff. The consultation closed on 28 November 2016 and received 4,072 responses from the early years sector and workforce (such as employers, managers of nurseries and other pre-school settings, teachers and early years practitioners), as well as other key stakeholders such as training providers and local authorities. Just over three-quarters of respondents (76.8%) stated that they had experienced difficulty recruiting to their setting or training course in the last two years. Just over half (52.9%) said they had experienced significant difficulties that had affected their organisation. Almost two thirds of respondents (64.9%) stated that applicants' lack of the required GCSEs was their main recruitment difficulty. Half of respondents (50.2%) selected level 2 functional skills as the 'most appropriate' literacy qualification and just over half of respondents (53.8%) selected level 2 functional skills as the 'most appropriate' numeracy qualification. An analysis of the consultation responses is available in the government's consultation response, which was published on 3 March 2017. The conclusion from the consultation was that the current minimum requirement for level 3 EYEs to hold GCSEs in English and mathematics to count in staff: child ratios as set out in the EYFS should be broadened to include other suitable level 2 qualifications, including functional skills, with effect from 3 April 2017. The report is available at https://www.gov.uk/government/consultations/level-3-early-years-educator-numeracy-and-literacy-requirements.

9. Guidance

9.1 This instrument does not include any complex amendments that will require standalone guidance on PFA in order to understand the changes.

9.2 This instrument does require additional guidance in order to understand which level 2 literacy and numeracy qualifications are considered suitable. From 3 April, this will be available on the Early Years Qualifications List[7] which currently provides guidance and a search tool to help those delivering the EYFS to identify qualifications that are considered to be full and relevant at levels 2 and 3, and qualifications that are considered equivalent to GCSEs in English and maths at grade C or above.

10. Impact

10.1 The impact on business, charities or voluntary bodies of the new PFA requirements are that employers will have to meet the first aid training cost for newly qualified staff every year, and the cost of refresher training every three years. These costs are set out in section 11 below and in the department's PFA Impact Assessment. For level 3 Early Years Educator literacy and numeracy qualification, the only significant cost to business, charities or voluntary bodies associated with this de-regulatory measure is limited to familiarisation, as set out in the department's Level 3 Literacy and

[6] https://consult.education.gov.uk/early-years-workforce/literacy-and-numeracy-level3/
[7] http://www.education.gov.uk/eypqd/

Numeracy Requirements Impact Assessment. An impact assessment for the new PFA requirments and for the literacy and numeracy qualification requirements for level 3 Early Years Educator staff will be published alongside this Explanatory Memorandum on the legislation.gov.uk website.

10.2 The impact of the PFA requirement on the public sector is that, over time, it will increase the number of trained staff in nursery classes in maintained primary and nursery schools.

10.3 An Impact Assessment for the new PFA requirement and for the new level 3 literacy and numeracy qualifications is submitted with this memorandum and will be publiched alongside this Explanatory Memorandum on: www.legislation.gov.uk.

11. Regulating small business

11.1 This legislation (including the Document) applies to small businesses such as nurseries and childminders, which make up a large proportion of the childcare market.

11.2 The impact of the PFA requirement: It is expected that 71% of the initial PFA training costs will be borne by training providers. This means that employers will have to meet 29% of the first aid training cost for newly qualified staff every year, and the full cost of refresher training every three years. Employers will start paying a total annual cost of approximately £0.74 million, and this will rise progressively over the 10 year appraisal period to reach approximately £8.4 million as more cohorts require the refresher training. Over 10 years the impact on businesses will amount to £46.4 million. However, to put this in context the potential impact on an average size nursery employing 12 members of staff to look after 48 2-year-olds is small by comparison. Under the existing EYFS, this nursery must have at least one staff member qualified to Level 3 and at least six staff members qualified to Level 2. Given that turnover in nurseries is 11%, it is reasonable to assume that only one of these seven members of staff leaves in any given year. If the nursery recruits a newly qualified Level 2 and/or Level 3 individual who had not already undertaken PFA training, the additional cost to the nursery (course cost plus staff cost) would be in the range £165-£173. The total annual mean expenditure in nurseries is £147,000 and total mean income is £190,000.

11.3 For level 3 Early Years Educator literacy and numeracy qualification the costs accrued directly to the private sector deduct the 'public carve out', reflecting the proportion of activity in these settings that is publicly funded, which are not in scope for the purposes of estimating the Equivalent Annual Net Direct Cost to Business (EANDCB). Dividing the one-off costs over the 10-year policy appraisal period, yields an annual direct cost to business of -£0.017m. This proposal is a qualifying regulatory provision and is deregulatory. The annual direct cost to business is expected to be less than -£0.1m (at -£0.017m p.a.). Given the potential scale of non-monetised benefits the EANDCB and business impact target score are zero.

12. Monitoring & review

12.1 Sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 (SBEEA), which came into force on 1 July 2015, place a statutory duty on UK Government Ministers to either include review provisions in secondary legislation that regulates business or voluntary and community bodies or else publish a statement that it is not appropriate in the circumstances to do so.. Therefore, this instrument includes a provision to review the amendments made by this instrument to The Early

Years Foundation Stage (Learning and Development Requirements) Order 2007 and The Early Years Foundation Stage (Welfare Requirements) Regulations 2012. The conclusion of the review will be published in a report within five years of the commencement date.

12.2 For the purposes of section 31(2)(a) of the SBEE Act 2015, the Minister has determined that it would be disproportionate to include a review provision for the minor/technical change made to The Childcare (Early Years Register) Regulations 2008. This amendment refers the reader to the definition of "appropriate first aid qualification" as set out in the revised EYFS, which was published on 3 March 2017. However, that amendment does not change the substance of the PFA description, and any burdens on early years providers to comply with the new PFA requirements will be captured under the review of The Early Years Foundation Stage (Welfare Requirements) Regulations 2012.

12.3 The department will continue to monitor the Document on a continuous basis as part of its regular contact with sector representatives and other early years reforms.

13. Contact

13.1 John Trakos at the Department for Education (telephone: 020 7340 7050 or email: john.trakos@education.gsi.gov.uk) can answer any queries in regard to this instrument.