

## **POLICY NOTE**

### **THE EDUCATION (SCHOOL LUNCHES) (SCOTLAND) REGULATIONS 2015**

#### **SSI 2015/269**

1. The above instrument is made in exercise of the powers in section 53(3)(c) of the Education (Scotland) Act 1980 (the 1980 Act). This draft instrument is subject to affirmative procedure.

#### **Policy Objectives**

2. This draft instrument extends the existing free school lunch (FSL) criteria to eligible pre-school children to add:
  - those with a parent or carer in receipt of:
    - State Pension Credit;
    - Incapacity or Severe Disablement Allowance
  - those who are (or have been at any point since turning 2) either looked after by the local authority, the subject of a kinship care order (as defined in section 72(1) of the 2014 Act), or an eligible child in terms of section 71 of the Children and Young People (Scotland) Act 2014 with a guardian appointed under section 7 of the Children (Scotland) Act 1995 (the 1995 Act);
3. This will bring the FSL entitlement within early learning and childcare (ELC) in line with the ELC entitlement criteria for the most vulnerable and disadvantaged 2 year olds (27% from August 2015) to ensure those 2 year olds; and, all vulnerable and disadvantaged children (3 and 4 year olds) in ELC, have access to a FSL.
4. The extended entitlement will apply to all pre-school children, where they are in a local authority ELC setting with a session spanning the middle of the day.

#### **Eligibility for Early Learning and Childcare**

5. The Scottish Government policy is to develop a universal system of high quality ELC that is affordable and accessible for all families. The key priorities for the Scottish Government are to improve outcomes for all children, especially the most vulnerable and disadvantaged, as well as supporting parents to work, train or study, especially those who need routes into sustainable employment and out of poverty in order to support their families.
6. Section 48(1) of the Children and Young People (Scotland) Act 2014 (“the 2014 Act”), defines the mandatory amount of ELC as being 600 hours per year during which a child is an eligible pre-school child and a pro-rata amount for each part of a year for which a child is an eligible pre-school child.

7. Section 47(2) of the 2014 Act defines an “eligible pre-school child” for the entitlement to ELC as those who are under school age (i.e. under 5); have not commenced attendance at primary school (other than a nursery class); and, are either those specified further under an order made by the Scottish Ministers<sup>1</sup>, or the most vulnerable 2 year olds, namely: those aged 2 or over who are (or have been at any point since turning 2) either looked after by the local authority, the subject of a kinship care order (as defined in section 72(1) of the 2014 Act), or an eligible child in terms of section 71 of the 2014 Act with a guardian appointed under section 7 of the 1995 Act<sup>2</sup>.
8. The Scottish Government made a commitment in January 2014 to expand the ELC entitlement to 15% of 2 year olds from August 2014, based on out of work benefits; and, to extend this cohort to around 27% of 2 year olds from August 2015, based on FSL criteria.
9. The Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014 (“the Specified Children Order”) was made on 30 June 2014 and describes the children entitled to the mandatory amount of ELC as 3 and 4 year olds; and, as 2 year olds with a parent on certain qualifying out of work benefits (out of work benefits as defined by the DWP). The current “qualifying benefits” are:
  - Income support;
  - Job seekers allowance (income based);
  - Employment and Support Allowance (income based);
  - Incapacity or Severe Disablement Allowance; and
  - State Pension Credit.
10. The Specified Children Order also defines the start and stop dates for the entitlement to funded ELC. 3 and 4 year olds become eligible from the first term after their third birthday and remain eligible up until they are due to start school. 2 year olds with a parent on out of work benefits are eligible from the first term after their second birthday or the first term after their parent starts receiving a qualifying benefit; and, also remain eligible for ELC once they have taken up their place even if their parent ceases to be in receipt of a qualifying benefit<sup>3</sup>, until the stop point specified in the Order<sup>4</sup>.
11. The 2014 Act provides that eligible 2 year olds who are or have been looked after, under a kinship care order or a guardianship order, since turning 2, remain eligible for ELC even where those circumstances change.
12. The draft Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2015 (the Specified Children Amendment Order) which was laid before Parliament on 28 April 2015, extends the ELC eligibility criteria to 2 year olds by amending the Specified Children Order to extend the definition of “qualifying benefits” to include the additional FSL criteria (as set out in section 53(3)(a) of the 1980 Act and any regulations made thereunder) that are not already included. These criteria are where the child’s parent is in receipt of:

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<sup>1</sup> The Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014 and the draft Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2015.

<sup>2</sup> Those children are eligible by virtue of section 47(3) of the 2014 Act.

