

Children and Young People (Scotland) Act 2014

Early Learning and Childcare Statutory Guidance

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Introduction

1. This statutory guidance is issued under section 34 of the Standards in Scotland's Schools Act 2000¹ (the 2000 Act) which empowers Scottish Ministers to issue guidance to education authorities on the exercise of their functions in relation to provisions in Part 6 of the Children and Young People (Scotland) Act 2014 (the Act)² on early learning and childcare. Part 6 of the Act comes into force on 1 August 2014. This guidance is also issued under section 96(3) of the Act which also comes into force on 1 August (in relation only to section 49 of the Act); section 96(3) of the Act empowers the Scottish Ministers to issue guidance on how to assess wellbeing.
2. This guidance has been developed by the *Early Learning and Childcare Statutory Guidance Policy Delivery Group* (membership at Annex A). It has also been informed by consultation, including under section 96(4) of the Act which requires Scottish Ministers to consult local authorities, health boards and other stakeholders as appropriate on guidance in relation to the assessment of wellbeing.
3. This guidance will replace previous guidance and circulars; and should be read in conjunction with Part 6 (Early Learning and Childcare); and, section 96 (Assessment of Wellbeing) of the Act. Further statutory guidance in relation to section 96 more broadly will also be developed.
4. This guidance is complemented by National Practice Guidance on Early Learning and Childcare: Building the Ambition³.

¹ <http://www.legislation.gov.uk/asp/2000/6/contents>. Section 34 of the 2000 Act was amended by paragraph 7 of Schedule 5 to the Children & Young People (Scotland) Act 2014.

² <http://www.legislation.gov.uk/asp/2014/8/contents/enacted>

³ National Practice Guidance on Early Learning and Childcare: Building the Ambition – to add link once published

Interpretation

5. Throughout this document, the following terms will be used:
 - *the Act* means the Children & Young People (Scotland) Act 2014;
 - *the 1980 Act* means the Education (Scotland) Act 1980;
 - *the 2000 Act* means the Standards in Scotland's Schools etc. Act 2000;
 - *mandatory* early learning and childcare means early learning and childcare which an education authority is under a duty to provide by virtue of section 1(1A) of the 1980 Act and Part 6 of the Act;
 - *discretionary* early learning and childcare means early learning and childcare which an education authority has powers under section 1(1C) of the 1980 Act to deliver; but, are not under a duty to provide⁴;
 - *the 1995 Act* means the Children (Scotland) Act 1995;
 - *the 2004 Act* means the Education (Additional Support for Learning) (Scotland) Act 2004
 - *the 2010 Act* means the Schools Consultation (Scotland) Act 2010; and
 - *eligible young child* means any eligible pre-school child⁵.
6. *Early Learning and Childcare* means 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 environment⁶. This encompasses and replaces terms such as pre-school education, ante pre-school, childcare and wrap around care.

⁴This enables education authorities to also provide early learning and childcare under their own local priorities which could include a wider range of more vulnerable or disadvantaged children.

⁵ Eligible pre-school child is defined in section 47(2) of the Act.

⁶ Early Learning and Childcare is defined in section 46 of the Act.

Purpose of Part 6, 7 and 8 of the Act: Early Learning and Childcare, Day care and Out of School Care

7. The aim of Parts 6, 7 and 8 of the Act is to improve and integrate the role of early years support in children and families' lives by increasing the amount and flexibility of early learning and childcare; as a significant step towards wider ambitions to develop a high quality and flexible system of early learning and childcare which is accessible and affordable for **all** children, parents and families.
8. The priorities are to:
 - improve outcomes for all children, especially our most vulnerable children - any expansion of early learning and childcare will focus initially on those most in need; and,
 - support parents to work, train or study, especially those who need routes into sustainable employment and out of poverty in order to support their families.
9. The Act at Part 6:
 - **section 46**, introduces a new concept of pre-school education as early learning and childcare;
 - **section 47** increases the children eligible for early learning and childcare to include the most vulnerable 2 year olds who are looked after, under a kinship care order; or, with a parent appointed guardian; section 47 also contains the powers to define further children eligible for early learning and childcare through secondary legislation⁷;
 - **section 48** increases the hours of funded early learning and childcare to a minimum of 600 hours per annum;
 - **section 49** requires education authorities to make alternative arrangements in relation to the child's education and care for looked after 2 year olds where this would better promote, support and safeguard the child's wellbeing; and, to record the outcome of an assessment and any alternative arrangements made in relation to the child in the child's plan;
 - **section 50** requires education authorities to consult representative populations of parents and carers on how mandatory early learning and childcare should be made available; and, publish plans on how they will make their services available in response to those consultations⁸;
 - **section 51** provides a minimum framework within which mandatory early learning and childcare should be delivered;
 - **section 52** requires education authorities in exercising their functions under section 50 (duty to consult and plan on delivery of early learning and childcare) and 51 (method of delivery of early learning and childcare) to 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.

⁷ Section 47(3) enables Ministers to specify by Order those children who are an eligible pre-school child and therefore eligible for mandatory early learning and childcare.

⁸ Parts 7 and 8 of the Act contain an equivalent duty on education authorities to consult and publish plans in relation to discretionary early learning and childcare and mandatory and discretionary day care and out of school care.

Parts 7 and 8 discretionary early learning and childcare; and, mandatory and discretionary day care and out of school care

10. The Act requires an authority to consult representative populations of parents on whether, and if so how, discretionary early learning and childcare under the 1980 Act; and, discretionary day care and out of school care for children not in need under the 1995 Act, should be provided or supported. The Act also requires an authority to consult representative populations of parents on how mandatory day care and out of school care for children in need under the 1995 Act should be made available. In all cases, there is a requirement to publish plans in response to those consultations.
11. However, Ministers are not empowered to provide statutory guidance on those Parts of the Act and although this guidance will briefly reference those provisions in order to ensure policies are linked, separate guidance on Parts 7 and 8 of the Act will be developed.

Other Related Parts of the Act and legislation

12. The guidance also references other related parts of the Act, including, Part 5 on the Child's plan and Part 13 on Support for Kinship Care. It should be noted that as at August 2014 those Parts are not yet in force. However, transitory provision in relation to the use of a child's plan and the definitions of a kinship care order and parent appointed guardians in relation to Part 6 (early learning and childcare) are commenced on 1 August 2014 and how these provisions mesh together is explained later in this guidance.
13. Finally, the guidance covers other related legislation, in particular the Education (Additional Support for Learning) (Scotland) Act 2004 as it applies to children who are receiving early learning and childcare.

Who is this guidance for?

14. As mentioned above, section 34 of the 2000 Act states that Scottish Ministers may from time to time give guidance to education authorities on how they carry out their functions under the 1980 Act and also Part 6 of the Act; and, that education authorities shall have regard to any such guidance in exercising their functions. Section 96(2) of the Act also requires the Scottish Ministers to issue guidance on how matters listed at section 96(2) are to be used to assess the wellbeing of the child⁹. This guidance is therefore issued to local authorities (and local authorities as education authorities) and is intended to assist all those involved in the implementation and delivery of early learning and childcare including partner providers, community planning partners, and agencies across all sectors which support the early learning and childcare sector.
15. This guidance will also be of interest to parents and carers; local communities; and, anyone with an interest in how local authorities consult and deliver early learning and childcare. Further information is available for parents and carers on the Scottish Government¹⁰ and Family Information Service websites¹¹.
16. The structure of this guidance broadly follows the order of the provisions under Part 6 of the Act.

⁹ Section 96 is commenced only in relation to section 49 by virtue of the Children & Young People (Scotland) Act 2014 (Commencement No.1 and Transitory Provisions) Order 2014 (SSI 2014/131).

¹⁰ <http://www.legislation.gov.uk/ssi/2014/131/contents/made>

¹¹ <http://www.scotland.gov.uk/Topics/People/Young-People/early-years/parenting-early-learning/childcare>
<https://www.scottishfamilies.gov.uk/>

Benefits

17. In addition to the central role of the family, there is a wide range of evidence indicating the potential benefits of high quality early learning and childcare:
- While all social groups benefit from high quality early learning and childcare provision, children from the poorest families gain most from universal provision;¹²
 - The benefits of high quality early learning and childcare provision continue at age 14, with particular benefit for children whose families had a poor early years home learning environment;¹³
 - 15 year olds who attended early learning and childcare performed better than those who did not, even after accounting for their socio-economic backgrounds;¹⁴
 - Among 5 year olds, early learning and childcare is generally beneficial to cognitive development and a child's vocabulary;¹⁵
 - Long-lasting effects from early learning and childcare lead to better cognitive scores at age 7 and 16;¹⁶
 - The more mental stimulation a child gets around the age of 4, the more developed the parts of their brains dedicated to language and cognition will be in the decades ahead.¹⁷
 - Latest GUS research¹⁸ indicates that as over 90% of children aged 4 take up their statutory entitlement, with children from more and less deprived areas and higher and lower income households equally likely to do so, this offers an important opportunity to address inequalities in cognitive and social development. Children who attended providers with a higher care and support grade from the Care Inspectorate were more likely to show higher vocabulary skills by age 5 irrespective of their skills at age 3 and social background.
18. There is also a strong evidence base to indicate that only high quality early learning and childcare contributes to positive outcomes for children; and, that poor quality provision can actually have a detrimental effect.¹⁹ *Making the Difference*²⁰ provides further evidence on the links between workforce qualifications and quality.

