

# EARLY LEARNING AND CHILDCARE STATUTORY GUIDANCE

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## Early Learning and Childcare Statutory Guidance

### Introduction

1. This statutory guidance is issued under section 34 of the Standards in Scotland's Schools Act 2000 (the 2000 Act) which empowers Scottish Ministers to issue guidance to education authorities on the exercise of their functions in relation to the delivery of early learning and childcare. This statutory guidance applies from 1 August 2021.
2. This guidance will replace previous guidance and circulars; and should be read in connection with the legislation to which it relates.
3. The main part of the statutory guidance follows the provisions as set out in Part 6 of the Children and Young People (Scotland) Act 2014, as it is through these functions that early learning and childcare is defined. To complement this the document also sets out additional guidance on key related legislation and policy that are out-with the scope of section 34 of the 2000 Act under which this statutory guidance is issued.

### Interpretation

4. In this document local authorities are referred to as 'education authorities' as most of the references in the guidance are with regards to their statutory functions that relate to school education.
5. Throughout this document, the terms 'parent' and 'parents' have been used, and includes guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of a child or young person.
6. Education authorities' functions to secure education for children under school age are provided for in the **Education (Scotland) Act 1980**.
7. The **Children and Young People (Scotland) Act 2014** (the 2014 Act), and the accompanying secondary legislation made since 2014:
  - defines the term 'early learning and childcare';
  - sets out eligibility for early learning and childcare;
  - sets out the amount of funded early learning and childcare (referred to as the mandatory amount of early learning and childcare in the legislation) that eligible children are entitled to and the framework for delivering this.

These terms are further explained in the Glossary (in Annex A).

8. To avoid potential confusion, and to align with supporting policy guidance documents, this Guidance refers to the 'mandatory amount of early learning and childcare' as the **funded early learning and childcare entitlement**.
9. Eligible children are not required to take up all, or any, of their funded early learning and childcare entitlement.
10. The 2014 Act places duties on education authorities to consult with parents on the delivery of funded early learning and childcare, and to have regard to the desirability of ensuring that early learning and childcare is made available in a way that is flexible and allows parents an appropriate degree of choice when deciding how to access the service.
11. The Education (Scotland) Act 1980 also enables education authorities to provide access to provision that is out-with the statutory entitlement as defined through the 2014 Act. This is referred to as **discretionary early learning and childcare**. The Standards in Scotland's Schools etc. Act 2000 empowers education authorities to charge for discretionary early learning and childcare.
12. The other key aspects regarding how funded early learning and childcare must be delivered are set out in the **Standards in Scotland's Schools etc. Act 2000**. This Act requires that early learning and childcare provision to eligible pre-school children must be delivered without the payment of fees. It also enables education authorities to enter into arrangements with other persons (i.e. providers in the private, third or childminding sectors) to deliver the funded early learning and childcare entitlement or to deliver discretionary early learning and childcare.
13. There are also other pieces of legislation that have implications for the delivery of early learning and childcare and to which references are made in this guidance. When referring to the various pieces of legislation throughout the remainder of the document the following terms are used:
  - 'the 2014 Act' means the Children and Young People (Scotland) Act 2014;
  - 'the 2014 Order' means the Provision of Early Learning and Childcare (Specified Children) Order 2014.
  - 'the 1980 Act' means the Education (Scotland) Act 1980;
  - 'the 2000 Act' means the Standards in Scotland's Schools etc. Act 2000;
  - 'the 1995 Act' means the Children (Scotland) Act 1995;
  - 'the 2004 Act' means the Education (Additional Support for Learning) (Scotland) Act 2004; and
  - 'the 2010 Act' means the Schools (Consultation) (Scotland) Act 2010.

## Context

14. The earliest years of life are crucial to a child's development and have a lasting impact on outcomes in health, education and employment opportunities later in life. It is widely acknowledged that the provision of universally accessible and high quality early learning and childcare can play a vital role in helping to close the poverty-related attainment gap.
15. In the longer term, the increased investment in children's outcomes during the early years is anticipated to reduce interventionist public spending later in life, and have a positive impact on long term health, wellbeing and productivity<sup>1</sup>. Early learning and childcare also brings other economic benefits through reducing household costs and improving parents' opportunities to access work, training or further study, contributing to cross government policy priorities, for example tackling child poverty, as highlighted in the Scottish Government's [Child Poverty Delivery Plan](#).
16. From 1 August 2021 the funded early learning and childcare entitlement is 1140 hours per year for all 3 and 4 year olds, and eligible 2 year olds. This will be high quality, flexible early learning and childcare that is accessible and affordable for families.
17. This will be supported by [Funding Follows the Child](#)<sup>2</sup>, which was agreed by the Scottish Government and COSLA, and ensures that the funded early learning and childcare entitlement is delivered in high quality settings. This approach is 'provider neutral' and is underpinned by a National Standard that all settings that wish to deliver the funded entitlement have to meet.
18. This is intended to support a wider system for the delivery of funded early learning and childcare that is built upon a mixed economy model of provision in the public, private, third and childminding sectors.
19. This guidance is supported by the Getting it Right for Every Child (GIRFEC) national approach which aims to improve outcomes through coordinating services that work with children and young people and Curriculum for Excellence Early Level. The GIRFEC approach puts the rights and wellbeing of children and young people at the heart of the policies and services that support them and their families – such as early years services, schools and the NHS. The Curriculum for Excellence Early Level begins at age 3, when most children will be in a range of early learning and childcare settings, and continues throughout their transition

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<sup>1</sup> Reynolds AJ et al: Long-term Effects of an Early Childhood Intervention on Educational Achievement and Juvenile Arrest: A 15-Year Follow-Up of Low-income Children in Public Schools. The Journal of the American Medical Association; 2001.

<sup>2</sup> Information on the implementation of Funding Follows the Child and the National Standard for Early Learning and Childcare Providers, including detailed Operating Guidance for education authorities and providers, is available on the [Scottish Government website](#).

into a school setting and the early primary years. Curriculum for Excellence places learners at the heart of education and helps our children and young people gain the knowledge, skills and attributes needed for life in the 21st century.

20. This guidance is further supported by the additional support for learning and the responsibilities set out in the 2004 Act. These provisions seek to ensure that children who face barriers to their learning, for whatever reason, receive the additional support that they need to reach their full learning potential.
21. The Scottish Government is committed to recognising, respecting and promoting children's rights, as set out in the [United Nations Convention on the Rights of the Child](#) (UNCRC). [The United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) was passed unanimously by the Scottish Parliament on 16 March 2021<sup>3</sup>. Once commenced, the Bill will incorporate the UNCRC, the first optional protocol on the involvement of children in armed conflict and the second optional protocol on the sale of children, child prostitution and child pornography into Scottish domestic law.
22. The Bill will support the delivery of a proactive culture of everyday accountability for children's rights across public services in Scotland and a fundamental shift in the way children's rights are respected, protected and fulfilled in Scotland.
23. Many articles contained within the UNCRC are particularly relevant to the delivery of early learning and childcare including Article 31 (leisure, play and culture) which provides for a child's right to culture, leisure, rest and play and Articles 28 (right to education) and 29 (goals of education). More flexibility about how early learning and childcare is delivered and accessed, also contributes to Article 18 (1) and (2) (parental responsibilities and state assistance) as models of early learning and childcare more suited to a families' working pattern can maximise the time that children are able to spend with their parent(s) and provide more opportunities for parent(s) to move into employment, increase their hours of work, or to study if they wish to do so. The wider economic benefits of early learning and childcare through reducing household costs and improving parents' opportunities to access work, training or further study can also contribute to Article 27 (adequate standard of living).
24. As per Article 2 (non-discrimination), the UNCRC rights apply to every child and young person regardless of the child's or their parent's background or status. Article 2 along with Articles 3 (Best interests of the child), 6 (Right to life, survival and development), and 12 (Right to be heard), are the four articles in the UNCRC which are known as the "General Principles". These assist in interpreting all the

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<sup>3</sup> The Bill contains provision which will mean it will automatically commence 6 months from Royal Assent. It also contains powers for the Bill to be commenced earlier than 6 months from Royal Assent.

other articles and play a fundamental role in realising all the rights in the UNCRC for all children.

### **How to use this guidance**

25. This statutory guidance is issued to education authorities who are required to have regard to it when carrying out their statutory functions in relation to securing the funded early learning and childcare entitlement for eligible children in their area. It is also intended to assist all those involved in the implementation and delivery of early learning and childcare, including providers in the private, third and childminding sectors, community planning partners, and agencies across all sectors which support the early learning and childcare sector.
26. This guidance will also be of interest to parents, local communities, and anyone with an interest in how education authorities consult on and deliver early learning and childcare. Further information is available for parents on their local authority's website, through the [Scottish Government](#), [Education Scotland](#), and [Parent Club](#).
27. The structure of the guidance broadly follows the order of the provisions under Part 6 of the 2014 Act.



## Section 46: Definition of early learning and childcare

Early learning and childcare is defined in section 46 of the 2014 Act as ‘a service, consisting of education and care, of a kind which is suitable in the ordinary case for children who are under school age, regard being had to the importance of interactions and other experiences which support learning and development in a caring and nurturing setting’.

28. Early learning and childcare, as defined in the 2014 Act, removed the artificial divide between pre-school for 3 and 4 year olds (seen as the educational element delivered in short blocks tied to a certain number of hours in a day), and wrap-around care or childcare for 3 and 4 year olds (seen as less important to learning, and something that is used to top up the pre-school hours). It recognises the role that responsive care, regardless of how it is funded, plays in supporting children’s development.
29. This term seeks to emphasise the holistic and seamless provision of nurture, care and development of social, emotional, physical and cognitive skills, abilities and wellbeing.
30. Play, as outlined in the national practice guidance [‘Realising the Ambition’](#), will continue to be an essential and fundamental part of children’s learning and happiness. Early learning and childcare providers should ensure that all children have play experiences as part of their daily lives, as enshrined in Article 31 (Leisure, play and culture) of the UNCRC.

## **Section 47: Duty to secure provision of early learning and childcare for eligible children**

Section 47 of the 2014 Act places a statutory duty on education authorities to ensure that the funded early learning and childcare entitlement is made available for eligible children in their local area. Section 47 of the 2014 Act and the 2014 Order further define which children are eligible for funded early learning and childcare.

31. Section 47(1) of the 2014 Act provides that each education authority must ensure that the statutory funded early learning and childcare entitlement is made available for each eligible young child belonging to (i.e. residing in) its area<sup>4</sup>.
32. Under section 35 of the 2000 Act, an education authority can enter into arrangements with any persons to secure the statutory funded early learning and childcare entitlement for children under school age, i.e. early learning and childcare providers in the private, third and childminding sectors.
33. Education authorities may work with providers in the private, third and childminding sectors, to secure all or part of a child's funded early learning and childcare entitlement. As such, education authorities may enter into a section 35 arrangement with such a provider, regardless of whether or not the provider can deliver the full statutory entitlement of 1140 hours of funded early learning and childcare.
34. Section 47(2) of the 2014 Act defines an "eligible pre-school child", by setting out the three conditions that must be met, in order for a child to be eligible. The first two conditions (Section 47(2)(a) and (b)) must be met by all children, and then the third condition (section 47(2)(c)) has two alternatives, and one of these must be met, in order for a child to be eligible, as set out below.

