EXPLANATORY MEMORANDUM TO

THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS PROVISION FREE OF CHARGE) AND CHILDCARE (FREE OF CHARGE FOR WORKING PARENTS) (ENGLAND) (AMENDMENT) REGULATIONS 2024

2024 No. 1228

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Stephen Morgan, Minister for Early Education at the Department for Education confirms that this Explanatory Memorandum meets the required standard.

2.2 Joanna Mackie, Deputy Director for Early Years Entitlements, at the Department for Education confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Sean Ruston at the Department for Education email: Sean.Ruston@education.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 On 2 September 2024 the government announced that state schools (including maintained schools, academies and non-maintained special schools) in England would no longer receive "overall effectiveness" judgements (also known as "single headline grades") following inspection by Ofsted[1] under section 5 of the Education Act 2005.

4.2 The purpose of this instrument is to provide an alternative to overall effectiveness judgements for schools inspected on or after 2 September 2024 in two sets of regulations governing the entitlements to free early years provision and childcare for eligible children (the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014 (S.I. 2014/2147) (the "2014 Regulations") and the Childcare (Free of Charge for Working Parents) (England) Regulations 2022 (S.I. 2022/1134) (the "2022 Regulations")).

Where does the legislation extend to, and apply?

4.3 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.4 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

[1] The Office for Standards in Education, Children's Services and Skills.

5. Policy Context

What is being done and why?

5.1 On 2 September 2024 the government announced that state schools (including maintained schools, maintained nursery schools, academies and non-maintained special schools) in England would no longer receive "overall effectiveness" judgements (also known as "single headline grades") following inspection by Ofsted under section 5 of the Education Act 2005, and that School Report Cards are expected to be introduced from September 2025. Accordingly for 2024/25, early years provision provided as part of these schools' activities and in maintained nursery schools will no longer receive overall effectiveness judgements, while other early years provision – including childminders and private, voluntary and independent providers - will continue to do so.

5.2 English local authorities have statutory duties to secure free early years provision and childcare (often referred to as the "free entitlements") for eligible children in their area. The regulations governing the free entitlements require local authorities to make arrangements for free of charge provision with an early years provider of the parents' choice.

5.3 This duty to make arrangements with the parents' choice of provider is disapplied in certain circumstances, including where the chosen provider fails to achieve specified Ofsted overall effectiveness judgements in its most recent inspection. These are currently "good" or better for the free entitlement for the most disadvantaged two-year-olds and "requires improvement" or better for the universal free entitlement for three-and four-year-olds (the "universal entitlement"), and the free entitlement for qualifying children of working parents (the "working parent entitlement"). Local authorities are also required to include provision in their provider arrangements enabling them to terminate the arrangements if a provider fails to achieve these Ofsted judgements. There is no requirement to terminate the arrangements and local authorities can continue to fund these settings, for example in cases of low sufficiency or where they feel quality improvements are being made. The rationale is that it gives local authorities a lever to ensure that entitlements funding is provided to safe and high-quality early years settings.

5.4 The intention of this instrument is to align the powers of local authorities as far as possible across different provider types during this year where state schools will no longer receive overall effectiveness judgements and private, voluntary and independent providers and childminders will continue to do so.

What was the previous policy, how is this different?

5.5 The amendments to the Regulations provide an alternative to overall effectiveness judgements for schools inspected under section 5 of the Education Act 2005 on or after 2 September 2024.

5.6 For all of the entitlements, local authorities will not be required to make arrangements with a state school of the parents' choice if Ofsted determines (within the meaning of section 13 of the Education Act 2005) that 'special measures' are required to be taken in relation to the school or that the school requires 'significant improvement' (rather than, as now, if the school receives an overall effectiveness judgement of 'inadequate'). The statutory sub-categories of 'special measures' and requires

'significant improvement' are equivalent to the previous 'inadequate' overall effectiveness judgement.

5.7 For the free entitlement for the most disadvantaged two-year-olds, local authorities will additionally not be required to make arrangements with a state school of the parents' choice unless the provider receives a judgement of "good" or better for the effectiveness of the early years provision (rather than, as now, "good" or better for overall effectiveness). To note, this will not apply to maintained nursery schools, of which only a very small number are rated 'inadequate' or 'requires improvement' as they do not receive a separate early years provision judgement. Accordingly, for maintained nursery schools inspected on or after 2 September 2024, the local authority will not be required to make arrangements with them if Ofsted determines that "special measures" are required to be taken or the school requires "significant improvement".

5.8 For state schools whose most recent inspection was before 2 September 2024, and all other providers, such as childminders and private, voluntary and independent providers, the previous references to overall effectiveness judgments will still apply.