¹² Mostafa, T. and Green, A., *Measuring the Impact of Universal Pre-School Education and Care on Literacy Performance Scores*. Institute of Education (2012)

¹³ Sylva, K., Melhuish, E., Sammons, P., Siraj-Blatchford, I., and Taggart, B., *Effective Pre-school, Primary and Secondary Education 3-14 Project (EPPSE 3-14) Report from the Key Stage 3 Phase: Influences on Students' Development From Age 11*. Institute of Education (2012)

¹⁴ OECD (2009)

¹⁵ Scottish Government, *Growing Up in Scotland: The Impact of Children's Early Activities on Cognitive Development* (2009)

¹⁶ Goodman, A., and Sianesi, B., *Early Education and Children's Outcomes: How Long Do the Impacts Last?* Institute for Fiscal Studies (2005)

¹⁷ Avants, B., Betancourt, L., Gianetti, J., Lawson, G., Gee, J., Farah, M. and Hurt, H., *Early Childhood Home Environment Predicts Frontal and Temporal Cortical Thickness in the Young Adult Brain*. University of Pennsylvania (2012)

¹⁸ *Growing up in Scotland: Characteristics of pre-school provision and their association with child outcomes*, Bradshaw et al ScotCen Social Research, June 2014

¹⁹ <http://www.nesse.fr/nesse/activities/reports/ecec-report-pdf>

²⁰ *Making the Difference*, Education Scotland, 2012

19. There are also strong links between the availability of affordable and accessible early learning and childcare and the employment opportunities parents (especially women) can access.²¹ Research indicates that of those mothers who chose to stay at home after the birth of their baby, 59% (equating to 1.2 million women across the UK) did so because of the high cost of early learning and childcare.²²
20. There is also evidence that fathers take a more active role in the care of their children in households where mothers work and this supports a better sharing of family and financial responsibilities. This was found to support the well-being of both parents²³.
21. Affordable, accessible and flexible early learning and childcare is fundamental to supporting parents into and sustaining work; and, to supporting workless households out of poverty. Further programmes²⁴ exist to support employment opportunities through information and support to access childcare.
22. Complementing the central role of the family, early learning and childcare is also a key part of family support. In addition to supporting parents to work, early learning and childcare can support parents more broadly. Integration with out of school care and flexible working can also provide additional support to parents and families.
23. Investment in early learning and childcare also has key economic benefits:
- provision of subsidised early learning and childcare increases female labour force participation and along with supply-side investment in the sector, promotes jobs growth, which in turn supplements income tax receipts for governments and alleviates pension shortfalls for women. Several studies have estimated a positive net benefit in this regard,²⁵
 - where subsidised childcare removes barriers to employment, it can help lift families out of poverty and help parents gain further skills, enhancing their employability and future earnings, as well as economy-wide productivity;
 - such policies that promote parenthood and work, such as subsidised childcare, have positive and lasting impacts on country fertility rates, which in turn assure the availability of a future workforce and the financing of future services;²⁶ and

²¹ The Resolution Foundation, *Counting the Cost of Childcare* (2012) and The Resolution Foundation, *The Price of Motherhood: Women and Part Time Work* (2012)

²² Mintel Research, "1.2 million mums stay at home due to high childcare costs", *Mintel Oxygen Reports* (2012)

²³ [The Impact of Maternal Employment Characteristics on Fathers' Participation in Child Care](#)(pp. 20-26)
Cynthia S. Darling-Fisher and Linda Beth Tiedje

²⁴ For example: <http://www.joinedupforjobs.org.uk/service-providers/funding/making-it-work-edinburgh/>

²⁵ Institute for Public Policy Research, *Making the Case for Universal Childcare* (2011)

²⁶ OECD, *Doing Better for Families* (2011)

- by serving a redistributive function, universal early learning and childcare mitigates the impacts of early economic and social disadvantage and promotes longer term economic benefits which are shared by all of society. The returns to such investments among vulnerable groups are well documented and stem from children's improved cognitive and non-cognitive skills, which in turn feed through to improved educational, social and employment outcomes, reduced dependence on the state and reduced criminal behaviour.²⁷

24. High quality early learning and childcare provision better suited to families' needs, aims to make a significant impact on these critical years of a child's development; to promote longer term health and wellbeing in children and young people; to remove barriers to work; and to improve economic outcomes for families and wider economic growth.

²⁷ Reynolds, A.J. 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)

Context

25. The availability of high quality, affordable early learning and childcare facilities for young children from birth to compulsory school age is a priority for the European Union. The European Commission Communication 2011²⁸ stated that Early Childhood Education and Care (ECEC) is *the essential foundation for successful lifelong learning, social integration, personal development and later employability. Complementing the central role of the family, ECEC has a profound and long-lasting impact which measures taken at a later stage cannot achieve.* It goes on to outline the wide ranging benefits of high quality ECEC and outlines its role in enabling parents to reconcile family and work responsibilities and supporting the wider economy. It stresses the particular benefits for those from low-income backgrounds. Moving on from the Barcelona targets set in 2002 to increase the quantity of childcare, this communication sets the dual challenge to increase access to ECEC and raise the quality of provision.
26. The Scottish Government's priority for early learning and childcare is set firmly within this context. The Scottish Government is committed to improving and increasing high quality, flexible and integrated early learning and childcare which is accessible and affordable for all, matching the best in Europe. The term "early learning and childcare" is used to reflect the holistic and continuous learning journey from birth.
27. Early Learning and Childcare is a key part of a wider system of learning and care for all children including school aged children; and, for supporting a range of working patterns for parents and support for families. It is also a key part of a wider system of integrated services and support for children and families. The Scottish Government will continue to develop those systems through legislative and other means to ensure a wider range of children and a wider range of working patterns are supported.
28. The Scottish Government wants to develop the provision of early learning and childcare to improve outcomes for children, in particular those from disadvantaged backgrounds; to support parents to work, provide economic security for their families and routes out of unemployment and poverty; and, to support parents with the costs of early learning and childcare.
29. Parents and carers remain central to their children's learning journey; and, parents and carers must therefore be valued and involved in all aspects of early learning and childcare. The entitlement to early learning and childcare is part of wider learning and care systems for all children into their teens; which should form an integrated pathway for children and families. This contributes directly to the *National Parenting Strategy's*²⁹ purpose to value, equip, and support parents to be the best they can be in order to give their children the best start in life. Early Learning and childcare should be delivered in partnership with parents; along with additional, integrated support for parents.

²⁸ Early Childhood Education and Care: Providing all our children with the best start for the world of tomorrow, European Commission, 2011.

²⁹ National Parenting Strategy, Making a positive difference to children and young people through parenting, Scottish Government, October 2012.

30. High quality provision is paramount to achieving positive outcomes for children, and increasing the amount, range and flexibility of early learning and childcare will not be at the expense of quality.
31. The current national frameworks for practice and quality assurance of early learning and childcare are *Pre-birth to three: Positive Outcomes for Scotland's Children and Families*³⁰; *Curriculum for Excellence*³¹ early level; *Early Learning and Childcare National Practice Guidance: Building the Ambition*³²; and, the *National Care Standards*³³ and *Child at the Centre*³⁴.
32. Quality assurance and improvement to ensure that high quality provision meets the needs of individual children is delivered through:
- self-evaluation, including input and feedback from and consultation with parents and stakeholders;
 - local authority duties to secure early learning and childcare provision; and, to raise standards³⁵ in their own and partner provider provision;
 - Education Scotland's powers³⁶ to inspect and support improvement of all local authority and partner providers of the entitlement to early learning and childcare;
 - Care Inspectorate duties to register and regulate³⁷ all providers of early learning and childcare; and, requirements on those providers to make proper provision for the health, welfare and safety of each child through a personal plan;
 - Scottish Social Services Council's role to register and regulate the education and training of the early learning and childcare workforce³⁸;
 - GTCS³⁹ role to register and regulate teachers and head teachers;
 - Third sector support for private and third sector providers; and
 - Workforce training, qualifications and CPD.
33. An independent national review of the Early Learning and Childcare and Out of School Care Workforce⁴⁰ under Professor Iram Siraj will also contribute to quality and improvement of the expanding workforce.