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<sup>4</sup> The immigration status or nationality of the parent or child is not normally relevant to eligibility for this entitlement. However, certain immigration conditions might impact on entitlement to qualifying benefits and in turn affect eligibility for some 2-year olds. Education authorities still have power to provide discretionary early learning and childcare under section 1(1C) of the 1980 Act.

35. An “eligible pre-school child” is a child who:

- is under school age;
- has not commenced attendance at a primary school (other than at a nursery class in such a school); **and is either:**

(i) aged 2 or over and is or has at any time since their second birthday been looked after<sup>5</sup>, is the subject of a kinship care order, or who has or has had a guardian by virtue of an appointment under section 7 of the 1995 Act (a parent-appointed guardian).

or

(ii) within such age range, or is of such other description, as Scottish Ministers may specify by order. This provides Scottish Ministers with the power to specify and expand eligibility through secondary legislation subject to affirmative procedure before the Scottish Parliament. This has been done through the 2014 Order.

36. The 2014 Order, as amended (made under the powers referred to in Section 47(2)(c)) therefore sets out further information on who is an ‘eligible pre-school child’, including which 2 year olds are eligible and the start dates for all children’s eligibility commencing. The combination of eligibility criteria defined under section 47(2)(c)(ii) of the 2014 Act and the 2014 Order, also means that some children who defer their start at primary school for a year, are eligible. An amendment to the 2014 Order that comes into force from 1st August 2023, means that from that date all children with birth dates on or between the day after the school commencement date in August and the last day in February who defer their entry to school for a year, will be eligible.

#### Discretionary early learning and childcare

37. Under section 1(1C) of the 1980 Act, education authorities are empowered to provide discretionary early learning and childcare, over and above the statutory entitlement. Some education authorities use these powers to provide access before the statutory ‘start date’ or after the ‘stopping date’; or to widen local eligibility criteria for 2 year old children, beyond the statutory eligibility criteria. Examples of how this discretion can be used are described throughout this guidance.

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<sup>5</sup> In terms of section 97(2) of the Act, “looked after” is to be construed in accordance with section 17(6) of the 1995 Act.

## Eligible 2 year olds

### Rationale behind the policy

38. Evidence from both UK and international evaluations and studies of early learning and childcare programmes<sup>6</sup> support the fact that all children, and especially those facing the most disadvantage, can benefit in terms of social, emotional and educational outcomes from attending high quality early learning and childcare.
39. This is the basis for the investment in early learning and childcare for all 3 and 4 year olds and eligible 2 year olds. The specific link to improved outcomes for those children facing the most socio-economic disadvantage is the rationale for targeting investment in early access to high quality childcare for eligible 2 year olds.
40. Eligibility for funded early learning and childcare entitlement for 2 year olds is set out under Section 47(3) of the 2014 Act (for looked after children, children in kinship care and those with a parent-appointed guardian) and in the 2014 Order (for those on qualifying benefits).
41. In addition, there are circumstances when the Scottish Government and COSLA can agree a national approach to using education authorities' discretionary early learning and childcare powers, to offer additional early learning and childcare over and above the statutory entitlement, to certain children. The policy to extend early learning and childcare eligibility to 2 year olds with a care experienced parent has been brought in through this route. We have also previously used this approach to bring in new income thresholds for those on qualifying benefits in advance of regulations being approved by the Scottish Parliament. This process is normally only used temporarily, until legislation can be amended. The latest eligibility criteria are made available on [mygov.scot](https://mygov.scot) and the Knowledge Hub and the Scottish Government will also communicate directly with education authorities and the wider sector when there are any changes to eligibility.

### Looked after children, kinship care and guardianship orders

42. Section 47(3) of the 2014 Act provides that any child who is aged 2 or over and is or has at any time since their second birthday been looked after<sup>7</sup>, is the subject of a kinship care order, or who has or has had a guardian by virtue of an appointment under section 7 of the 1995 Act (a parent-appointed guardian), is an eligible child entitled to funded early learning and childcare. As such, they remain eligible for the full funded early learning and childcare entitlement regardless of whether they remain looked after or not. Further detail on 2 year olds who are

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<sup>6</sup> [Rapid evidence review: Childcare quality & children's outcomes - Publications - Public Health Scotland](#)

<sup>7</sup> In terms of section 97(2) of the Act, "looked after" is to be construed in accordance with section 17(6) of the 1995 Act.

looked after, including arrangements to meet wellbeing needs, is outlined in this document in the guidance on section 49 of the 2014 Act.

43. Under section 47(4) of the 2014 Act, Scottish Ministers can specify that the children defined as eligible under section 47(3) of the 2014 Act (those who were entitled as 2 year olds where they were looked after, under a kinship care order, or with a parent appointed guardian) are no longer entitled to funded early learning and childcare once they reach school starting age. The 2014 Order<sup>8</sup> makes the same provision for stopping those children from receiving funded early learning and childcare as for all other children.

#### Two year olds with a care experienced parent

44. From August 2021, the [2019 Programme for Government](#) commitment to extend eligibility of the provision of funded early learning and childcare for 2 year olds who have a care experienced parent commences. Until such a time when legislation is put in place, education authorities should use their discretionary powers under section 1(1C) of the 1980 Act to provide places to 2 year olds who have a parent who has experience of care. We encourage the use of a wide definition of 'care experience', which is in line with the findings of The Independent Care Review, published in [The Promise](#); alongside a pragmatic and sensitive approach to establishing eligibility.

#### Parents in receipt of qualifying benefits

45. Under the 2014 Order, 2 year olds from households where a parent is in receipt of certain benefits are eligible from the first term after their second birthday; or, the first term after the parent starts receiving those benefits.
46. Education authorities may use their discretionary powers under section 1(1C) of the 1980 Act to provide earlier access to these eligible children, for example to provide access from their 2nd birthday.
47. All 2 year olds who have gained eligibility will remain eligible and entitled to funded early learning and childcare until the child's stopping date in relation to starting school, regardless of whether:
- a) a parent's circumstances change from the initial qualifying criteria;
  - b) the parent in their household remains on those benefits or not.
48. The 2014 Order may be subject to further amendments (including income thresholds for certain benefits which may vary annually). A list of the current eligibility criteria can be found on the [mygov website](#).

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<sup>8</sup> Article 3 of the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014. As set out in paragraph 36, an amendment to the 2014 Order will come into force from 1st August 2023 - this will revoke Article 3.

## Use of discretionary powers for 2 year olds

49. One example of how some education authorities use their discretionary powers under section 1(1C) of the 1980 Act, is to widen local eligibility criteria for 2 year old children who would not otherwise be eligible and are homeless; or to 2 year olds whose mothers have been part of the [Family Nurse Partnership Programme](#).
50. There are a range of benefits that are now available to families in Scotland that have a degree of overlap with eligibility criteria for the 2 year old entitlement. For example, eligibility criteria for [Best Start Foods](#) have been based on eligibility for the 2 year old early learning and childcare entitlement and so education authorities may use their discretionary powers to accept receipt of this benefit as a passport to eligibility. [Other benefits](#), such as Best Start Grant and Scottish Child Payment have wider eligibility criteria than the early learning and childcare entitlement. Education authorities may decide to use their discretionary powers to offer additional early learning and childcare, to children whose families are in receipt of these benefits, before they are eligible to the funded early learning and childcare entitlement, or may choose to include a similar income threshold as that in place for the 2 year old criteria for those in receipt of Universal Credit and Working Tax Credits.
51. Scottish Government communications for the Best Start benefits have included information on the 2 year old early learning and childcare entitlement to raise awareness of the offer. Education authorities may wish to make these connections in communications locally too.

## Promoting the entitlement

52. As uptake of the funded early learning and childcare entitlement is not compulsory, and depends upon parents taking up a place for their child, education authorities and all agencies and services working with families have a crucial role in identifying eligible families and building relationships to provide reassurance to families and promote the benefits to children and families of the entitlement. This may be through:
- Working collaboratively with local services who are well connected with eligible families, such as promoting the entitlement through health and social work staff, local community groups and third sector services.
  - Making connections with other departments of the local authority e.g. housing and council tax to raise awareness internally.
  - Ensuring local early learning and childcare providers, are kept up to date on processes for applying for places.
  - Providing support to families and workers with application processes and making administrative processes as simple and streamlined as possible.

- Ensuring local offers meet the needs of local families by ensuring eligible families are represented in local consultations on provision.
- Considering how the 2 year old offer can be cross-promoted with other local and national entitlements e.g. Best Start Grant and Best Start Food.

## Starting and stopping dates for eligibility

53. Section 47(2)(c)(ii) and (4) of the 2014 Act gives Scottish Ministers the power to specify and expand eligibility for funded early learning and childcare through secondary legislation subject to affirmative procedure before the Scottish Parliament. Taken together with the description of an 'eligible pre-school child' in Sections 47(2)(a) and (b), and 47(3) of the 2014 Act, the 2014 Order further specifies when eligibility for funded early learning and childcare starts and stops.
54. Starting and stopping dates for funded early learning and childcare depend on the date of the child's birthday, local school term dates and, where relevant, whether the parent has chosen to defer the child's start at primary school for a year.

### Starting dates

55. In terms of starting dates, under the 2014 Order, eligible 2 year olds and all 3 year olds are eligible for funded early learning and childcare from the beginning of the first term after the child's 2<sup>nd</sup> or 3<sup>rd</sup> birthday, as set out in the following table:

<b>Where a child's birthday falls on or between the following dates:</b>	<b>The child will become eligible from the terms set out below:</b>
1 March – 31 August	August (autumn term) occurring in that year
1 September – 31 December	January (spring term) following their birthday
1 January – last day February	March/ April (summer term) following their birthday

56. Some education authorities use their discretionary powers under section 1(1C) of the 1980 Act, to provide funded early learning and childcare to 2 and 3 year olds earlier than the statutory start dates. For example, from their 2<sup>nd</sup> or 3<sup>rd</sup> birthday, from the month after their 2<sup>nd</sup> or 3<sup>rd</sup> birthday, or to certain children before they are 2 or 3 years old. Arrangements to commence closer to the child's birth date are encouraged.



## Stopping dates

57. In terms of stopping dates for funded early learning and childcare, and as set out in paragraph 35, the 2014 Act defines an “eligible pre-school child” as a child who:

- is under school age;
- has not commenced attendance at a primary school (other than at a nursery class in such a school); **and is either:**

(i) aged 2 or over and is or has at any time since their second birthday been looked after<sup>9</sup>, is the subject of a kinship care order, or who has or has had a guardian by virtue of an appointment under section 7 of the 1995 Act (a parent-appointed guardian).

**or** (ii) within such age range, or is of such other description, as Scottish Ministers may specify by order. This provides Scottish Ministers with the power to specify and expand eligibility through secondary legislation subject to affirmative procedure before the Scottish Parliament. This has been done through the 2014 Order.

58. The 2014 Order further defines when eligibility for some children will stop. The 2014 Order provides that those children whose 5th birthday falls in the period beginning on 1st August and ending on 31st December are no longer eligible for funded early learning and childcare. An amendment has been made to the 2014 Order to remove this additional definition<sup>10</sup>, but does not come into force until 1 August 2023.