5.9 The instrument also aligns the way the 2014 and 2022 Regulations apply these provisions to local authority-maintained schools (including maintained nursery schools). In both cases, unlike other providers, the Regulations do not limit the requirements that can be imposed by local authorities on maintained schools and local authorities are not required to include provision enabling them to terminate the arrangements with maintained schools if the specified Ofsted ratings are not achieved. This reflects the wider relationship between local authorities and the schools they maintain, and the local authorities' statutory duty to maintain those schools.

5.10 The instrument also amends the definition of "inspection report" in the 2022 Regulations to include a report under section 162A Education Act 2002, which was repealed on 5th January 2015 by the Education and Skills Act 2008. This amendment is made for consistency with the definition of "early years provision inspection report" in the 2014 Regulations, and in case there are some early years providers whose most recent inspection was carried out under that provision.

6. Legislative and Legal Context

How has the law changed?

6.1 Section 7 of the Childcare Act 2006 places a duty on local authorities to secure free early years provision for eligible children – all three-and four-year olds and disadvantaged two-year-olds. The 2014 Regulations made under section 7 identify the children who should benefit from free early years provision, the type and amount of free early years provision and how local authorities should discharge their duty to secure free early years provision.

6.2 Section 1(1) of the Childcare Act 2016 places a duty on the Secretary of State to secure that childcare is available free of charge for qualifying children of working parents. This duty is delegated by the Secretary of State to English local authorities by the 2022 Regulations. Part 6 of the 2022 Regulations sets out that local authorities must secure that childcare is made available free of charge, the type and amount of free childcare and how local authorities must discharge the duty to secure free childcare.

6.3 The existing legal framework relating to inspections of maintained schools, academies and non-maintained special schools is contained in the Education Act 2005 and the

Education (School Inspection) (England) Regulations 2005 (S.I. 2005/2038). Those Regulations were amended by the Education (School Inspection) (England) (Amendment) Regulations 2024 (S.I. 2024/908), to ensure that the intervals between inspections would continue to work as intended in the absence of overall effectiveness judgements.

6.4 Ofsted also inspects early years providers under section 49 Childcare Act 2006 (applicable to providers registered in the early years register) and section 109 of the Education and Skills Act 2008 (applicable to registered independent educational institutions). Overall effectiveness judgements are still being given by Ofsted following inspections under those provisions.

Why was this approach taken to change the law?

6.5 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Department has not consulted on these amendments as they are being made in consequence of the decision to remove overall effectiveness judgements for maintained schools and academies inspected by Ofsted on or after 2 September 2024. We have engaged with Ofsted and a selection of local authorities to better understand the practical significance of the changes.

8. Applicable Guidance

8.1 There is statutory guidance to support local authorities in discharging their duty to secure free early education and childcare to eligible children in their area[2]. The Department will update the statutory guidance to reflect the amendments to the Regulations as part of a more general review of the guidance. The revised guidance will be published in Spring 2025 to come into force in April 2025.

8.2 The Department issued guidance directly to local authorities as part of a regular update on 24 October 2024 to support local authorities in the interim period and presented this guidance in a local authority webinar on 25 October. The Department intends to issue a further update with guidance in the days following the laying of this instrument to support local authorities in understanding and implementing the changes when the Regulations come into force.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because this is a technical change to enable local authorities to continue to secure high quality free early education and childcare for eligible children in their area following the removal of overall effectiveness judgements for maintained schools and academies.

9.2 Private, voluntary and independent childcare providers will continue to receive overall effectiveness judgements when inspected by Ofsted for 2024/25. DfE and Ofsted have

[2] Early Education and childcare statutory guidance - https://www.gov.uk/government/publications/early-education-and-childcare--2

committed publicly to working in partnership with the sector over the next year to develop alternative reporting arrangements.

Impact on businesses, charities and voluntary bodies

9.3 There is no, or no significant, impact on business, charities or voluntary bodies because this is a technical change following the removal of overall effectiveness Ofsted judgements for maintained schools and academies.

9.4 The legislation does not impact small or micro businesses.

9.5 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 Take-up of the free early education and childcare entitlements for all eligible children is monitored through the annual Early Years Census and the termly School Census and is published annually in official statistics[3]. The statistics contain data on the quality of childcare providers who deliver free early education and childcare places. The Department will review the Regulations following any decisions made by Ofsted and the government on the introduction of school report cards.

10.2 The instrument does not include a statutory review clause as it has no, or no significant, impact on business.

[3] Annual statistical release on take-up of government-funding childcare for children aged 2 to 4 - https://explore-education-statistics.service.gov.uk/find-statistics/education-provision-children-under-5

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").