EXPLANATORY MEMORANDUM TO

THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS PROVISION FREE OF CHARGE) (AMENDMENT) REGULATIONS 2014

2014 No. 1705

1. This explanatory memorandum has been prepared by the Department of Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

English local authorities are under a duty to secure early years provision free of charge for young children in their area who are under compulsory school age and of the prescribed description. The Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2013 ("the 2013 Regulations") prescribe those matters. This instrument amends the description in the 2013 Regulations of the two-year-old children entitled to free early years provision, in order to reflect changes introduced by the Children and Families Act 2014 ("CFA 2014").

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative Context

4.1 Section 7 of the Childcare Act 2006 provides that an English local authority must secure that early years provision of the prescribed description is available free of charge for each young child in their area who is under compulsory school age and is of the prescribed description.

4.2 Part 2 of the CFA 2014 makes changes to the operation of the Family Justice system, as recommended by the independent Family Justice Review and accepted by the Government in its response published on 6 February 2012. The Act contains provisions to introduce a 'child arrangements order', replacing residence and contact orders from 22 April 2014.

4.3 Part 3 of the CFA 2014 contains provisions which set out the statutory framework for identifying and assessing the needs of children and young people with special educational needs (SEN) who require support beyond that which is usually available. Statements made under section 324 of the Education Act 1996 and Learning Difficulty Assessments made under section 139A of the Learning and Skills Act 2000 are being replaced over a transitional period by new 0-25 Education, Health and Care plans (EHC plans) for both children and young people.

4.4 The regulations amend the 2013 Regulations to include, in the description of children who are eligible for funded early education, children who have an EHC plan and children who are no longer looked after as a result of a child arrangements order which covers with whom the child lives.

5. Territorial Extent and Application

This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

7.1 Since September 2008 local authorities have had a statutory duty to secure early years provision free of charge for all three- and four-year-olds in their area. This is known as funded early education.

7.2 In September 2013 the entitlement to funded early education was extended to the 20% most disadvantaged two-year-olds. Since September 2013 around 130,000 two-year-olds who meet the same criteria used for determining eligibility for free school meals or who are looked-after by the local authority have been entitled to a funded early education place.

7.3 In Autumn 2011 the Government announced that the entitlement would be extended to around 40% of the most disadvantaged two-year-olds from September 2014. This group includes children who have an EHC plan and children who are subject to a child arrangements order which covers with whom the child lives, in addition to those children already described in the 2013 Regulations.

8. Consultation outcome

8.1 From 5th July to 15th October 2012 the Department for Education consulted on "Extending Free Early Education to More Two-year-olds". The consultation invited views on the eligibility criteria set out in 4.4. A total of 173 responses were received from a wide range of private and voluntary early years providers, local authorities and national organisations. The Government response to the consultation was published on 2 September 2013 and can be found at:
www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1845&external=no&menu=3

8.2 A large majority of respondents (90.5%) agreed with the proposed earnings and benefits criteria. There was widespread agreement that the criteria should target places on children from lower income families. Some respondents commented that not all children

who would benefit from an early education place would be eligible under the proposed criteria although many of these respondents agreed with the proposed criteria in principle.

8.3 The majority of respondents agreed with the proposal that the entitlement should be extended to two-year-olds with statements of special educational needs, or an EHC plan, or in receipt of Disability Living Allowance. Some respondents described issues about the identification of two-year-olds with special needs and disability (SEND). Other respondents commented that the level of funding should reflect the higher costs of providing early education. The High Needs Block of the Dedicated Schools Grant provided to local authorities by the Department is available to meet the costs of children's significant or specialist needs.

8.4 A clear majority (81%) agreed that children who have been looked after before they reach age of two should be eligible for a funded early education place. Of the respondents disagreeing, half cited that children who have been looked after needed time to bond with their new families. However, early education for two-year-olds is not compulsory and adoptive parents and special guardians may consider that their child would benefit more from settling in with their new family than from early education. These regulations give an entitlement to a funded early education place for children who are no longer looked after by the local authority as a result of an adoption order, special guardianship order or a residence order.

8.5 The Department of Education has undertaken a number of consultations on the change from statements of SEN to EHC plans. The Department originally consulted on proposals to move from statements to EHC plans following the 2011 Green Paper: *Support and Aspiration; a new approach to Special Educational Needs and Disability*. In 2013, the Department undertook a consultation on detailed draft regulations on assessment and EHC plans, and there have been two consultations on the draft SEN and Disability Code of Practice, which includes a chapter on assessment and EHC plans. The Department has taken account of the consultation responses at each stage.

8.6 Child arrangements orders were one of the recommendations of the Family Justice Review (FJR). The FJR began work in March 2010 and was jointly sponsored by the Ministry of Justice, the Department for Education and the Welsh Assembly Government. It was established in recognition of increasing pressure on the family justice system. As part of its work, the FJR held a national consultation exercise on proposals to make a number of changes to the system, including replacing contact and residence orders with a single new order, the child arrangements order. There were over 600 responses to the consultation. A majority of those who commented on the proposal supported its introduction.

8.7 These provisions have been extensively debated during passage of the CFA 2014 through Parliament.

9. Guidance

There is already statutory guidance for local authorities on early education and childcare, published on 16th July 2013 and available at www.education.gov.uk/aboutdfe/statutory/g00209650/code-of-practice-for-las. That guidance will be revised to include new elements relating to the extension of the entitlement to funded early education for two-year-olds with EHC plans and child arrangements orders and is expected to be published in summer 2014. It will be available to download from the Department for Education's website: www.education.gov.uk

10. Impact

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private or voluntary sector is foreseen. There is no requirement on early years providers in the private or voluntary sectors to deliver funded early education places for two-, three- and four-year-olds.

11. Regulating small business

The legislation does not apply directly to small business, because, although private, voluntary and independent early years providers have an important role in providing funded early years provision, the regulations do not impose a requirement on them to deliver funded places and they can choose not to do so.

12. Monitoring & review

Take-up of funded early education places for two-year-olds is already monitored through the annual Early Years Census and Schools Census. Take-up of places by children with EHC plans and children who are no longer looked after as a result of a child arrangements order which covers with whom the child lives will be monitored as part of the Census.

13. Contact

Stephanie Martin at the Department for Education Tel: 0207 783 8059 or email: Stephanie.Martin@education.gsi.gov.uk can answer any queries regarding the instrument.