³⁰ <http://www.educationscotland.gov.uk/earlyyears/prebirthtothree/>

³¹ <http://www.educationscotland.gov.uk/earlyyears/curriculum/supportingearlylevel/>

³² *Early Learning and Childcare National Practice Guidance: Building the Ambition* Link will be added once published

³³ The National Care Standards for early education and childcare up to the age of 16: <http://www.nationalcarestandards.org/files/early-education.pdf>

³⁴ http://www.educationscotland.gov.uk/resources/c/genericresource_tcm4684384.asp

³⁵ Section 3 of the 2000 Act.

³⁶ Section 66 of the 1980 Act empowers Education Scotland to inspect nurseries providing early learning and childcare including those providers of early learning and childcare under arrangements made under section 35 of the 2000 Act.

³⁷ Section 53 of the Public Services Reform (Scotland) Act 2010 and the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 (SSI 2011/210), regulation 4(1)(a).

³⁸ This includes workers in day care of children services for whom registration is a requirement under the Regulation of Care Act (Scotland) Act 2001. Childminders and foster carers are not required to register with the SSSC.

³⁹ <http://www.gtcs.org.uk/home/home.aspx>

⁴⁰ National Review of the Early Learning and Childcare Workforce and Out of School Care Workforce, Professor Iram Siraj, commenced April 2014

34. Early learning and childcare and those wider systems of care and support will continue to be delivered through a mixed economy of public, private and third sector partnerships. Partnerships and collaboration will be fundamental to successful delivery.

Section 46: Definition of Early Learning and Childcare

35. The Act introduces a new concept of *early learning and childcare*. The term seeks to remove an artificial divide between pre-school for 3 and 4 year olds; and, childcare for 0 – 3 year olds; or, pre-school and wrap around care for 3 and 4 year olds; whereby pre-school is the educational element delivered in short blocks tied to a certain number of hours in a day; topped up by childcare or wrap around care which can be seen as less important to learning.
36. Early Learning and Childcare is defined in section 46 of the 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.*
37. 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. Learning cannot take place without a nurturing and caring environment.
38. There will therefore be a requirement to provide both education and care in a holistic and integrated way. The OECD⁴¹ and European Commission⁴² strongly support models of integrated early childhood education and care to improve quality of provision.
39. This will enable more holistic and integrated provision which supports learning and development in caring and nurturing environments for all young children; and, which can encompass any further expansion across all young children.
40. This also promotes greater consistency of high quality provision of interactions and experiences from 0-5; and, across different providers of early learning and childcare.
41. The Scottish Government has developed separate *National Practice Guidance on Early Learning and Childcare: Building the Ambition*⁴³. This will build on the current national frameworks *Curriculum for Excellence* and *Pre-birth to three: Positive outcomes for Scotland's Children and Families*. This will also contribute to the review of the National Care Standards⁴⁴. This guidance will cover the new definition, pulling together the principles, interactions and experiences of those national frameworks, within caring and nurturing settings, leading to the outcomes we seek for children and young people
42. Play, as outlined in the *Play Strategy*⁴⁵, will continue to be an essential and fundamental part of children's learning and happiness. Early Learning and

⁴¹ Starting Strong III, A Quality Toolbox, OECD, 2012 <http://www.oecd.org/edu/school/startingstrongiii-aqualitytoolboxforearlychildhoodeducationandcare.htm>

⁴² European Commission Communication on Early Childhood Education and Care, 2011

⁴³ *National Practice Guidance on Early Learning and Childcare: Building the Ambition* – to be added once published

⁴⁴ <http://www.scotland.gov.uk/Publications/2014/06/7325>

⁴⁵ Play Strategy For Scotland: Our Vision, Scottish Government, June 2013.

Childcare providers should ensure that all children have play experiences as part of their daily lives, as enshrined in Article 31 of the UNCRC⁴⁶.

⁴⁶ “the UNCRC” means the United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

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

43. Under section 47(1), local authorities must secure the mandatory minimum hours of early learning and childcare for each eligible young child belonging to (i.e. residing in) its area. Where an education authority has responsibility for a child residing outside the local authority area, e.g. for foster care, kinship care or additional support needs; the host authority is also responsible for securing the mandatory provision; including providing appropriate transport arrangements.
44. The purpose of section 47 of the Act is also to define which children are eligible for the mandatory amount of early learning and childcare; and, to provide Scottish Ministers with the power to specify and expand eligibility through secondary legislation subject to affirmative procedure before the Scottish Parliament.
45. Under section 47(2) of the Act an eligible child is a child who is under school age and has not started primary school; and, falls within subsection (3).
46. Under section 47(2)(c)(ii) of the Act, a child is also an eligible pre-school child if they are under school age and have not yet started primary school; and, is within such age range, or is of such other description, as the Scottish Ministers may by order specify.
47. Under the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014⁴⁷ (the Specified Children Order), 3 and 4 year olds will be eligible for the mandatory amount of early learning and childcare, with their eligibility commencing first term after the child's third birthday.

⁴⁷ SSI 2014/196. <http://www.legislation.gov.uk/ssi/2014/196/contents/made>

2 year olds with a parent in receipt of certain benefits

48. Under the Specified Children Order, 2 year olds from households where a parent or carer is in receipt of certain benefits will be eligible from the first term after their second birthday; or, the first term after the parent starts receiving those benefits. Those 2 year olds will remain entitled to early learning and childcare regardless of whether the parent in their household remains on those benefits or not.
49. Those 2 year old children are defined in the Specified Children Order as eligible where a parent or carer is in receipt of certain qualifying benefits⁴⁸, specifically:
- Income Support
 - Job Seekers Allowance (income based)
 - Employment Support Allowance (income based)
 - Incapacity Benefit or Severe Disablement Allowance
 - Pension Credit.
50. Education authorities will not be under a duty to identify those children and families. Parents or carers who wish to use the entitlement for their child will be required to self-refer for a place for their child. National information will promote eligibility for those 2 year olds; and, local authorities should promote the entitlement at a local level. This local promotion and any associated outreach work will provide local authorities with an opportunity to promote or support parents on certain benefits with work related activity such as job seeking, employability support programmes, training or studying; and, family support such as parenting support, family centre based early learning and childcare, or community childminding.
51. Education authorities will already have systems in place to identify children and families eligible for Free School Lunches, which also include qualifying benefits of income support; and, income based job seekers allowance or employment support allowance.
52. Education authorities will also have a range of self-referral and registration systems, either through a central point of contact, or contacts with local providers and partner agencies. Family Information Service and other website and local information will outline those systems.
53. The Scottish Government is committed to expanding the entitlement to around 27% of 2 year olds based on Free School Lunch eligibility criteria from August 2015 through a further Specified Children Order. This guidance will be updated accordingly at that time.

⁴⁸ Article 1(2) of the Specified Children Order defines “qualifying benefits”.

Commencement of eligibility

54. The duty to provide the mandatory amount of early learning and childcare under the Specified Children Order⁴⁹ will apply from 1st August 2014 in relation 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 2002⁵⁰ as well as those 3 year olds who will be entitled for the first time from the autumn term 2014. The duty also applies from 1st August 2014 in relation to those 2 year olds who qualify under section 47(3) of the Act because they are either looked after, subject to a kinship care order or have a parent appointed guardian.
55. The duty on an education authority to provide the mandatory amount of early learning and childcare to 2 year olds whose parent or carer is in receipt of certain benefits comes into force on 31st October 2014. However the policy intention in relation to those 2 year olds who are entitled by virtue of a parent being in receipt of certain benefits is that provision of early learning and childcare will be introduced from the start of the autumn term. The commencement of the legal duty to provide early learning and childcare to those 2 year olds is 31 October 2014 rather than 1 August 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 can be addressed.
56. This means that the legal duty applies from 31 October, but in practice and education authority is expected to provide early learning and childcare with effect from 1 August in relation to those children who turn 2 between 1 March 2014 and 31 August 2014 (and where their parent or carer is in receipt of certain benefits). 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).
57. 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, although an education authority will be expected to provide early learning and childcare to such children from the start of the autumn term. 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 2015. Where a child turns 2 between 1 September and 31 December; and, their parent or carer is in receipt of one or more qualifying benefits, the child will be eligible from the term after, ie, January 2015. This reflects how the

⁴⁹ <http://www.legislation.gov.uk/ssi/2014/196/contents/made>

⁵⁰ SSI 2002/90 which article 4 of the Specified Children Order revokes.

policy would have operated before the commencement date of the legal duty was extended.

