

POLICY NOTE

THE PROVISION OF EARLY LEARNING AND CHILDCARE (SPECIFIED CHILDREN) (SCOTLAND) ORDER 2014

SSI 2014/196

1. The above instrument is made in exercise of the powers conferred by section 47(2)(c)(ii) and (4) and 99(1) of the Children and Young People (Scotland) Act 2014 (the Act). The instrument is subject to affirmative procedure.

Policy Objectives

2. The purpose of this instrument is to specify under section 47(2)(c)(ii) of the Act those children who are “eligible pre-school children” and therefore entitled to the mandatory amount of early learning and childcare under section 47(1) of the Act. In terms of section 47(1) of the Act, an education authority is obliged, in pursuance of its duty under section 1(1) of the 1980 Act¹, to secure that the mandatory amount of early learning and childcare is made available for each eligible pre-school child belonging to its area. The mandatory amount of early learning and childcare is defined in section 48(1) of the Act as being 600 hours per year during which a child is an eligible pre-school child (or a pro rata amount for each part of a year for which a child is an eligible pre-school child).

3. Section 47(2) of the Act defines an “eligible pre-school child”. An “eligible pre-school child” is a child who is:

- under school age²
- has not commenced attendance at primary school (except a nursery class in such a school); and,
- either falls within section 47(3) of the Act; or
- is within such age range, or is of such other description, as Scottish Ministers may by order specify.

4. Section 47(3) of the Act defines other children who will be an “eligible pre-school child” as being a child aged 2 or over who is or has been at any time since their second birthday:

- looked after by the authority concerned or any local authority; or
- the subject of a kinship care order³ or a child falling within section 71(3)(f) of the Act⁴.

¹ Section 1(1) is the duty on an education authority to provide “school education”; section 1(5)(a)(i) of the 1980 Act (as amended by paragraph 2(2)(c) of Schedule 5 to the Act) includes early learning and childcare.

² “School age” is defined in section 97(3) of the Act by reference to section 135(1) of the Education (Scotland) Act 1980 (the 1980 Act); it means, subject to section 32(3) of the 1980 Act, a person who has attained the age of 5 but not 16. Section 32(3) provides that a child who has not attained the age of 5 on a school commencement date (defined in section 32(1) but generally a date fixed in August each year), is deemed for the purposes of section 31 of the 1980 Act not to have attained the age of 5 until the school commencement date (ie during August) following his or her 5th birthday.

³ “Kinship care order” is defined by reference to section 72(1) of the Act; it means an order under section 11(1) of the Children (Scotland) Act 1995 (the 1995 Act) which give to a qualifying person the right mentioned in section 2(1)(a) of that Act (a right to have the child living with them or otherwise to regulate the child’s residence); a residence order; or an order under section 11(1) of the 1995 Act (a court appointed guardian)

⁴ This refers to an eligible child who has a guardian by virtue of an appointment under section 7 of the Children (Scotland) Act 1995 (a parent appointed guardian).

Defining eligible pre-school children and start dates

5. The Scottish Government’s policy is to develop a universal system of high quality early learning and childcare which is accessible and affordable for all families; and, this instrument is the first step towards this. Where expansion occurs under section 47(2)(c)(ii) of the Act, the priority is to make sure this is affordable, sustainable and manageable; and, focuses on more vulnerable children in the first instance.

6. The most vulnerable 2 year old children are already defined in section 47(3) of the Act as those who are aged 2 or over and are (or have been at any point since turning 2) either looked after, the subject of a kinship care order or a child with a parent appointed guardian. They are eligible to start early learning and childcare from the point when they fall within section 47(3) of the Act.

7. This instrument therefore specifies the following children as also being an “eligible pre-school child”:

- 3 and 4 year olds from the first term after their third birthday; and
- 2 year olds with a parent in receipt of one or more qualifying benefits (out of work benefits) from the first term after their second birthday; or, the first term after their parent starts receiving out of work benefits.

8. 3 and 4 year olds are currently eligible for 475 hours of pre-school education from the first term after their 3rd birthday⁵; and, the policy intention is to continue this cohort as eligible for early learning and childcare under the Act⁶. Having 3 start dates across the year enables smaller groups of children to start at phased points; and, contributes to keeping the system manageable and sustainable.

9. 2 year olds with a parent⁷ on out of work benefits reflect the priority of expansion to more vulnerable 2 year olds. Children with a parent who is out of work are estimated at around 15% of the 2 year old population. The entitlement can also contribute to removing barriers to parents seeking work; or, to create wider opportunities to engage with parents.

10. The out of work benefits have been defined using DWP guidance and data. We have worked with colleagues in DWP to ensure our definitions are accurate and appropriate. They are:

- Income support
- Jobseekers allowance (income based)
- Employment and Support Allowance (income based)
- Incapacity or Severe Disablement Allowance
- State Pension Credit⁸.

