

## **Implications of the Small Business, Enterprise and Employment Act (2015)**

This briefing aims to provide background and an update of the legislative change for schools.

The Small Business, Enterprise and Employment Act (2015), by amending The Childcare Act (2006), has removed the requirement for schools to register their early years provision for two-year-olds separately with Ofsted, so long as it meets certain requirements. This came into force on 26<sup>th</sup> May 2015.

### **Implications of the change**

A school wanting to set up provision for two-year-olds will no longer have to register separately as an early years provider with Ofsted. Schools wishing to take advantage of the exemption will need to meet the criteria, which are set out in the Act and as currently applied to three and four-year old provision.

If a school was already taking two-year-olds, they should have continued to have a separate Early Years (EY) registration in place until 26th May 2015. However, from 26th May 2015, separate Consequential Amendments (SI 963/2015) legally lapsed all existing provision that met the requirements for exemption. Ofsted will have contacted schools that already had a separate EY registration. If schools had not heard they should email Ofsted using the following dedicated account: [eyeschools@ofsted.gov.uk](mailto:eyeschools@ofsted.gov.uk).

### **Changing the age range of schools to take two year olds as pupils**

Maintained schools can run a nursery for children two to four years of age, and can lower their age ranges by up to two years without having to follow a formal statutory process. An Academy or Free School will need to submit a fast-track request to lower their age ranges by up to two years. This does not need a formal business case.

If a maintained school, academy or free school is changing its age range by more than two years (for example, moving from a 5-11 age range to a 2-11 range) a formal process still needs to be followed. Details can be found at

<https://www.gov.uk/government/publications/school-organisation-maintained-schools>

In any case, once the decision has been taken to extend the school's age range, the governing body must inform the Secretary of State by ensuring that the department's Register of Educational Establishments (EduBase) is updated. Guidance on how schools and LAs can update EduBase is available at: <http://www.education.gov.uk/edubase/faq.xhtml>

In these cases, the two-year-olds will be classed as 'pupils' (included on the schools' register of pupils) and this can have implications for staffing (see below) and provision of free school meals.

### **Other delivery models**

Maintained schools can take two-year-olds under Section 27 (Education Act 2002). This section confirms powers of the governing body to provide community or charitable facilities. Again there is an expectation that schools consult when planning to use their powers under Section 27 but this is not a statutory process. Schools no longer have to follow advice from their local authority, or the Secretary of State when planning to open a community facility.

Academies and Free Schools could provide early education for two-year-olds under their Charitable Objectives, if it fits with these as laid out in their funding agreement or set up a trading subsidiary to it.

In both cases, the provision will be inspected as part of the main school inspection, even though in these delivery models, two-year-olds will not count as 'pupils'. As the exemption from registration applies to the early years provision within a school, providing at least one pupil is present within the early years provision and it delivered directly by the school it will meet the criteria as set out in the Act.

## **Once proposed changes have been implemented**

Schools must ensure the provision and the environment is fit for purpose and meets the needs of two-year-olds and EYFS Framework is adhered to.

In a maintained school or non-maintained special school only, the [Education \(Specified Work\) \(England\) Regulations 2012](#) sets out the types of 'specified work' which must normally be carried out by a Qualified Teacher Status (QTS) or a nominated teacher (broadly a trainee teacher or a specialist teacher).

These are:

- a) planning and preparing lessons and courses for pupils;
- b) delivering lessons to pupils;
- c) assessing the development, progress and attainment of pupils; and
- d) reporting on the development, progress and attainment of pupils.

(Regulations 3 and 5)

An Early Years staff member would not normally fall within the QTS or nominated teacher category. Therefore, where a maintained school has lowered its age range to include two-year-olds, and when carrying out the work specified at (a)-(d) above, the Early Years staff member must be 'subject to the direction and supervision of a qualified teacher or nominated teacher'. The head teacher must also be satisfied that the Early Years staff member has the skills, expertise and experience needed to carry out the work (para 6 of the schedule to the Specified Work Regulations). It is for the head teacher to determine the appropriate level of direction and supervision.

For all two-year-olds (whether pupils or not), all schools must also meet the EYFS qualification and ratio requirements which are that:

- there must be at least one member of staff for every four children;
- at least one member of staff must hold a full and relevant level three

qualification; and

- at least half of all other staff must hold a full and relevant level two qualification (para 3.32 EYFS)

All these members of staff must be available to work directly with the children as laid out in the EYFS.

This means that:

- In a maintained or non-maintained special school, where the two-year-olds are pupils, the school must meet the above EYFS requirements and if there is no qualified or nominated teacher present, the staff must be under direction and supervision of a qualified or nominated teacher when carrying out specified work.
- For independent schools (including free schools and academies) and in maintained schools and non-maintained special schools where the two year olds are not pupils, the Specified Work Regulations do not apply so a school taking two year olds will only need to meet the requirements of EYFS.

## **Background on the Legislation**

### **Childcare Act (2006)**

The Childcare Act (2006) set out the requirement for early years providers to register with Ofsted<sup>1</sup>. This stated that the requirement did not apply in relation to early years provision for a child or children who has (or have) attained the age of three, if:

- (a) The provision is made at any of the following schools as part of the school's activities in a
  - (i) a maintained school,
  - (ii) a school approved by the Secretary of State under section 342 of the Education Act (1996) (c. 56) (approval of non-maintained special schools), or
  - (iii) an independent school,
- (b) the provision is made by the proprietor of the school or a person employed to work at the school, and
- (c) the child is a registered pupil at the school or, if the provision is made for more than one child, at least one of the children is a registered pupil at the school.

### **Rising Threes**

Legislation in the Childcare (Exemptions from Registration) Order 2008<sup>2</sup> provided schools with the ability to also count older two year olds as rising threes if they met the following circumstances:

- 9. (1) The circumstances referred to in article 2(2) are where the provision is made:
  - (a) at a relevant school as part of the school's activities
  - (b) By the proprietor of the school or a person employed to work at the school, and
  - (c) for a child who

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2006/21/section/34>

<sup>2</sup> <http://www.legislation.gov.uk/uksi/2008/979/contents/made>

(i) is a registered pupil at the school, and

(ii) has not attained the age of three but will do so before the expiry of the child's first term at the school.

(2) "Relevant school" means a maintained school, a school approved by the Secretary of State under section 342 of the Education Act 1996(1) (approval of non-maintained special schools), or an independent school.

### **Small Business, Enterprise and Employment (SBEE Act (2015))**

The amendments in SBEE Act (2015) have amended the wording in the Childcare Act (2006) from three years of age to two years of age, clause 75 states:

Exemption from requirement to register as early years provider

(1) In section 34(2) of the Childcare Act (2006) (requirement to register: other early years providers) for "three" substitute "two".

(2) In section 40(1) (b) of that Act (duty to implement Early Years Foundation Stage) for "3" substitute "2".

(3) In section 63(3) of that Act (applications for registration on the general register)—

(a) in the words before paragraph (a), for "three" substitute "two".

(b) in paragraph (c) (as it has effect prior to the coming into force of paragraph 35(4) of Schedule 1 to the Education and Skills Act (2008) for "three" substitute "two".

(4) In section 99(1) (b) of that Act (provision of information about young children: England) for "3" substitute "2".

(5) In section 94(5) (b) of the Education and Skills Act (2008) (independent educational institution standards) for "three" substitute "two"<sup>3</sup>.

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2015/26/section/75/enacted>