Starting and Stopping Dates for Eligibility

58. Arrangements for starting early learning and childcare; and, stopping in relation to starting school, are set out under the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014⁵¹.

59. 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 ⁵²
1 September – 31 December	January (spring term) following their birthday
1 January – last day February	March/ April (summer term) following their birthday

60. Stopping dates are summarised as follows:-.

Where a child's 5 th 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 August	August (autumn term) occurring in the year of their 5 th birthday	Children will start school in the same year they turn 5, August (autumn term)
1 September – 31 December	August (autumn term) occurring in the year of their 5 th 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 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 5 th 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.

⁵¹ SSI 2014/196

⁵² In relation to those children who turn 2 between 1st March 2014 and 31st August 2014, the effect of article 1(5) of the Specified Children Order is that those children will be eligible from 31st October 2014 but it is expected that an education authority will make early learning and childcare available to such children.

61. Children are defined as eligible under section 47(2) of the Act where they are under school age; and, have not started primary school⁵³. As such, all children will cease to be entitled to early learning and childcare where they reach their 5th birthday by the end of December in the same year as school commences in the August (autumn term); and, they are entitled to start school.
62. This means that children who are born in September – December can start school at either 4 years and 8 – 11 months in the August (autumn) term before their 5th birthday; or, at 5 years and 8 – 11 months the August (autumn) term following their birthday. However, if their parent(s) or carers choose to defer starting to the August (autumn term) in the year following their 5th birthday, they are not entitled to an additional year of early learning and childcare.
63. Therefore, for all children whose 5th birthday falls in September to December, the education authority is not under a duty to provide early learning and childcare following the term that the child can start school. However, the education authority has 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 where they have not yet attained the age of 5 between September – December, 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.
64. Children who are born in January or February can start school either at 4 years and 6 or 7 months the August before their birthday; or, at 5 years and 6 or 7 months in the August (autumn term) following their 5th birthday. They 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.
65. All children who are entitled to the mandatory amount of early learning and childcare under section 47 of the Act; that is whether they derive eligibility for early learning and childcare under section 47(2)(c)(i) as read with subsection (3) of that section; or, by order under section 47(2)(c)(ii), will cease to be eligible where they turn 5 between 1 March and 31 December in the same year as the start of that school year in August.
66. Implementation of Curriculum for Excellence early level (3 – 6 years) and good transition arrangements; in combination with additional support for learning to meet the individual needs of the child, should make the journey from early learning and

⁵³ School age is defined in sections 31 and 32 of the 1980 Act. A child is school age where they have reached the age of 5; and, where they have not reached 5 they are not deemed to have reached school age until the school commencement date following their 5th birthday. However, under section 32(6) of the 1980 Act, education authorities can start children at school where children are under 5 but will reach 5 before a fixed date in respect of school commencement dates. Therefore children who reach 5 by the end of December can start school in the August (autumn term) of that same year, if the parent chooses to do so under section 32(6)(a) of the 1980 Act.

childcare into primary education seamless and without the need for deferring starting school.

67. Education authorities will have their own local procedures, guidelines and policies on deferred entries. Where education authorities wish to offer early learning and childcare to children earlier than they are statutorily obliged to provide it; or, start additional cohorts of children to those which they are statutorily obliged to provide it, then section 1(1C) of the 1980 Act⁵⁴ provides discretionary powers to education authorities to do this.
68. A number of education authorities therefore already secure a range of commencement dates and arrangements for their 3 year olds, including from their 3rd birthday, from the month after their third birthday, and, from the first term after their third birthday; or, certain children before they are 3 years old. Arrangements to commence closer to the child's third birthday are encouraged to support longer term aims to increase the amount of early learning and childcare provision for all children, parents and families where there is capacity within the system to do so.
69. Education authorities are under a statutory duty to provide the mandatory amount of early learning and childcare as defined in the Act for all eligible children who reside in their area. This duty applies regardless of children's nationality, citizenship or any other aspect of a child's or their parent's status.

2 year olds who are looked after, under a kinship care order, or with a parent appointed guardian

70. Under section 47(3) of the Act, a child is eligible if they are aged 2 or over, and, is or has been at any time since their second birthday looked after⁵⁵, subject to a kinship care order⁵⁶, or, has a parent appointed guardian⁵⁷. The purpose of this is to extend the entitlement to the most vulnerable 2 year olds. Further detail on 2 year olds who are looked after, including arrangements to meet wellbeing needs, is outlined from page 24 under section 49.

⁵⁴ Subsection (1C) was inserted by section 32(3) of the 2000 Act.

⁵⁵ 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.

⁵⁶ "Kinship care order" is defined in section 72(1) of the Act as meaning an order under section 11(1) of the 1995 Act which gives to a qualifying person the right mentioned in section 2(1)(a) of that Act in relation to a child, or a residence order which has the effect that a child is to live with, or live predominantly with, a qualifying person; section 72 which is essentially an interpretation provision is commenced from 1 August through the Children and Young People (Scotland) Act 2014 (Commencement No. 1 and Transitory Provisions) Order 2014 (SSI 2014/131).

⁵⁷ Under section 71(3)(f) of the Act, a child who has a guardian by virtue of an appointment under section 7 of the 1995 Act (see paragraphs 102 to 104).

2 year olds under a kinship care order

71. Under section 47(2)(c)(i) and (3)(b) of the Act, any 2 year old who is, or has been at any time since the child's second birthday, the subject of a kinship care order, or who has a guardian by virtue of an appointment under section 7 of the Children (Scotland) Act 1995 (such as a guardian appointed by a parent in their will - referred to in this guidance as a parent appointed guardian), is eligible for the mandatory amount of early learning and childcare. A kinship care order is defined in section 72(1) of the Act as meaning an order under section 11(1) of the 1995 Act which gives to a qualifying person the right mentioned in section 2(1)(a) of that Act in relation to a child, or a residence order which has the effect that a child is to live with, or live predominantly with, a qualifying person. The definition of kinship care order under section 72(1) also includes children with a court appointed guardian.
72. The purpose of these provisions is to recognise the importance of a family setting promoting the role of kinship care as an alternative to children becoming or remaining looked after. It also recognises that kinship carers can benefit from additional support for the role they have undertaken. This therefore also supports the purpose of Part 13 of the Act to provide support for kinship carers, and Part 12 of the Act which requires local authorities to provide services in relation to children at risk of becoming looked after, and sits alongside other forms of support which will arise from Parts 12 and 13 of the Act once these parts come into force⁵⁸.
73. The definition of "kinship care order" in section 72 of the Act will be brought into force by the Children and Young People (Scotland) Act 2014 (Commencement No. 1 and Transitory Provision) Order 2014 to give meaning to the term in section 47(3)(b), and therefore to allow this provision to work from 1 August 2014.

⁵⁸ Part 12 expected to be in force August 2016; Part 13 expected to be in force April 2015.

Parent-appointed guardians

74. The policy intention behind section 47(3)(b) of the Act is that any child who is aged 2 or over; and, is or has been at any time since their second birthday 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), should be considered an eligible young child entitled to early learning and childcare. However, the current drafting of section 47(3)(b) does not fully capture those 2 year olds with a parent appointed guardian who are not at risk of becoming looked after⁵⁹.
75. It is envisaged that this will only affect an extremely small number of children, if any; and, that local authorities will implement this provision within the spirit of the policy intention. It is expected that education authorities will use their discretionary powers under section 1(1C) of the 1980 Act to provide early learning and childcare to a child with a parent guardian who is not at risk of becoming looked after; and, to promote this alongside any local promotion of the entitlement.
76. Section 47(3)(b) will be amended through primary legislation at the earliest opportunity to remove this unintended exclusion.
77. Under section 27 of the 1995 Act, there is a duty on local authorities to provide any form of care, whether or not on a regular basis, for children under 5 who are not in school and in need; and, discretion to provide any form of care to those who are not in need. The provision under section 47(3) of the Act builds on this through guaranteeing minimum, regular and sustained provision of early learning and childcare for 2 year olds who are looked after, under a kinship care order or who have a parent appointed guardian.
78. Additional eligibility for early learning and childcare will be beneficial for children, particularly those who are looked after, under a kinship care order or with a guardian. This will complement family, foster care, or other supervision arrangements.
79. Under section 47(4) of the Act, Scottish Ministers can specify that the children defined as eligible under section 47(3) of the 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 early learning and childcare once they become 4. The Specified Children Order⁶⁰ makes the same provision for stopping those children from receiving early learning and childcare as for all other children.