59. Stopping dates until 31 July 2023, and those that apply from 1 August 2023, are therefore summarised separately below.

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<sup>9</sup> In terms of section 97(2) of the Act, “looked after” is to be construed in accordance with section 17(6) of the 1995 Act.

<sup>10</sup> [The Provision of Early Learning and Childcare \(Specified Children\) \(Scotland\) Amendment Order 2021](#).

60. Stopping dates **until 31 July 2023** (as defined under section 47(2)(a) and (b) of the 2014 Act and the 2014 Order and subject to the exceptions described in paragraphs 77 and 78) are summarised as follows:

<b>Where a child's birthday falls on or between the following dates:</b>	<b>Stopping funded early learning and childcare and starting school:</b>	<b>Eligibility for funded early learning and childcare when deferring school entry:</b>
1 March – the school commencement date <sup>11</sup> in August	Children's entitlement to funded early learning and childcare stops from the August (autumn term) following their 5 <sup>th</sup> birthday, at which point they will start school.	As these children will be 5 years old on the school commencement date, parents cannot defer entry to school <sup>12</sup> .
After the school commencement date in August – 31 December	Children's entitlement to funded early learning and childcare stops from the August (autumn term) in the year they turn 5, at which point they can start school or parents can defer their child's entry to school to the August (autumn term) of the following year.	Children's entitlement to funded early learning and childcare has ceased but parents can request that the education authority provide an additional year of funded early learning and childcare using their discretionary power under section 1(1C) of the 1980 Act.
1 January – last day in February	Children's entitlement to funded early learning and childcare stops from the August (autumn term) following their 5 <sup>th</sup> birthday. Children can start school in the August (autumn term) before they turn 5, or parents can defer their entry to school until the August (autumn term) after they turn 5.	Children's entitlement to funded early learning and childcare continues to the August in the year of their 5 <sup>th</sup> birthday so they are still entitled to funded early learning and childcare if they defer school entry.

<sup>11</sup> Each education authority fixes a date or dates for the commencement of attendance at primary schools in their area. This is referred to as the "school commencement date".

<sup>12</sup> In exceptional circumstances, an education authority may consider that a further year in early learning and childcare would be more appropriate than providing the child with education in primary school. Further information is outlined in paragraphs 77 and 78.

61. Stopping dates **from 1 August 2023** (as defined under section 47(2)(a) and (b) of the 2014 Act and subject to the exceptions described in paragraphs 77 and 78) are summarised as follows:

<b>Where a child's birthday falls on or between the following dates:</b>	<b>Stopping funded early learning and childcare and starting school:</b>	<b>Eligibility for funded early learning and childcare when deferring school entry:</b>
1 March – the school commencement date <sup>13</sup> in August	Children's entitlement to funded early learning and childcare stops from the August (autumn term) following their 5 <sup>th</sup> birthday, at which point they will start school.	As these children will be 5 years old on the school commencement date, parents cannot defer entry to school <sup>14</sup> .
After the school commencement date in August – last day in February	Children's entitlement to funded early learning and childcare stops from the August (autumn term) following their 5 <sup>th</sup> birthday. Children can start school in the August (autumn term) before they turn 5, or parents can defer their entry to school until the August (autumn term) after they turn 5.	Children's entitlement to funded early learning and childcare continues to the August in the year of their 5 <sup>th</sup> birthday so they are still entitled to funded early learning and childcare if they defer school entry.

62. Powers under section 1(1C) of the 1980 Act allow education authorities to provide discretionary early learning and childcare after a child's statutory 'stopping date'. This allows education authorities to:

- a) Until 1 August 2023, provide an additional year of funded early learning and childcare to children born after the beginning of the autumn term, in August, and before 1 January whose parent has chosen to defer the child's start at primary school for a year.
- b) In exceptional circumstances, provide an additional year of funded early learning and childcare to children with a birth date on or between 1 March and the school commencement date, where the education authority considers that a further year in early learning and childcare would be more appropriate than providing the child with education in primary school. Further information is outlined in paragraphs 77 and 78.

<sup>13</sup> Each education authority fixes a date or dates for the commencement of attendance at primary schools in their area. This is referred to as the "school commencement date".

<sup>14</sup> In exceptional circumstances, an education authority may consider that a further year in early learning and childcare would be more appropriate than providing the child with education in primary school. Further information is outlined in paragraphs 77 and 78.

## **Deferred school entry and eligibility**

63. The school year starts in August, with any single school year group usually consisting of children born between the beginning of March in one year and the end of February the following year. School age is defined in sections 31 and 32 of the 1980 Act<sup>15</sup>. Parents of children that are still 4 years old on the date they are eligible to start school (i.e. children with birth dates on or between the day after the school commencement date in August – last day in February) can defer their child's start at primary school for a year.

64. In terms of eligibility for funded early learning and childcare when children defer primary 1 for a year, an amendment has been made to the 2014 Order to ensure that from 1 August 2023, all children who defer are automatically entitled to funded early learning and childcare in their deferred year. Until then, eligibility depends on the child's birth date. Eligibility until 31 July 2023 and from 1 August 2023, for funded early learning and childcare for children who defer is therefore summarised separately below.

### **Deferred school entry and eligibility until 31 July 2023**

65. When a parent has chosen to defer their child's primary school start for a year, a child's entitlement to funded early learning and childcare depends on their birth date. If a child's entry to school is deferred for a year:

- a) they will automatically get an additional year of funded early learning and childcare if their 5<sup>th</sup> birthday is in January or February; or
- b) parents can apply to their education authority and request an additional year of funded early learning and childcare if the child's 5<sup>th</sup> birthday is after the beginning of the autumn term, in August, and before 1 January. The education authority will decide if the child is eligible for an additional year of funded early learning and childcare.

66. Parents of children that are still 4 years old on the date they are eligible to start school, are entitled to defer their child's entry to school for a year regardless of whether they are eligible for funded early learning and childcare.

67. Education authorities will have their own local procedures, guidelines and policies on using their discretionary power under section 1(1C) of the 1980 Act to provide an additional year of funded early learning and childcare for August to December

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<sup>15</sup> Sections 31 and 32 of the 1980 Act provide that a child is of school age where the child has reached the age of 5 on the school commencement date set by the education authority (a date in August). Where the child has not reached 5 on that date, the child is deemed not to have reached statutory school age until the school commencement date next following the child's 5th birthday. Where a child is not yet 5 at the school commencement date but will turn 5 before the 'latest appropriate date' set by the education authority (normally a date at the end of February), the authority can admit the child to start school in August before the child's 5th birthday.

born children whose school entry is deferred<sup>16</sup>. These decisions should be based on an assessment of wellbeing, putting the child at the centre and working in partnership with families.

68. Good quality and transparent decision making will involve a holistic assessment of the 8 wellbeing indicators (safe, healthy, achieving, nurtured, active, respected, responsible, and included). The [GIRFEC National Practice Model](#) (including the [My World Triangle and the Resilience Matrix](#)) provides a consistent way for education authorities to assess, understand and define the needs of the child, in partnership with their family and with advice from relevant professionals; and to record the outcomes of that assessment. In some cases, that assessment and analysis will lead to the development of a Child's Plan.
69. Education authorities' decisions about the provision of discretionary funded early learning and childcare should be separate from their considerations about children's additional support needs and the support that they may need to fully benefit from their education. Children with additional support needs (as defined by the 2004 Act and including those children with additional support needs arising from a disability within the meaning of the Equality Act 2010) will be supported through the provisions of the 2004 Act. Broadly, the 2004 Act places duties on education authorities to identify, provide for and review the additional support needs of children and young people who they are responsible for. Further information is outlined in this document in the guidance on Additional support needs.
70. Education authorities should ensure local policies and procedures are accessible for all parents, and can be easily understood so that they know how to request that their education authority provide discretionary funded early learning and childcare to their child using their powers under section 1(1C) of the 1980 Act. Education authorities may also wish to consider how they involve parents from the beginning of key decision making processes, ensuring that when a final decision is reached, they provide parents with a clear explanation of how and why the decision was taken. The Scottish Schools (Parental Involvement) Act 2006 (the 2006 Act) places duties on education authorities and schools to involve parents in their child's education, and this includes children attending nursery classes in a public school. Information on these duties can be found in the [2006 Act Statutory Guidance](#).
71. Good quality communication is central to building strong relationships with parents. It is also one of the key goals in the Scottish Government's ['Learning Together' Action Plan](#), a joint three year plan for 2018-21 between Scottish

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<sup>16</sup> For children with a birth date on or between 1 March and the school commencement date, there could also be exceptional circumstances, when an education authority considers that a further year in early learning and childcare would be more appropriate than providing a child with education in primary school. In these circumstances, the education authority can use their powers under section 1(1C) of the 1980 Act, to provide discretionary funded early learning and childcare. Further information is outlined in paragraphs 77 and 78.

Government and COSLA. The main focus of the plan is on ensuring parents get the support and information they need in appropriate formats and at the right times to support, and be fully involved and engaged with, their children's learning.

72. Education authorities should consider how they make parents aware of the deferral process; the support children will receive when transitioning to school; and any appeals or complaints processes. Education authorities should use a variety of methods to ensure they are engaging parents in an ongoing dialogue, recognising that a 'one size fits all' approach may not be appropriate for all parents, and responding to feedback. Parents are often balancing competing demands for their time and education authorities should be mindful of this by providing information with sufficient time, in advance of key deadlines, to allow parents to respond effectively. The timing of communication, particularly involving decisions on individual cases, is also key in allowing families and settings to plan transitions or make other arrangements.
73. Education authorities should be mindful that parents whose children have additional support needs, may have particular questions and concerns about their child's transition to school. Early or timely planning is required to ensure continuity and progression to school, in line with the provisions set out in the 2004 Act.
74. When children do make the transition from early learning and childcare to primary school, Curriculum for Excellence provides a framework to ensure children are supported in an appropriate way. The Curriculum for Excellence Early Level begins at age 3, when most children will be in a range of early learning and childcare settings, and continues throughout their transition into a school setting and the early primary years.
75. All children and young people have an entitlement to a curriculum which they experience as a coherent whole, with smooth and well-paced progression through the experiences and outcomes, particularly when they transition between different settings, for example from early learning and childcare to primary. Those planning the curriculum have a responsibility to plan, in partnership with others involved in learning, how they will jointly enable children to move smoothly between settings, building on prior learning and achievement in a manner appropriate to the needs of the individual. Guidance on supporting transitions is included in [National Practice Guidance on Early Learning and Childcare: Realising the Ambition](#), that builds on the current national framework of Curriculum for Excellence.

### **Deferred school entry and eligibility from 1 August 2023**

76. From 1 August 2023, if a parent of a child that is still 4 years old on the date they are eligible to start school (i.e. children with birth dates on or between the day after the school commencement date in August – last day in February) defers

their entry to school for a year, they can automatically access an additional year of funded early learning and childcare.

### **Deferred school entry and eligibility for children who have reached school age**

77. Parents of children with a birth date on or between 1 March and the school commencement date are not entitled to defer their child's start at primary school for a year<sup>17</sup>, as the child has reached school age. However, there may be circumstances where the education authority considers that a further year in early learning and childcare would be more appropriate than providing the child with education in primary school.