⁵ The Provision of School Education for Children under School Age (Prescribed Children) Order 2002 (SSI 2002/90 as amended by SSI 2007/396) describes those children. Article 4 of the Order revokes those Orders.

⁶ Article 2(1) of the Order will ensure that those children are now eligible under this Order for the 600 hours of early learning and childcare.

⁷ “Parent” is defined in the Order as having the meaning given in section 135(1) of the 1980 Act. This definition “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.

⁸ These “qualifying benefits” are defined in article 1(2) of the Order.

11. Children will remain entitled to early learning and childcare once started regardless of whether their parent or carer continues to be on those benefits or not⁹. This is to ensure consistency of provision for the child; and, so as not to discourage parents to seek work.

12. Local authorities will not be under a duty to identify individual children who may be entitled to early learning and childcare. The place will be mandatory where parents choose to register or take up a place for their child. We do not have the statutory basis to receive data on identified families from HMRC; therefore we will promote the entitlement nationally.

13. This Order will come into force for all purposes (other than article 2(2) to (5)) on 1 August 2014 and the duty to provide the mandatory amount of early learning and childcare will apply to all children currently entitled to pre-school education under the current law as set out in the Provision of School Education for Children under School Age (Prescribed Children) (Scotland) Order 2002; as well as those 3 year olds entitled for the first time from the autumn term 2014.

14. The Order will come into force for the purposes of article 2(2) to (5) (which relates to those children who are aged 2 and whose parents are in receipt of certain qualifying benefits) on 31 October 2014. From that date, the duty to provide the mandatory amount of early learning and childcare will apply to all children whose 2nd birthday falls on or after 1 March 2014 (and where their parent is in receipt of certain out of work benefits).

15. The policy intention in relation to those 2 year olds who are entitled by virtue of their parent(s) being in receipt of out of work benefits is that provision of early learning and childcare will be introduced from the start of the autumn term as announced; and, which local authorities are planning and working towards. However, commencement of the legal duty to provide early learning and childcare to those 2 year olds has been extended to 31 October 2014 in order to support effective implementation and provide a period during which any outstanding or unresolved issues in relation to this new cohort of children are addressed.

16. The Order makes it clear¹⁰, in relation to those children who turn 2 between 1 March 2014 and 31 August 2014, that whilst the legal duty to provide early learning and childcare will now commence on 31 October 2014 and not the first day of the autumn term, the trigger point (ie the date on which the child's parent requires to be in receipt of benefits) remains the first day of the autumn term. This is important because it ensures that even if the circumstances of the child's parent changes between the first day of the autumn term and the extended date of 31st October 2014 the child will still be eligible (in the same way that they were eligible before the commencement date of the legal duty was extended to 31 October 2014). Therefore, in relation to those children who turn 2 between 1 March 2014 and 31st August 2014 and their parent is in receipt of one or more qualifying benefits *on* the first day of the autumn term, they will be eligible for early learning and childcare from 31 October 2014. Therefore, in relation to those children who turn 2 between 1 March 2014 and 31 August 2014; and, where their parent starts receiving one or more qualifying benefits *after* the first day of the autumn term, they will be eligible for early learning and childcare from the term after ie January. This reflects how the policy would have operated before the commencement date of the legal duty was extended.

⁹ See article 2(5) of the Order.

¹⁰ See article 1(5) of the Order as read with the definition of "starting point for 2 year olds" in article 1(2) and as also read with article 2.

Defining stop dates

17. In terms of section 47(2)(a) and (b) of the Act once a child starts early learning and childcare provision, they will remain an “eligible pre-school child” for as long as they are under school age and have not started primary school. As mentioned above, school age means a child who has attained the age of 5 but is qualified by section 32(3) of the 1980 Act which has the effect that those children who turn 5 during the course of a school year are deemed to still be under 5 until the start of the school year following their 5th birthday.

18. Under section 32(6) of the 1980 Act, children can start school younger than 5 (generally those who turn 5 between August and February) where the child’s parent chooses to do so. The Order makes provision in relation to those children who have their 5th birthday on or after the start of the school year and who would have been entitled to start school but their parent chooses to defer entry to primary school to the following year. The 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 pre-school children” and therefore will cease to be entitled to early learning and childcare for the deferred year.

19. In relation to these children, the education authority is not under a duty to provide early learning and childcare during the deferred year. However, the education authority has a discretionary power under section 1(1C) of the 1980 Act to provide additional early learning and childcare to any child. Therefore where a parent chooses to defer their child, the education authority has a discretionary power to provide additional early learning and childcare. This would be based on an assessment of wellbeing informed by appropriate professional assessment which could include educational psychologists, early years staff or teachers. This could be due to complex learning needs or social care issues.