⁵⁹ Section 47(3)(b) refers to a child who falls within section 71(3)(f); section 71(3)(f) refers to an *eligible* child who has a guardian by virtue of an appointment under section 7 of the 1995 Act; that is, a child who has a parent appointed guardian; however, the reference to *eligible* child in section 71(3)(f) is defined with reference to section 71(5) as one who the local authority considers “to be at risk of becoming looked after”. This means that those 2 year olds with a parent appointed guardian who are not at risk of becoming looked after are unintentionally excluded.

⁶⁰ Article 3: Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014 No 196

Section 48: Mandatory amount of Early Learning and Childcare

80. Under section 47(1) of the Act, an education authority must secure that the mandatory amount of early learning and childcare is made available for each eligible young child belonging to its area. Section 48 of the Act defines the mandatory amount as 600 hours in each year for which a child is an eligible young child; and, a pro rata amount for each part of a year for which a child is an eligible young child. A year will be a school year, as defined in the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014⁶¹.
81. Section 48(2) of the Act enables Scottish Ministers to change the mandatory amount of early learning and childcare, e.g. to increase the hours in line with longer term aims and ambitions. Such an Order would be subject to affirmative procedure by virtue of section 99(2) of the Act and in terms of section 48(3) of the Act, is capable of making different provision for different types of eligible children, for example, different number of hours for children of different ages.
82. In terms of section 1(1C) of the 1980 Act⁶² education authorities are empowered to secure additional hours of early learning and childcare beyond that which they are under a duty to provide by virtue of section 1(1) and (1A) of the 1980 Act as amended by the Act; and, under section 33(2) of the 2000 Act have discretionary powers to charge for such additional hours of early learning and childcare. This enables local authorities to expand hours further to meet parent's needs and provide greater consistency for the child.

⁶¹ Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014 No 196

⁶² Subsection (1C) was inserted by section 32(3) of the 2000 Act.

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

83. Looked after children can benefit especially from the provision of early learning and childcare in order to improve their wellbeing and development needs and their chances of better educational outcomes. The purpose of section 49 of the Act is to ensure that those most vulnerable 2 year olds who are eligible for early learning and childcare receive the most appropriate provision to meet their wellbeing needs, including family like early learning and childcare that provides secure, nurturing relationships with a consistent adult. It is imperative that any provision or alternative arrangements are high quality and take individual and family circumstances into consideration in order to make a positive difference for children.
84. This requires the assessment of wellbeing under section 96 of the Act; and, the recording of the outcome of any such assessment along with any alternative arrangements made in relation to the child in any Child's Plan prepared under Part 5 of this Act.
85. As the provisions about wellbeing under the Act will not be commenced wholesale until a later date, section 96 of the Act is commenced for the limited purpose only of enabling an assessment of wellbeing under section 49(1)(b) of the Act⁶³. Section 96 is commenced for this purpose by virtue of the Children & Young People (Scotland) Act 2014 (Commencement No. 1 and Transitory Provisions) Order 2014⁶⁴.
86. While looked after children are likely to have a lead professional from social work, it is the education authority's responsibility to make sure the outcome of any assessment of the child's needs is recorded, together with any alternative arrangements it makes, in relation to the child's education and care in the Child's Plan.
87. The provisions relating to a Child's Plan under Part 5 of the Act will not be brought into force until a later date. Transitory provision is made in the Children & Young People (Scotland) Act 2014 (Commencement No. 1 and Transitory Provisions) Order 2014. This has the effect that, until a Child's Plan is prepared for the first time under section 33 of the Act, the requirement in section 49(5) to record certain matters will require to be recorded in any Child's Plan which is prepared under regulation 5 of the Looked After Children (Scotland) Regulations 2009⁶⁵. When section 33 of the Act comes into force, this information will be recorded in the Child's Plan prepared under Part 5 of the Act.
88. Looked after children are defined in section 97(2) of the Act whereby "looked after" is to be construed in accordance with section 17(6) of the 1995 Act⁶⁶.

⁶³ Guidance on the assessment of wellbeing prepared by the Scottish Ministers under section 96(3) is contained in the next section of this document. In terms of section 96(5), in measuring the wellbeing of a child or young person under section 96(2) of the Act, a person is to have regard to such guidance.

⁶⁴ SSI 2014/131

⁶⁵ SSI 2009/210

⁶⁶ Any reference in this Chapter of this Part to a child who is "looked after" by a local authority, is to a child—

(a) for whom they are providing accommodation under section 25 of this Act;

Under section 47(2)(c)(i) and (3) of the Act, any 2 year old child who is looked after, or has at any point been looked after since their second birthday, will be eligible for early learning and childcare. As such, they remain eligible for the minimum mandatory amount of early learning and childcare regardless of whether they remain looked after or not. The provision of early learning and childcare can provide continuity even where the circumstances of the child may change, or they move between carers and parents. This provision ensures consistency of care for the child and reduces the need for any additional transitions.

89. Under section 49(2) of the Act, a local authority need not provide the mandatory amount of early learning and childcare where it considers, after assessing the child's needs, that making alternative arrangements including the number of hours (which may amount to less than the minimum mandatory 600 hours; or, may include hours of working jointly with parents) in relation to the child's early learning and childcare would better safeguard or promote the child's wellbeing. The assessment will be an integrated, multi-agency assessment, using the *GIRFEC* process leading to a Child's Plan to improve wellbeing outcomes.
90. Where an authority, after assessing the child's needs considers that the making of alternative arrangements in relation to the child's education and care would better safeguard or promote the child's wellbeing, then the local authority must in terms of section 49(2)(b) of the Act make alternative arrangements in relation to the child's early learning and childcare as it considers appropriate.
91. Under section 49(5) of the Act, following the assessment of the child's needs, under section 49(1)(b), the education authority must seek to ensure that the outcome of that assessment and any alternative arrangements that it makes in relation to the child's early learning and childcare, is recorded in the child's plan⁶⁷. While the assessment and planning will be part of a multi-agency process, it will be the responsibility of the education authority, as a partner to the plan, to make sure the assessment information and outcomes relating to any alternative arrangements for the child's early learning and childcare are recorded in the child's plan, and delivered in line with the plan. The assessment and recording of outcomes is intended to ensure that there are considered and transparent reasons to support the decision making on alternative arrangements made under section 49(2)(b) of the Act.

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- (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 this Act or section 190 of the Children's Hearings (Scotland) Act 2011 (effect of Orders made outwith 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, been made and has not ceased to have effect.

⁶⁷ As paragraph [79] above states, until such times as the provisions in Part 5 of the Act relating to the Child's Plan come into force, any assessment and alternative arrangements (where made) should be recorded in the Child's Plan prepared under regulation 5 of the Looked After Children (Scotland) Regulations 2009 (SSI 2009/210).

Section 96: Wellbeing

92. Early Learning and Childcare is delivered within the wider context of *Getting it right for every child (GIRFEC)*. The wellbeing of children and young people is at the heart of GIRFEC. The Act will place the approach on a statutory footing.
93. Section 96 of the Act is only in force in relation to Part 6 of the Act (early learning and childcare)⁶⁸. Section 96(3) of the Act requires the Scottish Ministers to issue guidance on how persons are to assess wellbeing of a child or young person; and, section 96(4) requires Scottish Ministers to consult each local authority, each health board, and, other persons they consider appropriate before issuing or revising such guidance. The following paragraphs on the assessment of wellbeing in relation to Part 6 of the Act have been consulted upon as required. Further substantive guidance on wellbeing under the Act will be issued in due course and can be used to supplement what is noted here. In terms of section 96(5), a person is to have regard to this guidance in assessing wellbeing of a child or young person.

⁶⁸ Children & Young People (Scotland) Act 2014 (Commencement No. 1 and Transitory Provisions) Order 2014 (SSI 2014/131): <http://legislation.data.gov.uk/cy/ssi/2014/131/made/data.htm?wrap=true>

Assessment of Wellbeing

94. In terms of section 96(1) of the Act, section 96 applies wherever the Act requires a person to assess whether a child or young person's wellbeing is being or would be:

- promoted
- safeguarded
- supported
- affected; or
- subject to an effect.

95. Section 49 of the Act refers to safeguarding or promoting the child's wellbeing.

These terms have the following meaning:

- Promoted – actively encouraged or further developed
- Safeguarded – protected from harm or damage.