78. In these circumstances, the education authority can use their powers under section 1(1C) of the 1980 Act, to provide discretionary funded early learning and childcare<sup>18</sup>. However, we expect that this would only be in exceptional circumstances and these decisions must take into account the wishes of the parent<sup>19</sup>.

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<sup>17</sup> Parents of school age children can choose to not send their child to school, but only where they intend to home educate the child. Section 30(1) of the 1980 Act sets out that it is the responsibility of the parent of every child of school age to provide their child with a suitable education either by causing them to attend a public school or by other means. While most parents fulfil their responsibility to provide education by sending their children to school, others choose to provide home-based education.

<sup>18</sup> Under Section 1(1C) of the 1980 Act, an education authority has the power to provide school education (which includes early learning and childcare) to pre-school children as they see fit. Section 1(4B) of the 1980 Act provides that, for the purposes of section 1 of the 1980 Act, "pre-school children" means children under school age who have not yet started school and children who are of school age but who haven't started school.

<sup>19</sup> Section 28(1) of the 1980 Act provides that in providing school education (which includes early learning and childcare) the education authority shall have regard to the general principle that, so far as is compatible with the provision of suitable instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.

## **Section 48: Mandatory amount of early learning and childcare to be offered**

Education authorities are required to make 1140 hours of funded early learning and childcare available for eligible children in each year and a pro rata amount for each part of a year.

79. Under section 47(1) of the 2014 Act, an education authority must ensure that the statutory amount of funded early learning and childcare entitlement is made available for each eligible child belonging to its area.

80. Section 48 of the 2014 Act provides the statutory entitlement as 1140 hours of funded early learning and childcare in each year and a pro-rata amount for each part of a year of which a child is eligible.<sup>20</sup> The starting point for the year is in-line with the 'school year', which means a period of 12 months commencing on 1st August of any year.

81. The legislation refers to the 'mandatory amount of early learning and childcare', however to avoid confusion this is referred to as the funded early learning and child entitlement in this guidance. This is to make clear that this is an entitlement for children but that it is not compulsory for parents to take up all, or any, of their child's funded early learning and childcare entitlement. Education authorities should make this clear in their own communication to parents on the funded early learning and childcare entitlement.

82. Section 48(2) of the 2014 Act enables Scottish Ministers to change the amount of the funded early learning and childcare entitlement. Such an order would be subject to the affirmative procedure by virtue of section 99(2) of the 2014 Act and, as set out under Section 48(3) of the 2014 Act, can make different provision for different types of eligible children, for example, different number of hours for children of different ages.

### **Funded early learning and childcare entitlement delivered without the payment of fees**

83. Under section 33(1) of the 2000 Act, the entitlement to funded early learning and childcare must be provided without the payment of fees, including where this is delivered through a third party (i.e. providers in the private, third or childminding sectors), under a section 35 arrangement. This means that:

- parents are not asked to make any upfront payment, including a deposit or any other payment, in respect of the funded early learning and childcare entitlement;

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<sup>20</sup> [The Children and Young People \(Scotland\) Act 2014 \(Modification\) Order 2021](#) amended the mandatory amount of funded early learning and childcare defined in Section 48 from 600 hours to 1140 hours. This order came into force on 1 August 2021.



- no top-up fees are charged to parents relating to the funded early learning and childcare entitlement; and
- parents are not required to purchase additional hours beyond the funded early learning and childcare entitlement in order to access their child's funded early learning and childcare entitlement.

### **Charges for optional extras**

84. As set out above, the entitlement to funded early learning and childcare must be provided without the payment of fees. However, there may be optional additional services that parents wish to purchase from the child's setting. This could include purchasing additional hours over and above their child's funded early learning and childcare entitlement.

85. Any charges which are in addition to the funded early learning and childcare entitlement must only be for optional extras, and limited to, for example, costs of outings or extracurricular activities, and snacks (excluding snacks provided through the [Scottish Milk and Healthy Snack Scheme](#)). These optional charges could include where a setting offers an additional optional service such as the provision of localised cover arrangements required by parents (for example acting as the emergency contact for a child, cover for parents' shift patterns, cover for periods when the child cannot attend their usual pattern of attendance due to being on holiday, etc) which requires the setting to retain a place in order to meet this demand during the hours that the child is receiving part of their funded early learning and childcare entitlement at another setting as part of a blended placement.

86. It is expected that settings make it clear that these are optional charges and that if the parent chooses not to purchase these optional extras then this will not prevent them from accessing their child's funded early learning and childcare entitlement at the setting.

87. It is also expected that where parents choose to purchase further hours, or optional additional services, in addition to the funded early learning and childcare entitlement, the associated fees and hours will be transparent and clearly set out in any parental communication and invoices.

### **Charges for additional early learning and childcare**

88. Under section 1(1C) of the 1980 Act, education authorities have discretionary powers to provide early learning and childcare beyond the statutory funded early learning and childcare entitlement requirements under section 1(1) and (1A) of the 1980 Act and section 47(1) of the 2014 Act (i.e. the funded early learning and childcare entitlement). This can enable education authorities to prioritise certain children who would benefit most from such provision.

89. Education authorities are also, under section 33(2) of the 2000 Act, empowered to charge fees for such discretionary early learning and childcare. The provision of discretionary early learning and childcare, through fees subsidised or otherwise, can provide additional flexibility. Any education authority fees for parents for discretionary early learning and childcare should be transparent.
90. Where education authorities charge for discretionary early learning and childcare, as part of their overall approach to setting charges for discretionary services, it is expected that they give appropriate consideration to the potential impacts on the competitiveness and business sustainability of other providers offering the funded early learning and childcare entitlement.

## Section 49: Looked after 2 year olds: alternative arrangements to meet wellbeing needs

Section 49 of the 2014 Act provides that the duty to make available the statutory funded early learning and childcare entitlement to every 'eligible pre-school child' can be disapplied for children aged 2 and over that have, since their second birthday, been looked after by a local authority where: an assessment of the child's needs has taken place, and the local authority considers that alternative arrangements for the child's education and care would better safeguard or promote the child's wellbeing.

91. Looked after children are defined in section 97(2) of the 2014 Act in accordance with section 17(6) of the 1995 Act<sup>21</sup>.
92. Under section 47(2) of the 2014 Act, any child aged 2 or over who is looked after, or has been looked after at any point since their second birthday, is considered an 'eligible pre-school child' for the purposes of the duties on education authorities in relation to access to early learning and childcare. As such, they remain eligible for the full statutory entitlement of funded early learning and childcare regardless of whether they remain looked after or not.
93. The purpose of section 49 of the 2014 Act is to provide increased flexibility in the type of service education authorities can make available for the education and care of children aged 2 or over who have been looked after at any time since their second birthday, and are eligible *only* because they have been looked after, i.e. under section 47(3)(a)(i).

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<sup>21</sup> Any reference in this Chapter of this Part to a child who is "looked after" by an education authority, is to a child—

(a) for whom they are providing accommodation under [section 25](#) of the 1995 Act;

(b) who is subject to a compulsory supervision order or an interim compulsory supervision order and in respect of whom they are the implementation authority (within the meaning of the [Children's Hearings \(Scotland\) Act 2011](#));

(d) who is subject to an order in accordance with which, by virtue of regulations made under [section 33\(1\)](#) of the 1995 Act or [section 190](#) of the Children's Hearings (Scotland) Act 2011 (asp 1) (effect of Orders made out-with Scotland), they have responsibilities as respects the child; or

(e) in respect of whom a permanence order has, on an application by them under [section 80](#) of the Adoption and Children (Scotland) Act 2007 (asp 4), been made and has not ceased to have effect.

94. Under section 49(2) of the 2014 Act, the education authority does not need to comply with their duty to provide access to early learning and childcare (under section 47(2) of the 2014 Act) for these children only where:

- a) an assessment of needs has been made (to consider whether alternative arrangements for the child's education and care would better safeguard or promote the child's wellbeing than access to 'early learning and childcare'); and
- b) an authority makes 'alternative arrangements in relation to the child's education and care as it considers appropriate for the purposes of safeguarding or promoting the child's wellbeing'.

However, as set out under section 49(3) of the 2014 Act, these exceptions do not apply if a parent of a child who is not being looked after by the authority, objects to the authority making alternative arrangements.

95. 'Appropriate' alternative arrangements are not further defined in the 2014 Act. Reference to ensuring that alternative arrangements 'safeguard or promote the child's wellbeing' relates to section 96 of the 2014 Act which relates to guidance on an 'assessment of wellbeing'.

96. Where there is an assessment of wellbeing, it must be undertaken with reference to the 8 wellbeing indicators described within Part 18, section 96 of the 2014 Act.

97. The assessment and recording of outcomes in a child's plan will ensure that there are considered and transparent reasons to support the decision making on alternative arrangements made under section 49(2)(b) of the 2014 Act as good practice.<sup>22</sup>

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<sup>22</sup> Part 5 of the 2014 Act has not been fully commenced. The Scottish Government intends to seek to repeal Part 5 of the 2014 Act which made provision for a statutory Child's Plan; however a child's plan continues to be best practice under Getting it right for every child.

## Section 50: Duty to consult and plan on delivery of early learning and childcare

Under section 50(1) of the 2014 Act, education authorities must, at least once every 2 years:

- consult with persons who appear to be representative of parents of children under school age in their area about how they should make early learning and childcare available.
- have regard to the views expressed in the consultation and must prepare and publish a plan setting out how they intend to make early learning and childcare available.

### Undertaking the consultation

98. Consultation on the delivery of early learning and childcare provides an opportunity for parents to share their views on models, flexibility, types of setting where they wish to access their child's early learning and childcare (for example, across public, private, third and childminding settings) and systems of choice so that parents can inform options on offer and education authorities can develop systems to allocate options. The aim is to deliver high quality early learning and childcare that meets a range of needs. It also provides the opportunity for realising every child's right to express their views and be heard, either directly or through a representative or appropriate body (Article 12 of the UNCRC – Respect for the views of the child). Education authorities may also consider if child consultation would be useful.

99. Examples of what the consultation on the delivery of early learning and childcare could seek views on are:

- the type and mix of settings available in the area;
- the pattern of delivery (e.g. whole day, half day, blended placements etc.);
- the number of weeks in the year provision is available;
- the desire for Gaelic medium provision;
- the desire for cross-boundary placements;
- the extra support children / families need to access their entitlement;
- the location of provision.

These are just examples, and it is for education authorities to decide what the consultation should cover to ensure that families are able to drive the nature, and type, of provision and support provided locally.

100. Education authorities are required to consult with what appears to them to be a representative sample of parents of children under school age in their local area. However this does not mean that education authorities will be required to ask every current or prospective parent of a child eligible for the funded early

learning and childcare entitlement about their individual choice of setting or pattern of hours.