<sup>3</sup> Article 2(6) of the Specified Children Order.

<sup>4</sup> Article 3 of the Specified Children Order.

- Child Tax Credit (but not Working Tax Credit), based on an annual income not exceeding the income threshold for Child Tax Credit (currently £16,105); or
- Both maximum Child Tax Credit and maximum Working Tax Credit based on an annual income not exceeding the income threshold for Working Tax Credit (currently £6,420); or where the child's parent has ceased to work the required minimum number of hours but remains entitled to Working Tax Credit (Working Tax Credit can continue to be awarded for a maximum period of 4 weeks immediately following the end of employment or reduction in hours); or
- Support under Part VI of the Immigration and Asylum Act 1999; or
- Universal Credit.

### **Free School Lunches and Early Learning and Childcare**

13. Section 53(1) of the 1980 Act makes provision about an education authority providing meals, snacks and drinks for pupils in attendance at public schools. These provisions also apply to an eligible pre-school child who receives ELC in a local authority setting, where their session spans the middle of the day. Under section 53(3) and (3AA) of the 1980 Act an education authority must provide a FSL for children whose parent(s) are in receipt of certain benefits.
14. The current FSL criteria are defined under section 53(3)(a) of the 1980 Act. Children are entitled to a FSL if their parent is in receipt of:
  - Income support;
  - Job seekers allowance (income based);
  - Employment and Support Allowance (income based);
  - Support under Part VI of the Immigration and Asylum Act 1999; or
  - Prescribed tax credits (see paragraph 14 below).
15. The Education (School Lunches) (Scotland) Regulations 2009 (the 2009 Regulations) prescribe the following Tax Credits:
  - Child Tax Credit (but not Working Tax Credit), based on an annual income not exceeding the income threshold for Child Tax Credit (currently £16,105); or
  - Both maximum Child Tax Credit and maximum Working Tax Credit based on an annual income not exceeding the income threshold for Working Tax Credit (currently £6,420); or where the child's parent has ceased to work the required minimum number of hours but remains entitled to Working Tax Credit (Working Tax Credit can continue to be awarded for a maximum period of 4 weeks immediately following the end of employment or reduction in hours).
16. The Education (School Lunches) (Scotland) Amendment Regulations 2013 amend the 2009 Regulations to include:
  - Universal Credit.

## Draft Instrument

17. One of the implications of extending ELC eligibility criteria to those that meet the FSL criteria, in addition to the existing eligibility criteria for 2 year olds, is that a small number of 2 year olds who are eligible for a funded ELC place will not be eligible for a FSL, where their only eligibility for ELC is by virtue of the fact that:
  - They have a parent in receipt of Incapacity or Severe Disablement Allowance;
  - They have a parent in receipt of State Pension Credit.
  - They are (or have been at any time since their second birthday) looked after, the subject of a kinship care order or a guardianship order under section 7 of the Children (Scotland) Act 1995.
18. This draft instrument will extend the FSL criteria to include those criteria listed above. This is to ensure that all 2 year olds that are receiving funded ELC, as a result of being vulnerable or disadvantaged, are not missing out on the entitlement to a FSL, and that there is equity among their peers.
19. To ensure that there are no discrepancies in FSL provision, this entitlement will apply to all eligible pre-school children, and not just eligible 2 year olds. This is to avoid those 2 year olds losing their entitlement when they turn 3; and, creates equity for 3 and 4 year olds in the same circumstances.
20. Therefore, all eligible 2, 3 and 4 year olds will become entitled to a FSL through the additional criteria set out in the draft instrument from August 2015.
21. If a child meets the additional criteria at any point throughout their time as an eligible pre-school child they will be eligible to take up their FSL entitlement from the date their parent starts receiving the specified benefits, or from the date that they become looked after, are subject to a kinship care order, or a guardianship order under section 7 of the Children (Scotland) Act 1995.
22. Under this draft instrument, additional children entitled to a FSL are defined with reference to those children who are eligible for ELC in terms of section 47(3) of the 2014<sup>5</sup>, and those eligible because their parent is in receipt of one or more benefits listed in article 1(2)(d), (e), and (f) of the Specified Children Order 2014<sup>6</sup>.
23. One further implication is that the definition of a child with a parent appointed guardian (Section 71(3)(f) “*an eligible child* who has a guardian by virtue of an appointment under section 7 of the Children (Scotland) Act 1995”) is also being extended through the Education (Scotland) Bill as the current definition only covers those at risk of becoming looked after; and, not those who are not at risk of becoming looked after. As it was never the policy intention to exclude those children, and as the current Early Learning and Childcare Statutory Guidance indicates that only an extremely small number of children

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<sup>5</sup> A child falls within section 47(3) of the 2014 Act if they are aged 2 or over, where they are or have been at any time since their 2nd birthday looked after, the subject of a kinship care order or “a child falling within section 71(3)(f)”.