96. The *GIRFEC* approach uses eight indicators of wellbeing (sometimes collectively referred to as *SHANARR*) These indicators are set out in section 96(2) of the Act.

In terms of section 96(2), a person is to assess the wellbeing of a child or young person by reference to the extent to which the child or young person is, or would be:

- Safe
- Healthy
- Achieving
- Nurtured
- Active
- Respected
- Responsible
- Included

97. The Wellbeing Indicators support practitioners to take a holistic view of the child when considering their wellbeing, noting strengths and barriers. Whenever wellbeing is assessed in relation to early learning and childcare, this should be done so in relation to the 8 indicators above. An explanation of how to assess wellbeing using the indicators can be found on the Scottish Government website⁶⁹ and by following the links for each indicator. Reference should also be made to the *GIRFEC* National Practice Guide.⁷⁰

98. The wellbeing indicators, along with the My World Triangle⁷¹ and the Resilience Matrix⁷² form the National Practice Model which is the tool used to gather, structure and analyse information about a child's wellbeing. In some cases that assessment and analysis will lead to the development of a Child's Plan.

⁶⁹ <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright>

⁷⁰ <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright/national-practice-model>

⁷¹ <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright>

⁷² <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright>

Role of the Named Person and Lead Professional

99. Part 4 of the Act defines a named person service which covers children who are under school age, or who have commencement at school deferred through local authority consent; and, sets out the duties in relation to that service. Under section 28 of the Act, local authorities, health boards, directing authorities and relevant authorities must have regard to guidance issued by Scottish Ministers about the exercise of functions conferred by Part 4 of the Act. This part of the Act, including issuing and consulting on guidance is not yet commenced. Until Part 4 is commenced and relevant guidance is issued, the Scottish Government has existing policies which endorse the *GIRFEC* approach on the use of a named person and lead professional. It is assumed that the named person and lead professional will have key roles in the wellbeing of looked after 2 year olds; and, in this context, the existing guidance on *GIRFEC*⁷³ should be used.
100. Under section 49(4) of the Act, the local authority may at any time review any alternative arrangements it makes in relation to a looked after 2 year old child; and, must review such alternative arrangements on becoming aware of any significant change in the child's circumstances. Following such a review, the authority may alter those arrangements.
101. Where the child's circumstances or status have changed, all of those providing interventions should be consulted and new interventions agreed with the parents/carers as appropriate, and in line with requirements for review of the Child's Plan, to meet the agreed outcomes for the child.
102. Based on the individual assessment of looked after 2 year olds and their family circumstances, it is recognised that each child might benefit from a range of provision in a range of settings. This could for example include work with parents or carers; and, work in the home, in family centres or through specific programmes.
103. Where a child ceases to be looked after before the commencement of their universal entitlement after their third birthday, the child remains entitled to the mandatory amount of early learning and childcare, including any alternative arrangements. This minimises transitions and ensures consistency for the child. It is expected that the local authority would continue to work closely with parents and carers. In terms of section 49(3) of the Act, the authority may only make alternative arrangements in relation to a child who is no longer looked after, where the parent or carer of the child agrees to such a course of action.
104. It is important that the infrastructure and systems for looked after children improved through the Act meet the no-order principle and do not incentivise children becoming looked after. Prevention is paramount, and integrating early learning and childcare services and family support is crucial to supporting children and families without compulsory measures. Education authorities can use their discretionary

⁷³ <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright/named-person>
<http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright/lead-professional>

powers⁷⁴ to provide early learning and childcare to children at risk of becoming looked after.

105. Even where a looked after 2 year old child is in foster care, they can benefit from an entitlement to early learning and childcare, unless there is a reason identified through assessment that it would not promote, support, or safeguard their wellbeing. There may also be alternative arrangements designed to meet the child's needs that involve parents; or, particular interventions or programmes that foster carers could be involved in.

⁷⁴ Under section 1(1C) of the 1980 Act, local authorities have a power to secure for pre-school children in their area, school education other than which they are required to secure, as they think fit.

Additional Support Needs

106. In relation to early learning and childcare for children with additional support needs⁷⁵ (including those children with additional support needs arising from a disability within the meaning of the Equality Act 2010 (the 2010 Act)⁷⁶, it is important that professionals and parents understand that young children with additional support needs will be supported through the 2004 Act⁷⁷.
107. Statutory Guidance on the 2004 Act is contained in the [Code of Practice](#) on Additional Support for Learning (ASL Code of Practice).⁷⁸
108. Local authorities will therefore require to have regard to the 2004 Act for any eligible young child entitled to the mandatory amount of early learning and childcare with additional support needs. Additional support for learning is required to help a child or young person to overcome a barrier to their learning. The support provided to help need not be provided in an educational establishment, and is directed to learning in its broadest sense.
109. NHS Boards and other local authorities must help an education authority to deliver its duties for additional support for learning so there is an important recognition of joint partnership planning and delivery of support⁷⁹.
110. Education authorities and other agencies have a wide range of duties under the 2004 Act, meaning they are required to [identify, provide for, and monitor](#), 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 Practice⁸⁰ which supports implementation of the 2004 Act.

⁷⁵ Section 1(1) of the 2004 Act provides that a child or young person has additional support needs for the purposes of the 2004 Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person. "School education" is defined in section 29(2) of the 2004 Act by reference to section 135(1) of the 1980 Act which cross refers to the definition of "school education" in section 1(5)(a)(i) of the 1980 Act; paragraph 2(2)(c) of schedule 5 to the Children & Young People (Scotland) Act 2014 amends section 1(5)(a)(i) to specifically refer to early learning and childcare.

⁷⁶ Disability is defined under section 6 of the Equality Act 2010 (the 2010 Act) where a person has either a physical or mental impairment which has substantial and long term adverse effects on the ability of the person to carry out normal day to day activities. Paragraph 2 of Schedule 1 to the 2010 Act defines the effect of an impairment as long term if it has lasted or is likely to last 12 months or more. The Equality Act Guidance⁷⁶ has further detail. Therefore children with additional support needs arising from a disability (Annex 1 of that Guidance illustrates some examples) that are not short term or temporary are entitled to early learning and childcare from when that need is identified.

⁷⁷ The 2004 Act is amended by paragraph 10 of schedule 5 to the Act.

⁷⁸ Link to ASL Code of Practice: <http://www.scotland.gov.uk/Publications/2011/04/04090720/0>

⁷⁹ Section 23 of the 2004 Act.

⁸⁰ <http://www.scotland.gov.uk/Publications/2011/04/04090720/0>

111. Following identification of additional support needs, a plan should be established as to how those needs will be met, and reviewed. The assessment and planning process should follow the *GIRFEC* approach under the National Practice Model until further statutory guidance is issued. Where a Co-ordinated Support Plan is required, this should form part 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.
112. Young children with additional support needs also benefit from current policies on the use of a named person and lead professional. A key issue for young children with additional support needs is the early identification of those needs. A child's health and wellbeing are assessed from birth using the contacts set out in the child health programme which now includes a 27 – 30 month universal health review.
113. 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 the assessment as to whether a co-ordinated support plan is required.
114. The 2004 Act duties will apply when a child becomes eligible for funded early learning and childcare and so will apply to 2 year olds subject to a kinship care order or with a parent appointed guardian. 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.
115. 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 age⁸¹ 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 identified⁸².
116. 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.⁸³
117. Further, under the Education (Disability Strategies and Pupil Educational Records (Scotland) Act 2002⁸⁴ responsible bodies have duties to develop and publish accessibility strategies to increase access to the curriculum, the physical environment, and communication.
118. A summary of the overlap between the Equality Act 2010 and the 2004 Act definitions of children and young people is attached at Annex B.

⁸¹ Annex B including column 1 and notes

⁸² See section 5(2) and (3) of the 2004 Act.

⁸³ Section 20 of the Equality Act 2010: <http://www.legislation.gov.uk/ukpga/2010/15/section/20>

⁸⁴ 2002 asp 12: <http://www.legislation.gov.uk/asp/2002/12/contents>

119. Under the 2004 Act parents and carers 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) area⁸⁵.
120. Information for parents' and carers about all of the provisions of the 2004 Act is available in the [Enquire guide](#).
121. Section 50 of the Act requires education authorities to consult with locally representative populations of parents. Education authorities should use this opportunity to encourage broad, open and transparent dialogue between local authorities and parents and carers; and, to identify needs of parents and carers with a range of needs including those with children who are disabled or have other additional support needs.
122. Children and young people will progress differently, depending on their circumstances but 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. Services and agencies must play their part in making sure that young people are healthy, achieving, nurtured, active, respected, responsible, included and, above all, safe. This applies to all children's services, and related services which work with adults who can potentially impact directly on the wellbeing of children, e.g. adult mental health services, substance misuse service

⁸⁵ See section 22 of, and Schedule 2 to, the 2004 Act.