101. Education authorities are encouraged to use embedded [good practice in how they consult](#), ensuring that they consult on a wide scope of needs, rather than a closed set of options. Education authorities should use this opportunity to encourage broad, open and transparent dialogue with parents.
102. To ensure that consultations are representative and inclusive, education authorities should use a range of consultative methods to engage a wide range of parents. They should seek to include:
- Working parents
  - Parents residing in rural areas
  - Parents who are less likely to engage with statutory services
  - Parents with lived experience of poverty and disadvantage
  - Parents of children with additional support needs
  - Parents with additional support needs
  - Corporate parents
  - Parents seeking Gaelic medium education
  - Parents who live in communities where provision is limited
  - Parents from the Veterans and Armed Forces community
  - Parents who have or are parents of children with 'protected characteristics'<sup>23</sup> e.g. minority ethnic families (including Gypsy/Traveller families), parents with a disability or parents of children with a disability, LGBTI parents, and those from religious communities. Consulting families with protected characteristics, helps education authorities meet the public sector equality duty under the Equality Act 2010 and section 3B of the 2000 Act and can inform local impact assessments. Further information is outlined in paragraphs 106 and 107.
103. It is also recognised that there are increased barriers that families in rural areas face in accessing early learning and childcare. Education authorities in rural areas should engage with parents, providers offering the funded early learning and childcare entitlement, and communities, to explore all funding and support options to ensure high quality funded early learning and childcare is accessible for families. This may include encouraging and developing innovative and/or community-led provision of funded early learning and childcare. In addition, under section 7(1) of the Islands (Scotland) Act 2018, education authorities

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<sup>23</sup> Protected characteristics are defined under the Equality Act 2010 as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

listed as relevant authorities in terms of the schedule of that Act, should have regard to island communities in carrying out their functions.

104. Some families may wish for their child to access their early learning and childcare entitlement through the medium of Gaelic. Although there are no duties on education authorities to provide Gaelic early learning and childcare, education authorities retain a discretion to provide it. The [Statutory Guidance on Gaelic Education](#) recommends that authorities consider establishing Gaelic early learning and childcare as a step towards Gaelic Medium Primary Education (GMPE) and will be expected to strive for a degree of continuity of Gaelic medium education (GME) in accordance with their Gaelic Language Plan and the [National Gaelic Language Plan](#). The duty to consult under the 2014 Act provides education authorities with the opportunity to consult parents on Gaelic early learning and childcare so that they can consider whether and if so how, they make such provision available in their area.
105. It is important to consult with parents who have children currently using provision (including those who use the funded early learning and childcare entitlement only, and those who purchase additional unfunded provision); as well as those with younger children who will use provision over the next few years. Education authorities should consult with parents accessing their child's entitlement in a range of settings across the public, private, third and childminding sectors. Education authorities may also find it useful to consult parents whose children received the funded early learning and childcare entitlement, but are now at early school age. These parents may be able to offer a retrospective view that provides insight into past parental experiences of accessing the entitlement, and the outcomes of that provision.
106. When education authorities are consulting on the delivery of early learning and childcare and preparing their plans in response to these views, they must assess the impact on persons with 'protected characteristics' (defined under the Equality Act 2010 as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and consider how to reduce inequalities of outcome as a result of socio-economic disadvantage<sup>24</sup>.
107. The duty to consult under the 2014 Act should provide useful evidence to help education authorities meet the public sector equality duty under the Equality Act

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<sup>24</sup> Section 3B of the 2000 Act, imposes certain duties on education authorities when making and implementing strategic decisions affecting pupils experiencing inequalities of outcome as a result of socio-economic disadvantage. In addition, the Fairer Scotland Duty under section 1 of the Equality Act 2010, places a legal responsibility on education authorities to actively consider (have 'due regard' to) how they can reduce inequalities of outcome caused by socio-economic disadvantage, when making strategic decisions and a written assessment must be published showing how this has been done. See the [guidance on meeting the Fairer Scotland Duty](#).

2010<sup>25</sup> and section 3B of the 2000 Act and inform local impact assessments. When consulting on the delivery of early learning and childcare, it is therefore important that education authorities engage directly with persons with 'protected characteristics' and persons with lived experience of poverty and socio-economic disadvantage. The Equality and Human Rights Commission have produced a series of guides providing advice on the public sector equality duty in Scotland. This includes [guidance to implement the duty as it relates to involvement](#).

### Frequency of consultation

108. Education authorities are under a duty to carry out a consultation on the delivery of early learning and childcare at least once every two years.
109. The aim of requiring consultation every two years is to ensure that services are regularly taking into account local needs, recognising that the children and families accessing early learning and childcare will be changing year on year.
110. Section 50(2) of the 2014 Act gives Scottish Ministers the power to vary the frequency of that consultation by order subject to affirmative procedure.

### Preparing and publishing a plan on early learning and childcare delivery

111. Education authorities are under a duty to publish their plan for the delivery of early learning and childcare at least once every 2 years. These plans should set out the comprehensive strategic direction for the delivery of early learning and childcare in their local area, respond to local need and will reflect the diversity of communities that education authorities cover.
112. Under section 50(1)(b) of the 2014 Act education authorities must have regard to the views expressed in consultation as described above, before preparing the plan. Education authorities should ensure that the final consultation results can be easily accessed.
113. In preparing their plans for the delivery of early learning and childcare, education authorities should be clear about the need for delivery to be manageable and affordable within their resources.

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<sup>25</sup> The public sector equality duty under section 149 in the Equality Act 2010 requires education authorities in exercising functions, to have 'due regard' to the need to: eliminate discrimination, harassment, victimisation; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and foster good relations between persons who share a relevant protected characteristic and persons who do not share it. Under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, education authorities must assess and review policies and practices against the needs mentioned under section 149 in the Equality Act 2010.



114. Ongoing engagement with the early years workforce across all early learning and childcare sectors will be a necessary part of the planning process and service design.
115. National and local government both have a role to play in making sure parents can make informed choices about their child's entitlement. In addition to formal consultation there is a need to provide clear information for parents on the provision of the funded early learning and childcare entitlement at national and local levels. Education authorities should consider how they make parents aware of their child's entitlement, of the range of provision available, and how to access this.
116. In publishing their plans and communicating locally about the early learning and childcare entitlement, education authorities should consider how they can make this information readily accessible for parents within their local area. For example, ensuring information is in Plain English, and available in alternative formats such as audio tape, Braille, large print, British Sign Language (BSL), Easy Read, and other community languages. The [Inclusive Communication Hub website](#) includes tools, guidance and practical assistance on how to make information accessible to people. Education authorities should also consider how information will be made available for those who are not online, so hard copies may need to be provided to certain stakeholders to share with those who will need them.
117. Education authorities should ensure communities know that this information exists; where to find it; and that it is available in alternative formats. To maximise reach, education authorities can involve organisations and stakeholders such as third party organisations, advocacy groups or other relevant bodies, in sharing and cascading the information through their networks and communities or groups.
118. Good quality communication is central to building strong relationships with parents. It is also one of the key goals in the Scottish Government's ['Learning Together' Action Plan](#), a joint three year plan 2018-21 between Scottish Government and COSLA. The main focus of the plan is on ensuring parents get the support and information they need in appropriate formats and at the right times to support, and be fully involved and engaged with, their children's learning.

## Additional support needs

Education authorities have duties under the Education (Additional Support for Learning) (Scotland) Act 2004 and should have regard to this when providing funded early learning and childcare to eligible children with additional support needs.

119. Children and young people will progress differently, depending on their circumstances, but, as enshrined in the UNCRC, every child and young person has the right to expect appropriate support from adults to allow them to develop as fully as possible across each of the wellbeing indicators and curricular areas. Education authorities should seek to engage with parents with children who are disabled or have other additional support needs as part of their duty to consult under Section 50 of the 2014 Act.
120. The 2004 Act provides the legal framework for identifying and addressing the additional support needs of children and young people who face a barrier, or barriers, to learning. The 2004 Act aims to ensure that all children and young people are provided with the necessary support to help them work towards achieving their full potential. It also promotes collaborative working among all those supporting children and young people and sets out the rights of children, young people and parents within the system.
121. Section 1(1) of the 2004 Act explains that a child or young person has additional support needs where, for whatever reason, they are likely to be unable, without the provision of additional support, to benefit from school education. Education includes the provision of early learning and childcare. Education authorities are required to have regard to the 2004 Act for any eligible young child entitled to the funded early learning and childcare entitlement with additional support needs.
122. Statutory Guidance on the 2004 Act is contained in the Additional Support for Learning [Code of Practice](#) (ASL Code of Practice).
123. Education authorities and other agencies (including NHS boards) have a wide range of duties under the 2004 Act. They are required to identify, provide for, and review the additional support needs of their children and young people. In addition, authorities have duties to plan for transitions, to consider placing requests, and to establish co-ordinated support plans where appropriate. Full details of the responsibilities on education authorities and other agencies can be found in Chapter 1 of the ASL [Code of Practice](#) which supports implementation of the 2004 Act.
124. Following identification of additional support needs, a plan should be established as to how those needs will be met, and reviewed. There are a

range of planning mechanisms used by education authorities to meet children's needs and the types of support will vary depending on assessed need. Planning approaches will be dependent on the collaboration of all relevant agencies involved in delivering services to ensure that children and young people's barriers to learning are identified and addressed.

125. The National Practice Model, part of the GIRFEC approach, is well established good practice and provides a consistent framework for practitioners across all services to plan for children's wellbeing. In certain circumstances a child may require a Co-ordinated Support Plan. This statutory plan supports the co-ordination of support across agencies for children who have complex or multiple needs which require support from education and at least one other agency. Where a co-ordinated support plan is required, it is important that the process of developing it is integrated fully with the planning and review of the Child's Plan as outlined in the ASL Code of Practice. Education authorities' duties to plan for the transition into and from early learning and childcare will also be of relevance for this group of children.
126. A key consideration for young children with additional support needs is the early identification of those needs. [A Universal Health Visiting Pathway for Scotland](#) was published in October 2015 and presents a core home visiting programme to be offered to all families by health visitors as a minimum standard.
127. The 2004 Act duties will apply when a child becomes eligible for funded early learning and childcare and so will apply to eligible 2 year olds who are subject to a kinship care order or with a parent appointed guardian or whose parents are in receipt of certain benefits. In relation to those subject to a kinship care order, carers (like any carer or parent) can request that the additional support needs of the child be assessed and this can include a specific type of assessment.
128. The provisions of the 2004 Act apply to looked after 2 year olds. Under section 1(1A) of the 2004 Act a looked after child is deemed to have additional support needs unless or until they are assessed otherwise. This assessment should also include an assessment as to whether a co-ordinated support plan is required.
129. In certain circumstances the duties under the 2004 Act will apply earlier. The 2004 Act imposes a duty on an education authority to provide appropriate additional support for certain [disabled children under school age](#) **before** entitlement to the mandatory amount of early learning and childcare; potentially from birth and generally before the age at which children become eligible for early learning and childcare, where this need is identified<sup>26</sup>.

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<sup>26</sup> See [section 5\(2\) and \(3\) of the 2004 Act](#).

130. Under the Equality Act 2010 responsible bodies have a duty to make reasonable adjustments for disabled young children and provide auxiliary aids and services to avoid substantial disadvantage.<sup>27</sup>
131. Further, under the [Education \(Disability Strategies and Pupils' Educational Records\) \(Scotland\) Act 2002](#) responsible bodies have duties to develop and publish accessibility strategies to increase access to the curriculum, the physical environment, and communication.
132. Under the 2004 Act parents can make a [placing request](#) for early learning and childcare in relation to a child with additional support needs either within the authority they reside (home authority) or another education authority (host authority) area<sup>28</sup>.
133. Where a placing request is successful, the home authority is responsible for the costs of early learning and childcare. They may also provide free transport to the host authority, but are not under a duty to do so. The host authority is therefore not responsible for the costs of the placement or any associated transport. It is therefore essential to confirm transport arrangements with parents to inform their placing request.
134. Information for parents about all of the provisions of the 2004 Act is available from [Enquire](#) - the national advice and information service on additional support for learning.