20. Those children who turn 5 in January or February and who would also have been entitled to start primary school the previous August (by virtue of section 32(6) of the 1980 Act) but whose parent choose to defer entry to primary school until the following year will continue to be entitled to early learning and childcare up to the August (Autumn) term following their 5th birthday. This provides an extra layer of flexibility and support for those youngest children.

21. Under section 47(4) of the Act, Scottish Ministers can specify the circumstances when those children defined as an eligible pre-school child under section 47(3) of the Act (ie those who were entitled as 2 year olds where they were looked after or under a kinship care order or who have a parent appointed guardian), are no longer entitled to early learning and childcare; and, article 3 of this instrument sets out those circumstances. The stop dates for those children are identical to those children who derive eligibility under the Order (namely the circumstances set out in paragraphs 14 to 17 above).

22. Start and stop dates are summarised at **Annex A**.

Consultation and Impact Assessment including Equality Implications

23. The policy intention behind defining eligible children as 3 and 4 year olds from the first term after their 3rd birthday through secondary legislation has been widely debated throughout the passage of the Children & Young People (Scotland) Bill.

24. There was wide consensus around the desire to expand the entitlement to more vulnerable 2 year olds through-out the passage of the Bill. The commitment to adding 2 year olds with a parent who is out of work or job seeking was made in January 2014; and, there has been intensive engagement and consultation with key stakeholders and delivery partners over how to define those children and ensure that delivery of this ambitious commitment is sustainable, manageable and affordable whilst remaining high quality. Those 2 year olds will become eligible the first term after their 2nd birthday as this was considered to be the most effective way to phase in a new cohort of children from the autumn term.

25. On-going engagement with COSLA and local authorities has identified that while every local authority has plans in place to deliver early learning and childcare provision for eligible 2 year olds, a commencement date of 31 October 2014 in relation to 2 year olds from workless households would enable local authorities to address any issues that arise and fully test the implementation of local authority plans. This decision to extend the commencement date in relation to those children was therefore agreed with COSLA, based on a joint assessment by the Scottish Government and COSLA.

Business and Regulatory Impact Assessment (BRIA)

26. A BRIA was carried out on the Early Learning and Childcare provisions of the Children & Young People(Scotland) Bill. There will be additional impacts on partner providers arising from the expansion to additional 2 year olds which could have positive impacts on partner providers to provide additional capacity, although partner providers remain concerned about funding levels from local authorities.

27. The draft statutory guidance covers the issue of partner providers and the National Day Nurseries Association has been fully involved in developing this guidance.

Financial Implications

28. The financial implications of the additional 2 year olds has been estimated at £15 million revenue in 2014/15 and £44 million revenue in 2015/16; and, has been allocated in the Scottish Government Budget. The revenue includes funding for the increased cohort of 2 year olds specified in this Order; and, those who will be eligible under free school lunch criteria(which amounts to around 27% of 2 year olds) from August 2015, although those children are not specified in this Order and will be specified in a further Order next year.

29. Similarly, while the Order only covers eligible 2 year olds in 2014/15; we are in the process of estimating capital across 2014/15 and 2015/16 to cover the full cohort of around 27% 2 year olds. An initial £61 million capital has been allocated in the Scottish Government Budget over 2014/15 and 2015/16; and, we will continue to work closely with local authorities and COSLA to secure a final estimate.

Scottish Government

Early Years Division
June 2014

SUMMARY OF START DATES AND STOP DATES

1. First term after the child's 2nd or 3rd birthday means the following:

Where a child's birthday falls on or between the following dates:	The child will become eligible from the school terms set out below:
1 March – 31 August	August (autumn term) occurring in that year ¹¹
1 September – 31 December	January (spring term) following their birthday
1 January – last day February	March/April (summer term) following their birthday

2. Stopping dates are summarised as follows:

Where a child's 5th birthday falls on or between the following dates:	The child will cease to be eligible for Early Learning and Childcare from:	Starting School and Stopping Early Learning and Childcare
1 March – 31 July	August (autumn term) occurring in the year of their birthday	Children can start school in the same year they turn 5, August (autumn term)
1 August – 31 December	August (autumn term) occurring in the year of their birthday.	Children can start school in the same year they turn 5, August (autumn terms); or; defer entry to school to the August (autumn term) of the following year, but if they do defer will not be entitled to an additional year of early learning and childcare
1 January – last day of February	August (autumn term) occurring in the year of their birthday	Children can start school the August (autumn term) preceding their birthday, but their entitlement to early learning and childcare continues to the August (Autumn) term occurring in the same year of their birthday.

¹¹ In relation to those children who turn 2 between 1st March 2014 and 31st August 2014, the effect of article 1(5) of the Order is that those children will be eligible from 31st October 2014 and not the first day of the autumn term.