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

123. It is important that the statutory system of early learning and childcare is child and family centred. Under section 50(1)(a) of the Act education authorities must consult with such persons as appear to them to be representative of parents of children under school age in their area about how they should make early learning and childcare available. Under section 50(1)(b) of the Act, education authorities must have regard to the views expressed in those consultations and prepare and publish plans on how it intends to make early learning and childcare available in response to those views.
124. Education authorities will also need to be clear about the need for delivery to be manageable and affordable within their resources.
125. On-going engagement with the early years workforce across all early learning and childcare sectors will be a necessary part of the planning process and service re-design.
126. Section 50(1) of the Act requires education authorities to consult with such persons as appear to them to be representative of parents of children under school age in their area every 2 years; and, section 50(2) of the Act enables Scottish Ministers to vary the frequency of that consultation by order subject to affirmative procedure by virtue of section 99(2) of the Act.
127. The aim of requiring consultation every 2 years is to build initial momentum into the incremental increase, year on year, of more flexible models of early learning and childcare provision through reconfiguration of services. It is anticipated that the regularity of consultation and planning could be reduced if successive consultations were producing similar findings; or, if a wide range of flexible provision had been achieved. Conversely, the regularity could be increased if there was a major policy change emerging in response to local consultation or national priorities.
128. Education authorities are required to consult with representative samples of their local population. Education authorities are encouraged to use embedded good practice in how they consult⁸⁶; and, to use a range of consultative methods to engage a wide range of parents such as working parents, minority ethnic populations, hard to reach parents, parents of children with a disability or additional support needs; and parents with support needs. Education authorities can also consult on a local area basis to determine local area based models of provision and flexibility.
129. Reconfiguration of services will be based on consultation with parents as required under section 50 of the Act, and will also require negotiation and close cross sector working with all key delivery partners, including private and third sector partner providers.

⁸⁶ <http://www.scotland.gov.uk/Topics/People/engage/NationalStandards>

130. It is envisaged that education authorities will not be required to ask every current or prospective parent of an eligible young child for early learning and childcare about their individual choice of provider and pattern of hours. The consultation is around models, flexibility and systems of choice so that parents can inform options on offer and local authorities can develop systems to allocate options. The aim is to develop a high quality system of early learning and childcare that meet a range of needs.
131. Placing requests which apply to education authority primary and secondary schools do not apply to the entitlement to early learning and childcare (with the exception of children with additional support needs)⁸⁷. However, under section 28 of the 1980 Act, there is a general duty on local authorities to educate children in accordance with the wishes of their parent(s).
132. Under section 33(1) of the 2000 Act, the entitlement to mandatory early learning and childcare should be provided without the payment of fees, including where this is delivered through partner providers under a section 35 arrangement. It is important that there is a very clear system of information for parents on how fees will be administered; and, will require transparency from education authorities about the level of those fees.

⁸⁷ See section 22 of, and Schedule 2 to, the 2004 Act.

Parts 7 and 8: Non-statutory guidance on duties to consult and plan in relation to discretionary early learning and childcare; and, mandatory and discretionary day care and out of school care for children in need and not in need

133. Parts 7 and 8 of the Act also require local authorities to consult representative populations of parents on whether, and if so how, discretionary early learning and childcare under the 1980 Act; and, discretionary day care and out of school care for children not in need under the 1995 Act, should be provided or supported. The Act also requires an authority to consult representative populations of parents on how mandatory day care and out of school care for children in need under the 1995 Act should be made available. In all cases, there is a requirement to publish plans in response to those consultations.
134. The aim of these provisions is to integrate and co-ordinate all consultation, planning and delivery or support for services that meet the needs of all children, parents and families. However, Parts 7 and 8 are not subject to statutory guidance and separate guidance will therefore be developed. The following paragraphs are therefore a description of the provisions, pending the development of non-statutory guidance.
135. Under section 1(1C) of the 1980 Act, local authorities have discretionary powers to provide early learning and childcare beyond the mandatory minimum requirements under section 1 and (1A) of the 1980 Act as amended by the Act⁸⁸ (ie mandatory early learning and childcare). They are also, under section 33(2) of the 2000 Act empowered to charge fees for such discretionary early learning and childcare. This can therefore enable local authorities to prioritise certain vulnerable children; and, through fees subsidised or otherwise, provide more flexibility around their mandatory minimum hours.
136. Under section 27(1) of the 1995 Act, local authorities are required to provide day care⁸⁹ for young children (ie those under 5 who have not commenced attendance at a school) who are in need and have powers to provide day care for those who are not in need⁹⁰.
137. Under section 27(3) of the 1995 Act, local authorities are required to provide out of school care to school aged children in need; and, have powers to provide out of school care to those who are not in need. Again, these provisions provide an opportunity to consult on how out of school care should be delivered to those in need; and, whether and if so how, to those not in need.
138. Combined, these provisions provide an opportunity to consult more widely on early learning and childcare beyond the mandatory minimum entitlement of 600 hours, including how early learning and childcare should be provided to those in need; and, whether and if so how, to those who are not in need or those receiving additional, more flexible provision.

⁸⁸ Section 1(1A) of the 1980 Act is amended by paragraph 2(2) of Schedule 5 to the Act.

⁸⁹ "Day care" is defined in section 27(4) as any form of care provided for children during the day, whether or not it is provided on a regular basis.

⁹⁰ "In need" is defined by section 93(4) of the 1995 Act.

139. In all cases, there is a duty on local authorities to consult with local representative populations of parents about provision and then to prepare and publish plans in response to those consultations. This will require to be done every 2 years. However, there will not be a requirement for authorities to deliver services which are discretionary.
140. The purpose of Parts 7 and 8 is to enable local authorities to broaden the scope of their consultation and planning to reflect longer term aims to develop systems of early learning and childcare, day care and out of school care that meet the needs of all children, parents and families. Broader consultation will provide a more comprehensive picture of provision for children of all ages; and, how it can become more flexible and integrated. Going forward, the provisions create the opportunity for local authorities to co-ordinate consultation and planning of all mandatory early learning and childcare, day care and out of school care along-side discretionary provision which local authorities have the powers to deliver or support.

Section 51: Method of delivery of early learning and childcare

Minimum Framework

141. Under section 51 of the Act, education authorities must deliver the mandatory amount of early learning and childcare within a minimum framework of sessions which are no less than 2.5 hours; and, no more than 8 hours a day in duration. This must be over a minimum of 38 weeks a year (or pro rata) which need not be confined to term time. It is intended that children take up their entitlement at times that best support their learning and support the needs of parents. It is also intended that the increased hours are used as an opportunity to increase consistency for the child.
142. There are a wide range of models or patterns that local authorities could implement, e.g. :
- Short sessions of around 2.5 – 3.5 hours
 - Half day sessions around 4 hours
 - School day sessions around 6 hours
 - Full working day sessions up to 8 hours
 - Sessions out-with school term times, across more than 38 weeks/ year
143. These are just examples, and it will be for local authorities to identify models in consultation with local populations.
144. Where education authorities secure sessions of a particular length from partner providers, it is not necessary to specify when those sessions should start and stop in line with education authority timings as long as the minimum framework is met, as this will limit flexibility. For example, where an education authority offers sessions of 3 hours and 10 minutes, from say 9:00 am – 12:10 pm, it is not necessary to require a 3 hour 10 minute session to be from 9:00 am – 12:10 pm in partner provision. Where parents require more hours, additional unfunded hours could be used.

Providing less than the minimum mandatory hours or framework.

145. The minimum mandatory hours are an entitlement for children, but are not compulsory. Where parents request less hours than the minimum, it is at the local authority's discretion to make arrangements that meet the needs of the parent(s) or carer(s) and continue to meet the best interests of the child. Local authorities should seek to meet the needs of the parents or carers and the child, but usually less than 2 ½ hours/ day or 2 days / week are not considered beneficial for the child or the group in which the child is participating. Clear policy and communication with parents and carers should support and ensure working out the best, realistic and manageable arrangement for the child, parent/ carer, and local authority.
146. The obligation on education authorities in terms of section 47 of the Act is to provide 600 hours early learning and childcare in each year for which a child is eligible. Anything more than that would be on a discretionary basis by local authorities. This may include what is in the best interests of the child, as well as other children who are receiving the mandatory hours.
147. The obligation under section 47 of the Act is for the education authority to ensure that it makes early learning and childcare available by way of sessions provided during at least 38 weeks of every calendar year and which are each more than 2.5 hours but less than 8 hours in duration.
148. Section 51(2) of the Act enables Scottish Ministers to modify or change this minimum framework by order subject to affirmative procedure by virtue of section 99(2) of the Act.