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<sup>27</sup> See [Section 20 of the Equality Act 2010](#)

<sup>28</sup> See [Section 22](#) of, and [Schedule 2](#) to, the 2004 Act.

## Section 51: Method of delivery of early learning and childcare

The funded early learning and childcare entitlement must be delivered in sessions of **10 hours or less** and must be delivered over a minimum of **38 weeks** in any given year. This is sometimes referred to as the 'minimum framework' for the delivery of funded early learning and childcare.

Ministers may modify the framework for the delivery of funded early learning and childcare by order subject to affirmative procedure.

### Framework for delivering funded early learning and childcare

135. Under section 51 of the 2014 Act, education authorities must ensure that funded early learning and childcare is delivered in sessions of 10 hours or less a day in duration<sup>29</sup>. This must be delivered over a minimum of 38 weeks a year which need not be confined to term time. It is intended that children take up their entitlement at times that best support their needs, and that the increased hours are used as an opportunity to support consistency for the child.

136. There are a wide range of models or patterns that funded early learning and childcare can be delivered through. For example:

- Half day sessions around 4 hours
- School day sessions around 6 hours
- Full working day sessions up to 10 hours
- Short sessions of around 2.5 hours to 3.5 hours
- Sessions operating over the full year (more than 38 weeks per year) as well as term time sessions (38 weeks per year).

137. These are just examples, and it is for education authorities to ensure that families are able to choose from a range of types of setting, offering different patterns of provision and support across their local area. This should reflect local demand and circumstances and it is not expected that all options will be available in all areas and settings. The range of models and patterns of delivery should be informed by consultation carried out under Section 50 of the 2014 Act and should be reflected in education authorities' early learning and childcare delivery plans.

138. While the framework permits 10 hour sessions of funded early learning and childcare, this does not set an expectation that the statutory entitlement to funded early learning and childcare should be delivered only through full day sessions. Moreover, section 51 of the 2014 Act does not set a requirement for

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<sup>29</sup> [The Children and Young People \(Scotland\) Act 2014 \(Modification\) \(No. 1\) Order 2019](#) introduced the requirement that from 1 August 2019 a funded early learning and childcare session should be 10 hours or less.

every early learning and childcare setting delivering the funded entitlement to deliver 10 hour sessions where these are not already delivered.

139. While flexibility for families is an important element of the expansion of hours, the key purpose of the approach is to ensure children have the best start in life. If evidence came to light showing that certain session lengths may have a detrimental impact on children's wellbeing and outcomes, then the Scottish Government will consider whether further amendments are required to the framework for how funded early learning and childcare is delivered.
140. The maximum session length only relates to the provision of funded early learning and childcare and does not place restrictions on the opening hours of settings or the provision of additional early learning and childcare out-with the funded early learning and childcare entitlement within in any setting, (i.e. regardless of whether it is an education authority, private, third, or childminding sector setting).

#### Providing less than the statutory funded early learning and childcare entitlement

141. The statutory funded early learning and childcare is an entitlement for children, and is not compulsory. This means that parents do not have to take up all, or any, of their child's funded early learning and childcare entitlement. Where parents request fewer hours than the full entitlement, it is at the education authority's discretion to make arrangements that meet the needs of the parent(s) and continue to meet the best interests of the child. Education authorities should seek to meet the needs of the parent(s) and the child, including by advising on the pattern of attendance that is likely to be in the best interest of each child. Clear policy and communication with parents should support and ensure working out the best, realistic and manageable arrangement for the child, parent, and education authority.
142. Settings offering the funded early learning and childcare entitlement do not have to be able to deliver the full amount of funded early learning and childcare entitlement. For example, there will be high quality settings across the sector who operate over shorter hours, or who may have limited capacity to expand, that limits their ability to offer the full funded early learning and childcare entitlement. Where this is the case, and a setting meets the requirements for offering the funded early learning and childcare entitlement, it is expected that the education authority and the setting will work closely together to develop delivery models informed by local demand and the education authorities' plan for the delivery of early learning and childcare (as required under section 50 of the 2014 Act).
143. Section 51(2) of the 2014 Act enables Scottish Ministers to modify or change the method of delivering early learning and childcare by order subject to affirmative procedure by virtue of section 99(2) of the 2014 Act.

## Attendance

144. All schools are required to keep an attendance register of every pupil to record if children are present<sup>30</sup>. This applies to early learning and childcare where it is delivered as part of the entitlement for eligible young children. In addition, all early learning and childcare providers registered with the Care Inspectorate are required to maintain a record of children's attendance to show the total number of children in 'daycare of children' premises at any one time.
145. This has implications for practice in providers in the private, third or childminding sectors delivering funded early learning and childcare, and where there are blended placements, whereby education authorities should establish systems and procedures, e.g. links and communication between blended placements and clear responsibilities on settings delivering funded early learning and childcare to record, monitor and report changes in attendance. Providers in the private, third or childminding sectors delivering funded early learning and childcare need to work in an integrated way to ensure that a child's attendance is monitored and any concerns shared and acted upon. Guidance on the management of attendance and absence is provided within [Included, Engaged and Involved part one](#).
146. As set out under section 14 of the 1980 Act, if there is a longer term absence of an eligible young child due to prolonged ill health, education authorities are under a duty to make alternative arrangements to ensure the child continues to receive early learning and childcare elsewhere and can access appropriate support with their learning. In these circumstances, and to support a consistent approach, it is absolutely essential that there is clear communication between the different agencies, services, professionals and the parent and child concerned. There is [specific guidance and information available to education authorities in relation to their statutory duty, under section 14 of the 1980 Act](#).
147. SEEMiS Early Years will provide the functionality for settings to record attendance of children registered for funded early learning and childcare. If this functionality is used by settings, the respective education authority will be able to monitor attendance of children within their area.

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<sup>30</sup> Schools General (Scotland) Regulations 1975.

## **Section 52: Flexibility in the way in which early learning and childcare is made available**

Education authorities must have **regard to the desirability** of ensuring that the method by which it makes early learning and childcare available is **flexible enough to allow parents an appropriate degree of choice** when deciding how to access the service.

148. The purpose of section 52 of the 2014 Act is to support families through the provision of flexible hours that provide an appropriate degree of choice.
149. The intention is that education authorities will ensure that there is flexibility and choice for parents in terms of the patterns of hours of funded early learning and childcare available across their authority area.
150. Flexibility in provision also extends to access to funded early learning and childcare delivered through settings in the private, third and childminding sectors.
151. Section 52 of the 2014 Act does not place an expectation that every setting will offer every possible pattern of provision that a parent may request. This is to allow providers to effectively plan for and manage the capacity of their setting, and to acknowledge that for providers in the private, third and childminding sectors they will likely have a core offer for parents that underpins their business model. For example, settings will have established session times when delivering their service. While parents should have access to a range of sessions of varying lengths and start times, it is not expected that individual settings must accommodate every request from parents to use their child's statutory funded early learning and childcare entitlement for only part of a session (i.e. choosing their own drop off/pick up time).
152. Flexibility should be driven by local demand from families regarding the nature, and type, of provision and support that they require. The range of options available to families, should be established through consultation with representative populations of parents as specified in section 50 of the 2014 Act.
153. The range should also be delivered within the framework as defined in section 51 of the 2014 Act.
154. This will enable education authorities to ensure an appropriate mix of provision within their area that reflects local circumstances and allows for choice of:
- Different types of settings including those in the private, third, and childminding sectors.



- Choice in patterns of delivery such as varying lengths in sessions (whole day, half day, blended placements etc.) and the number of weeks of the year in which they access the statutory entitlement (term time or year round provision).
155. It is important to stress that flexibility and choice is around patterns or models of provision. It will be for education authorities to design and develop those models in response to consultation; and to design systems of choice. Appropriate choice under section 52 of the 2014 Act is therefore intended around models and not individual providers or places.
156. Where providers in the private, third and childminding sectors, are delivering funded early learning and childcare sessions of a particular length, it is not necessary for education authorities to specify when those sessions should start and stop. Sessions also do not need to be in line with education authority timings as long as the framework for delivering funded early learning and childcare as defined in section 51 of the 2014 Act is met, as this will limit flexibility.
157. Parents may wish to alter the days of the week or the sessions during which they access their child's funded early learning and childcare during a term. Providers offering the funded early learning and childcare entitlement should work with parents to accommodate this where possible, however section 52 of the 2014 Act does not set an expectation that settings must accommodate frequent changes to the delivery pattern for a child's funded early learning and childcare entitlement.
158. This flexibility in choices for parents that arise from consultations will mean that education authorities will have to be adaptable. This will require a recognition that there will be an ongoing need to review and change models in response to demand from parents within their area.

### Transitions and blended placements

159. The aim of flexibility is to provide options for families which are in the best interests of the child whilst also meeting the needs of the parents. Being able to access funded and discretionary early learning and childcare, where they are required, at the same location can provide consistency for the child and their parent(s). However, there is no evidence to indicate that all of the child's funded early learning and childcare entitlement should be delivered by the same provider. A mixed model of provision can be beneficial for children and parents, and education authorities should accommodate blended placements across different providers where this meets the needs of the child and parent(s).

160. The key priority in moving between settings is to manage those transitions well<sup>31</sup>. This should be done by sharing responsibility for the child's personal plan and focusing on developing a supportive and caring relationship between the child and their caregivers. The most important factor is that children receive high quality provision, wherever and however early learning and childcare is provided.
161. When a child starts at an early learning and childcare setting, they will make a number of transitions: from home to the setting, within the setting, potentially between settings, and from person to person. This can be exciting yet challenging for parents and children, as change often brings apprehension. Transitions may be more challenging for some children who have additional support needs and this should be an important consideration when planning for the support of children in these circumstances. Where transitions are well supported, children can learn to manage change in a positive way, which is an important skill for life. A high quality early learning and childcare setting will build on the valuable learning and experiences that a child has had in and around the home; and, staff respond to children's and parent's needs to make sure the transition is positive and meaningful. Guidance on supporting transitions is included in [National Practice Guidance on Early Learning and Childcare: Realising the Ambition](#), that builds on the current national framework of Curriculum for Excellence.

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<sup>31</sup> Principles of effective transitions are set out in a [sector-wide position statement published in 2019](#).

## **Additional guidance on other key legislation and policy relating to the delivery of early learning and childcare**

162. This section sets out additional guidance on aspects of the legislative and policy framework which relate to the delivery of early learning and childcare, but are out-with the scope of section 34 of the 2000 Act under which the Early Learning and Childcare Statutory Guidance is issued. Links are provided where separate guidance, either statutory or non-statutory, is available on areas covered in this section.

## **Delivery of funded early learning and childcare through a range of providers**

163. Under section 47 of the 2014 Act, it is the duty of the education authority to secure the statutory amount of early learning and childcare for each eligible child. Under section 35 of the 2000 Act, the education authority can enter into arrangements with any persons to make that provision for children under school age. As a result, funded early learning and childcare is delivered through a mixed economy model with a mixture of public, private, third, and childminding sector providers, offering the funded early learning and childcare entitlement.