<sup>6</sup> (d) incapacity benefit under Part II of the Social Security Contributions and Benefits Act 1992; (e) severe disablement allowance under the Social Security Contributions and Benefits Act 1992 (f) state pension credit payable under the State Pension Credit Act 2002.

will fall into this category, if any; the guidance advises that local authorities should include those children in the spirit of the legislation, until the definition of those children is resolved through the Education (Scotland) Bill. Similarly, it is therefore expected that until section 47(3) is amended by the Education (Scotland) Bill, if any such children presents, that authorities would provide them with a FSL using their powers to provide a school lunch free of charge under section 53(2B)(a) as read with (2C)(a) of the 1980 Act.

24. Section 47(3) of the 2014 Act provides that a child is eligible for ELC by virtue of their being (or *having been at any time* since their 2nd birthday) looked after, or subject to a kinship care or guardianship order. This means that such children will retain their entitlement to ELC even if their status changes. As the draft instrument is linked to this definition, the effect is that these children will also retain their entitlement to FSL if their status changes (and for example they are no longer looked after).
25. However, in terms of the existing criteria in section 53(3)(a) of the 1980 Act, children cease to be entitled to a FSL if their parent ceases to be in receipt of the qualifying benefits listed there; and, this also applies to those additional children who are eligible for ELC from the start of the term following their second birthday by virtue of the fact that their parent receives the benefits specified in article 1(2)(d), (e), and (f) of the Specified Children Order (Incapacity Benefit, Severe Disablement Allowance, or State Pension Credit) (see paragraph 8 above). The draft instrument has therefore been drafted to be consistent with this position (in other words those children will cease to be entitled to a FSL if their parent ceases to be in receipt of the benefits in the draft instrument (Incapacity Benefit, Severe Disablement Allowance or State Pension Credit)).

### **Consultation and Impact Assessment including Equality Implications**

26. The number of 2 year olds that have a parent in receipt of Incapacity or Severe Disablement Allowance; State Pension Credit; or who are looked after, the subject of a kinship care or guardianship order is small, and estimated to be around 1,200 nationally.
27. In addition, children who are looked after may be eligible for a FSL under other benefits criteria (it is estimated that only around 30% of looked after children are not eligible through other qualifying criteria).
28. COSLA are agreed in principle that this discrepancy in entitlement to a FSL for some vulnerable and disadvantaged pre-school children should be rectified, provided the costs that will be incurred by local authorities are fully met.
29. The Association of Directors of Education (ADES) (early years group) also agreed that it is necessary to rectify this discrepancy to ensure there is equity amongst pre-school children.

30. The ELC statutory guidance group which developed the initial guidance for August 2014 will meet to discuss updating this guidance, in order to take account of the Specified Children Amendment Order and this draft instrument. This updated guidance will address the inclusion of children not currently covered under section 71(3)(f) of the 2014 Act (an “eligible child who has a guardian by virtue of an appointment under section 7 of the Children (Scotland) Act 1995 but who is not at risk of becoming looked after), until this issue is resolved through the Education (Scotland) Bill.
31. This draft instrument is not considered to be discriminatory on the basis of age, disability, race, religion or belief, sex, sexual orientation or gender reassignment; and there should be no group adversely affected by this draft instrument.
32. There will be benefits to the most vulnerable and disadvantaged pre-school children, as they will be receiving a FSL, along with their peers. Evidence shows that the provision of FSL has a positive impact on improving attainment, through offering healthy and nutritious lunches that help children achieve their best.
33. In addition, this will create savings for low income families, of at least £330 per child per year, helping to protect household incomes and tackle the scourge of child poverty in Scotland.

#### **Business and Regulatory impact assessment**

34. A BRIA has not been carried out in connection with this SSI as there is no impact on businesses as this is a duty that will apply only to local authorities.

#### **Financial Implications**

35. The cost of extending the FSL criteria to include the additional categories for all eligible pre-school children is estimated to cost around £600,000 in the first year, pending agreement with COSLA.
36. The costs are likely to rise year on year as more ELC is accessed over lunch time. Further agreement will be reached with COSLA on how best to estimate changing costs going forward.

**Scottish Government  
Early Years Division  
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