### Funding Follows the Child and the National Standard for Early Learning and Childcare Providers

164. [Funding Follows the Child](#)<sup>32</sup>, which was agreed by the Scottish Government and COSLA, ensures that the funded early learning and childcare entitlement is delivered in high quality settings. This approach is ‘provider neutral’ and is underpinned by a National Standard that all settings – regardless of whether they are in the public, private, third or childminding sectors – that wish to deliver the funded entitlement have to meet.

165. At the heart of the National Standard is a clear and consistent set of quality criteria, to ensure that all settings which are offering the funded entitlement are delivering the highest quality early learning and childcare experience. Funding Follows the Child also enables choice as parents can access their child’s funded early learning and childcare entitlement at the provider of their choice if that provider meets the criteria in the National Standard, has a space available and is willing to enter into a contract with the education authority.

166. This is intended to support a wider system for the delivery of funded early learning and childcare that is built upon a mixed economy model of provision in the public, private, third and childminding sectors. It is expected that education authorities and providers offering the funded early learning and childcare

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<sup>32</sup> Information on the implementation of Funding Follows the Child and the National Standard for Early Learning and Childcare Providers, including detailed Operating Guidance for education authorities and providers, is available on the [Scottish Government website](#).

entitlement will work together meaningfully and in genuine partnership to deliver high quality and flexible early learning and childcare provision.

### Securing high quality provision

167. Under section 66(1A)<sup>33</sup> of the 1980 Act, Scottish Ministers have the power to cause inspection by HM Inspectors of Education of those providing early learning and childcare under a section 35 arrangement.
168. Under the Public Services Reform (Scotland) Act 2010 (the PSR Act) The Care Inspectorate has a statutory responsibility to inspect and regulate all registered providers of day care and childminding services including those that provide early learning and childcare under a section 35 arrangement. The Care Inspectorate must take account of the National [Health and Social Care Standards](#) in making any decision and, under section 50 of the PSR Act, Scottish Ministers are required to keep any standards under review.
169. Under section 59 of the PSR Act, any person seeking to provide a care service must apply to the Care Inspectorate for registration of that service. It is an offence under section 80 of the PSR Act to operate a service without registration. All care services classed as day care of children services including nurseries, children or family centres, creches and those providing a childminding service must be registered with the Care Inspectorate. When registration is granted, the provider is issued a certificate of registration with conditions of the service that can be provided.
170. Under section 70 of the PSR Act, any person providing a care service may apply to the Care Inspectorate for a change to the care service for the variation, removal or addition of a condition of registration. The date of the application of change to care service must not be less than 3 months before the proposed change is to take place. If the Care Inspectorate grants a variation to registration the care service provider will be issued with a new certificate of registration.
171. Therefore, all settings delivering the funded early learning and childcare entitlement will be inspected by the Care Inspectorate on a risk-based frequency cycle. Some providers may also be sampled for inspection by HM Inspectors of Education.
172. Under section 3 of the 2000 Act, Scottish Ministers and education authorities are under a duty to endeavour to secure improvement in the quality of school education which is provided in Scotland; this includes early learning and childcare; and, under section 3(3)(b) of the 2000 Act, education authorities are under a duty to endeavour to secure improvement in school education (which

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<sup>33</sup> Subsection (1A) was inserted into section 66 of the 1980 Act by section 36 of the 2000 Act.

includes early learning and childcare) which is provided by providers under arrangements made under section 35 of the 2000 Act.

173. Therefore, education authorities also have a key role in securing improvement of quality in their own settings and in settings offering the funded early learning and childcare entitlement. Education authorities undertake this through quality improvement, learning and development, CPD (continuing professional development) and other forms of support. This is most effective when carried out jointly with their own settings and other providers delivering funded early learning and childcare. Education authorities should develop an integrated approach to work through forums and networks with providers in their area delivering funded early learning and childcare to maximise access to information, learning and development, CPD, and other support in order to assure and improve quality; and, ensure effective implementation of early learning and childcare and related policies.
174. Representative bodies of private, third and childminding sector providers, also contribute significantly to quality assurance and improvement; and, work in partnership locally and nationally to achieve this.

#### Local funding arrangements

175. It is the responsibility of education authorities to determine fair and sustainable settlements locally with providers who are delivering funded early learning and childcare under a section 35 (of the 2000 Act) arrangement, while securing high quality provision. [Guidance](#) has been produced to support education authorities to set sustainable rates for providers delivering the funded early learning and childcare entitlement.
176. Providers can include third sector organisations, social enterprises, private businesses and childminders. It is not for education authorities to seek to comment on or intervene in fees charged by these providers out-with the funded early learning and childcare entitlement.
177. Providers will have important views on a range of issues to ensure the easiest and most effective method of payments and fees, such as distribution and spread of funding arrangements. All providers including education authority settings who charge fees will be aware of other systems of subsidy available to parents through the tax and social security systems.
178. Education authorities should not deduct payments to providers delivering funded early learning and childcare based on short term absences of children or short term emergency closure of an establishment, e.g. due to severe weather. This would not be a sustainable practice in any provision where the place is expected to be there for the child.

## **Consultation under the Schools (Consultation) (Scotland) Act 2010**

179. Under the 2010 Act, education authorities must consult on any proposal to permanently discontinue a nursery school<sup>34</sup> or all the nursery classes<sup>35</sup> in a public primary school.
180. To support the expansion and reconfiguration of early learning and childcare, the Schools (Consultation) (Scotland) Act 2010 (Modification) Regulations 2017 removed the requirement to carry out a statutory consultation on proposals to establish a new nursery school or new nursery class and proposals to relocate a nursery school or nursery class under the 2010 Act.
181. Further information can be found in the [Schools \(Consultation\) \(Scotland\) Act 2010: guidance](#).

### **Admissions policies and cross boundary arrangements**

182. Education authorities can put in place admission policies to ensure they meet their statutory duty to secure the statutory entitlement to funded early learning and childcare for children within their area.
183. It is expected that for many education authorities their admissions policies will include cross-boundary arrangements. Under Funding Follows the Child the choice of setting available to families is not restricted to their own local authority boundary. Therefore families should be able to access their child's early learning and childcare entitlement at any setting that meets the National Standard, has a space available and is willing to enter into contract with the education authority. Education authorities should, wherever possible, make arrangements that ensure families accessing cross-boundary placements are treated on the same basis, for example in the timeframe for providing a decision, as families accessing provision within their local authority area.
184. It is recommended that a cross boundary no charging policy is implemented uniformly by education authorities.

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<sup>34</sup> Paragraph 1 of Schedule 1 to the 2010 Act refers to "school"; section 21(1)(a) of the 2010 Act defines "school" by reference to a public school as defined in section 135(1) of the 1980 Act; under that section "school" includes a "nursery school". The definition of "nursery school" is contained in section 135(1) of the 1980 Act and was amended by the 2014 Act (paragraph 2(6)(b) of schedule 5) to define a nursery school as a school which provides early learning and childcare. Section 135(1) of the 1980 Act, as amended by paragraph 2(6)(a) of the 2014 Act defines "early learning and childcare" as having the same meaning as in Part 6 of the 2014 Act.

<sup>35</sup> Paragraph 12 of Schedule 1 to the 2010 Act provides that "nursery class" is to be construed in accordance with section 135(1) of the 1980 Act. That section (as amended by paragraph 2(6)(b) of schedule 5 to the 2014 Act) defines "nursery class" as being a class which provides early learning and childcare.

185. It is recommended that education authorities meet on a regional or neighbouring basis to identify movement and places across boundaries and reach sustainable and mutually beneficial arrangements.
186. [Funding Follows the Child and the National Standard For Early Learning and Childcare Providers: Transition Options Guidance on Contracting](#) provides additional guidance, for where a procurement process will be undertaken, on education authority contracting arrangements with settings in the private and third sectors where there are high levels of cross boundary places.

### **Meals, snacks and drinks**

187. Section 53 of the 1980 Act sets out the arrangements for the provision of school meals, snacks and drinks for pupils in attendance at public schools. This can apply to an eligible young child who receives funded early learning and childcare in an education authority establishment or in settings in the private, third or childminding sectors delivering funded early learning and childcare through a section 35 arrangement.<sup>36</sup>
188. All meals and snacks must meet the most up-to-date nutritional guidance provided for early learning and childcare (currently included in [Setting the Table](#)). Settings that are part of a school, can provide meals and snacks through school catering arrangements/facilities, as long as they meet the nutritional guidance for early learning and childcare.

### Free school meals

189. The 1980 Act provides criteria for children eligible for free school meals. Current information on eligibility criteria can be found on [mygov.scot web pages](#).
190. Education authorities have a statutory duty to provide free school meals to eligible children when they are accessing their statutory entitlement to funded early learning and childcare.
191. Under section 53(12) of the 1980 Act, a school lunch means anything provided in the middle of the day which the education authority considers is appropriate for consumption as a meal at that time of day. It is for education authorities to

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<sup>36</sup>“Pupil” is defined in section 135(1) of the 1980 Act as meaning “a person of any age for whom education is or is required to be provided under the Act”; and “public school” means any school under the management of an education authority.; “school” means an institution for the provision of primary or secondary education or both primary or secondary education being a public school, a grant-aided school or an independent school, and **includes a nursery school** and a special school; and the expression “school” where used without qualification includes any such school or all such schools as the context may require. “Nursery school” and “nursery class” have the meanings assigned by section 1(5)(a)(i) of the 1980 Act which, as amended by the 2014 Act means schools and classes which provide early learning and childcare.



determine at what point they serve school lunches within the general meaning of the middle of the day.

### Early learning and childcare meal commitment

192. As part of the agreement to deliver the expanded statutory entitlement to 1140 hours of funded early learning and childcare, the Scottish Government and COSLA made a joint commitment that every child attending a funded early learning and childcare session – which is any session that includes funded early learning and childcare hours, regardless of whether they are mixed with ‘paid for’ hours – will be provided with a free meal. This commitment is a key aspect of Funding Follows the Child<sup>37</sup>.
193. Children already eligible for free school meals will continue to receive their meal entitlement, which will be expanded to include all children attending a session that includes funded early learning and childcare hours.
194. Education authorities will provide settings who are delivering funded early learning and childcare with the funding to deliver the free meals, unless, in cases where a setting does not have onsite catering facilities, there may be an agreement that the education authority will provide the meals to the setting. Education authorities are expected to work in partnership with providers in the private, third and childminding sectors, to support them in identifying solutions to deliver the free meals commitment, particularly where they do not have onsite catering facilities.
195. As is the case for free school lunches, the up-take of the free meal is optional. Parents who prefer to provide their child with a packed lunch are free to do so. [Setting the Table](#) sets out how food should be stored.
196. Where children access their funded early learning and childcare in a blended placement, settings should seek to establish methods to effectively share information with other practitioners. This will ensure that practitioners are aware of what food a child has consumed during a funded early learning and childcare session, and ensure appropriate delivery of the free meals commitment.
197. Further information is available in [Funding Follows the Child and the National Standard for Early Learning and Childcare Providers: Operating Guidance](#).

### Additional meals/snacks

198. Under 53(3)(b) of the 1980 Act, education authorities have discretionary powers to provide food and drink, including school meals, to all young children; and, to

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<sup>37</sup> Information on the implementation of Funding Follows the Child and the National Standard for Early Learning and Childcare Providers, including detailed Operating Guidance for education authorities and providers, is available on the [Scottish Government website](#).



provide this free or at a charge. This means that they can provide free meals to any young children at their own discretion or under their own local priorities; and, can provide those meals at any time of the day. They can also provide snacks and meals at any time of the day and charge for children who don't fall within the eligibility criteria for a free school lunch.

### Scottish Milk and Healthy Snack Scheme

199. From 1 August 2021, the Scottish Milk and Healthy Snack Scheme replaced the existing UK Nursery Milk Scheme in Scotland.

200. Eligible settings wishing to participate in the Scottish Milk and Healthy Snack Scheme need to register with their local authority. Each setting needs to register in the local authority in which it operates.

201. Under the Scottish Milk and Healthy Snack Scheme eligible childcare providers are those (including childminders) providing pre-school day care, registered with the Care Inspectorate and registered with the local authority for the new Scheme. They receive funding via the local authority to enable children in receipt of 2 hours or more childcare in the day to be provided with:

- 189 mls (1/3 pint)\* of plain fresh cow's milk (whole milk for children over 1 year or to include semi-skimmed milk for children over 2 years), or first infant formula (for children under 12 months); or
- 189 mls (1/3 pints)\* of plain fresh goat or sheep milk (whole milk for children over 1 year or to include semi-skimmed milk for children over 2 years);
- Or specified unsweetened calcium- enriched non-dairy alternatives (excluding rice milk) for those children over 12 months who cannot consume cow's milk because of medical, ethical or religious reasons;
- and for those aged 6 months and over, a healthy snack item (a portion of fresh fruit or vegetables) meeting the portion requirements as set out in [Setting the Table](#).

\* Alternatively, a 200 ml container may be provided where the item is commonly supplied in individual portions of this size.

202. More information on the Scottish Milk and Healthy Snack scheme can be found on the [Scottish Government website](#).

### **Day care for pre-school under section 27 of the 1995 Act**

203. Under section 27 of the 1995 Act, there is a duty on education authorities to provide any form of care, whether or not on a regular basis for children in need

who are under 5 and who are not in school, and discretion to provide any form of care to those who are not in need<sup>38</sup>.

204. Education authorities must also consult with persons who appear to be representative of parents of children under 5 who are not in school who are in need and those who are not in need within their area about how they should make care available under section 27 of the 1995 Act. This consultation must be carried out at least once every 2 years. Education authorities must have regard to the views expressed in the consultation and must prepare and publish a plan setting out how they intend to provide day care for children under 5 who are not in school and in need, and their plans in relation to the provision of day care for those who are not in need.

### **The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill**

205. [The United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) 2021 was passed unanimously by the Scottish Parliament on 16 March 2021<sup>39</sup>. Once commenced, the Bill will incorporate the [UNCRC](#), the first optional protocol on the involvement of children in armed conflict and the second optional protocol on the sale of children, child prostitution and child pornography into Scottish domestic law.
206. The Bill will support the delivery of a proactive culture of everyday accountability for children's rights across public services in Scotland and a fundamental shift in the way children's rights are respected, protected and fulfilled in Scotland.
207. The Bill will mean that public authorities, including the Scottish Ministers and education authorities, will be legally obliged to respect children's rights, and that rights-holders will be able to challenge public authorities in the courts for breaches of their rights.
208. The Scottish Government will support implementation of the UNCRC Bill with a package of measures, including guidance to support public authorities and those undertaking functions of a public nature in fulfilling their duties under the Bill. The guidance will support public authorities prepare for commencement, secure better or further effect of the rights of children and support listed authorities to fulfil their reporting requirements.

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<sup>38</sup> Under the 1995 Act, 'day care' is understood as "any form of care provided for children during the day, whether or not it is provided on a regular basis". "In need" is defined by section 93(4) of the 1995 Act.

<sup>39</sup> The Bill contains provision which will mean it will automatically commence 6 months from Royal Assent. It also contains powers for the Bill to be commenced earlier than 6 months from Royal Assent.

## **Gaelic medium early learning and childcare**

209. Early learning and childcare can be provided through the medium of Gaelic. There are no duties on education authorities to provide Gaelic early learning and childcare but they may do so.
210. The [Statutory Guidance on Gaelic Education](#) recommends that authorities consider establishing Gaelic early learning and childcare as a step towards GMPE and will be expected to strive for a degree of continuity of GME, in accordance with their Gaelic Language Plan and the [National Gaelic Language Plan](#).
211. Under section 7 of the Education (Scotland) Act 2016 ( the '2016 Act'), parents of children under school age, and who have not yet started to attend a primary school, have a right to request an assessment of the need for Gaelic Medium Primary Education (GMPE), however this does not include early learning and childcare.
212. The Bòrd na Gàidhlig are developing Gaelic medium early learning and childcare guidance to support the aims in the National Gaelic Language Plan. This will be available to education authorities and the wider early learning and childcare sector via the Scottish Government and Bòrd na Gàidhlig websites.

## Enforcement of statutory obligations

213. Any concerns regarding whether an education authority is fulfilling its statutory obligations in relation to early learning and childcare should be pursued initially through discussions with the provider and education authority. Where concerns cannot be resolved in this way, parents can choose to seek to resolve these concerns through the local authority complaints process and, where necessary, the [Scottish Public Service Ombudsman](#).
214. There are separate arrangements in place under the 2004 Act which seek to support the resolution of concerns about the additional support a child is receiving. However, any concerns should be discussed with the provider and education authority in the first instance. Further information and support for parents about how concerns can be resolved is provided by [Enquire](#), a service funded by the Scottish Government to provide advice and information on additional support for learning.
215. The Scottish Ministers' default power under section 70 of the 1980 Act might apply where a person with an interest alleges a failure to discharge a statutory duty relating to early learning and childcare. Where Ministers are satisfied that there has been a relevant failure by the managers of a school or educational establishment the Scottish Ministers may order that the duty be carried out within a specified period. There are statutory timescales within which a matter being considered under section 70 must be dealt with<sup>40</sup>.
216. In general, the exercise of public functions can also be challenged in the courts by way of Judicial Review.

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<sup>40</sup> These are set out in the Section 70 (Procedure) (Scotland) Regulations 2017.

## Annex A: Glossary

Term	Description
Additional Support Needs (ASN)	A child or young person has additional support needs where, for whatever reason, they are likely to be unable, without the provision of additional support, to benefit from school education.
Attendance	This refers to the presence of children on any given day. Settings are required to record attendance.
Blended model/blended placement	The model where children are attending two or more settings, managed by different providers, who are working together to provide them with their entitlement to funded early learning and childcare. This is usually referred to as a 'blended placement' although sometimes 'split placement' is used.
COSLA	COSLA, the Convention of Scottish Local Authorities, is the voice of Local Government in Scotland. They provide political leadership on national issues, and work with local authorities to improve local services and strengthen local democracy.
Childminders	A childminder is defined as a person who works with children for more than 2 hours a day in their own home for reward.
Early Learning and Childcare (ELC)	Provision of a service, consisting of education and care, of a kind which is suitable in the ordinary case for children who are under school age, regard being had to the importance of interactions and other experiences which support learning and development in a caring and nurturing setting.
Eligible child	<p data-bbox="469 1218 1398 1382">An eligible child is defined in legislation (the Children and Young People (Scotland) Act 2014 and the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014, as amended).</p> <p data-bbox="469 1429 1398 1552">This is all 3 and 4 year olds and some children aged 2, from the relevant start date. The date the child can access their funded entitlement depends on their birth date.</p>
Education authority	A local authority in the exercise of its functions which relate to school education . Education authorities' functions to secure education for children under school age are provided for in the Education (Scotland) Act 1980.

<b>Term</b>	<b>Description</b>
Flexibility	<p>Education authorities will ensure that there is flexibility and choice for parents in terms of the patterns of hours of funded early learning and childcare available across their authority area.</p> <p>This flexibility also extends to access to funded early learning and childcare delivered through settings in the private, third and childminding sectors.</p>
Funded early learning and childcare entitlement	<p>The number of hours of early learning, as defined in section 48 of the Children and Young People (Scotland) Act 2014, that eligible children are entitled to and which education authorities are under a duty to make available for eligible children. This is referred to as the mandatory amount of early learning and childcare in the Children and Young People (Scotland) Act 2014 and is set at 1140 hours in each year for which a child is eligible.</p>
Funded provider	<p>A setting that meets the National Standard and offers the statutory entitlement to funded early learning and childcare to eligible children. This includes local authority settings and settings in the private, third and childminding sectors, who are delivering the statutory funded early learning and childcare entitlement.</p>

Term	Description
Funding Follows the Child	<p>This provider neutral approach will ensure that the funded early learning and childcare entitlement is delivered in high quality settings, and is underpinned by a National Standard that all settings who wish to deliver the funded early learning and childcare entitlement have to meet.</p> <p>At the heart of the National Standard are a clear and consistent set of quality criteria, recognising that the early learning and childcare expansion is fundamentally about improving the early years' experience of our youngest children.</p> <p>The approach will provide parents with choice as they will be able to choose any settings - regardless of whether they are in the public, private, third or childminding sectors – that meets the National Standard, has a place available, and is willing to enter into a contract with the local authority.</p> <p>Information on the implementation of Funding Follows the Child and the National Standard for Early Learning and Childcare Providers, including detailed Operating Guidance for education authorities and providers, is available on the <a href="#">Scottish Government website</a>.</p>
Getting it Right for Every Child (GIRFEC)	<p>The national approach in Scotland to improving the wellbeing of our children and young people by offering the right help, at the right time, from the right people, to support them and their parents to work in partnership with the services that can help them. Wellbeing sits at the heart of the GIRFEC approach and reflects the need to tailor the support and help that children, young people and their families are offered to support their wellbeing. A child or young person's wellbeing is influenced by everything around them and the different experiences and need they have at different times in their lives.</p>
Minimum framework	<p>The minimum framework defines the method that funded early learning and childcare should be delivered. Funded early learning and childcare sessions should be delivered over at least 38 weeks in any given year, and must be 10 hours or less in duration.</p>
Pattern of attendance	<p>This refers to the sessions that a child is registered to attend in a setting (e.g. 5 mornings a week, 48 weeks a year).</p>

<b>Term</b>	<b>Description</b>
Play	Play encompasses children’s behaviour which is freely chosen, personally directed and intrinsically motivated. It is performed for no external goal or reward and is a fundamental and integral part of healthy development which seeks to improve play experiences for all children.
Provider	Any organisation offering early learning and childcare provision, over one or more settings, registered with the Care Inspectorate under daycare of children or childminding registrations.
Provider neutral	The approach which enables parents to choose from a variety of early learning and childcare settings that best suits the needs of their child, in line with Funding Follows the Child. It allows parents to choose from a number of different providers – regardless of whether they are in the public, private, third or childminding sectors – if the setting meets the National Standard, has a place available and is willing to enter into a contract with the local authority.
Setting	Any service offering early learning and childcare provision registered with the Care Inspectorate under daycare of children or childminding registrations.
Third sector	Third sector, includes charities, social enterprises and voluntary groups, delivers essential services. They play a vital role in supporting communities at a local level.





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