Split Placements

149. An aim of integrating early learning and childcare is to provide greater consistency for children. The aim is therefore to reduce or remove the need to split placements in the day if this is not in the interests of the child and parent.
150. However, a range of settings can also be beneficial for children and parents, and most local authorities do accommodate split placements across 2 different providers more widely across the week where this meets the needs of the child and parents or carers.

Attendance

151. All schools are required to keep an attendance register of every pupil by the Schools General (Scotland) Regulations 1975⁹¹. 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.
152. Recording and monitoring attendance is fundamental to the child's wellbeing and child protection. Local authorities should therefore ensure that attendance is recorded and monitored. Any changes in patterns of attendance or concerns should be conveyed to the named person or lead professional; and, local authority guidance should be followed in conjunction with national guidance on child protection and on children missing from education⁹².
153. This has implications for practice in partner providers and split placements, whereby local authorities should establish systems and procedures in line with GIRFEC, e.g. links and communication between split placements; and, clear responsibilities on partner providers to record, monitor and report changes in attendance. Partner providers need to work in an integrated way to ensure that a child's attendance is monitored; and, any concerns shared and acted upon.
154. If there is a longer term absence of an eligible young child due to prolonged ill health⁹³ education authorities are under a duty to make alternative arrangements to ensure the young child continues to receive early learning and childcare elsewhere under section 14 of the 1980 Act^{94 95}. Consistency for the child is very important in such circumstances.

⁹¹ SI 1975/1135 – regulation 6.

⁹² <http://www.scotland.gov.uk/Topics/People/Young-People/protecting/child-protection>
Children missing from education: <http://www.cmescotland.net/Pages/Home.aspx>

⁹³ Currently defined as being around 3 weeks of continuous absence that is detrimental to the wellbeing and development of young children: <http://www.scotland.gov.uk/Resource/Doc/158331/0042883.pdf>

⁹⁴ Section 14 was substituted by section 40 of the 2000 Act.

⁹⁵ <http://www.scotland.gov.uk/Resource/Doc/158331/0042883.pdf>

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

155. The entitlement to early learning and childcare is part of our high quality universal education system, based on *Curriculum for Excellence* and *Pre-birth to three*; and, the aim is to maintain a high quality universal service which can be expanded and built upon to meet the needs of a wider range of children and families in the future. The purpose of securing early learning and childcare through education authorities is to protect education, quality, and integration with other key areas of policy and practice for children such as *GIRFEC*, additional support for learning, and child protection amongst many.
156. Early learning and childcare also enables parents to secure employment, training or education; and, family support. The purpose of section 52 of the Act is therefore to support families through the provision of flexible hours and an appropriate degree of choice.
157. Under section 52 of the Act, education authorities must, in exercising their functions under section 50 (duty to consult and plan on delivery of early learning and childcare) and 51 (method of delivery of early learning and childcare) have regard to the desirability of ensuring that the method by which it makes early learning and childcare provision available under Part 6 of the Act is flexible enough to allow parents an appropriate degree of choice when deciding how to access the service.
158. It is envisaged that education authorities will provide patterns of hours of early learning and childcare provision which allow a degree of choice for parents to support their patterns and needs. The range should be established through consultation with representative populations of parents under section 50 of the Act; and, delivered within the minimum framework as defined in section 51 of the Act.
159. The introduction of flexibility and choice, following consultation, will require significant reconfiguration of services by education authorities; and, it is recognised that this is best achieved through year on year incremental change. It is expected that following the introduction of a minimum of 600 hours from August 2014 which may constitute initially one new additional model in each education authority in the first year only, further year on year improvements to flexibility and choice are built up as planned and published by education authorities following statutory consultations required by section 50 of the Act. Annual incremental increases in funding from the Scottish Government will enable education authorities to increase flexibility and choice on an annual basis.
160. Flexibility means moving away from what has been a default model of provision of 2.5 hours per day; to, providing models of provision that support a wider range of needs of parents including supporting parents who are employed, training or studying. Those models will be defined by education authorities in consultation with local populations of parents.

161. Different models will have different implications on staffing and costs and appropriate accommodation. It will take time for education authorities to find out the views of parents and to re-configure services towards those needs of parents. The Scottish Government has provided additional funding to local authorities to do this, and has estimated increased levels of funding from 2014 – 2019. This recognises that education authorities will need to build up models and choice incrementally, year on year. In addition, the Scottish Government will provide capital funding over the first three years to enable local authorities to increase and/ or adapt their accommodation.
162. The aim is that children experience consistent high quality early learning and childcare. This means consistency of relationships with staff and other children; and consistency of experiences. This sits alongside the aim to alleviate the need for parents to change their child's provider during the day to provide additional hours due to a model of funding and placements based on one minimal session of 2 ½ hours a day. Longer sessions of early learning and childcare should be available through local authorities and their partner providers for parents who need this.
163. Education authorities can continue to secure additional capacity and flexibility through partner providers; and, the contribution of high quality partner providers is a crucial element of funded early learning and childcare.
164. It is important to stress that the flexibility and choice is around patterns or models of provision, e.g. 3 hours 10 minutes a day; or 4 hours a day; or 8 hours a day across a range of days a week. It will be for local authorities to design and develop those models in response to consultation; and, to design systems of choice. Appropriate choice under section 52 of the Act is therefore intended to be around models, and not individual providers or places.

Further Issues for Consideration

Consultation under the Schools Consultation (Scotland) Act 2010

165. Under the 2010 Act, education authorities must consult on certain relevant proposals. Specifically, education authorities must consult on any closure, establishment or relocation proposal.⁹⁶ In terms of paragraph 1(a) and (b)(i) of Schedule 1 to the 2010 Act, a closure proposal includes a proposal to permanently discontinue a nursery school⁹⁷ or discontinue all the nursery classes in a school⁹⁸. In terms of paragraph 2(a) and (b) of Schedule 1 to the 2010 Act, an establishment proposal is a proposal to establish either a new nursery school⁹⁹ or a new nursery class in a school¹⁰⁰. In terms of paragraph 3 of Schedule 1 to the 2010 Act, a relocation proposal is a proposal to relocate (in whole or in part) a school or nursery class¹⁰¹.

166. The consultation requirements under the 2010 Act are engaged where there is a proposal to establish a new nursery school or new nursery class in a school where no such school or class previously existed. Therefore, where education authorities already have early learning and childcare provision in a stand-alone setting (ie a nursery school) or as part of a school (ie a nursery class) and they wish to add to that provision, the 2010 Act provisions are not engaged. In these circumstances, education authorities do not need to consult in order to add new cohorts or ages of young children to those existing schools/classes which they are under a duty to add under section 47(2)(c)(ii) of the Act.

167. The consultation requirements under the 2010 Act apply where there is a proposal to establish a nursery school or nursery class where one did not previously exist. So, for example, where an education authority plans to add early learning and childcare provision (ie a nursery class) to a school that does not have existing early learning and childcare provision (this could be a primary, secondary or special school); or, plans to provide early learning childcare in a new stand-alone facility (ie a nursery school), where there is similarly no existing provision, then an education authority is required to consult.

⁹⁶ See paragraphs 1, 2 and 3 of Schedule 1 to the 2010 Act.

⁹⁷ 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 Education (Scotland) Act 1980 (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 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 Act defines “early learning and childcare” as having the same meaning as in Part 6 of the 2010 Act.

⁹⁸ 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 Act) defines “nursery class” as being a class which provides early learning and childcare.

⁹⁹ Paragraph 2(a) of Schedule 1 to the 2010 Act refers to “school”; for the definition of “school” see footnote 94.

¹⁰⁰ Paragraph 2(b) of Schedule 1 to the 2010 Act refers to “stage of education”. Paragraph 12(b) of Schedule 1 to the 2010 Act defines “stage of education” as meaning a nursery class in a school; for the definitions of “nursery class” and “school” see footnotes 95 and 94 respectively.

¹⁰¹ For the definitions of “nursery class” and “school” see footnotes 95 and 94 respectively.

168. Therefore, in order to expedite expansion and reconfiguration of early learning and childcare under the Act, the Children and Young People (Scotland) Act 2014 (Ancillary Provision) Order 2014¹⁰², which came into force on 28 June 2014, temporarily suspends the requirement to consult under paragraphs 2(a) and (b) of Schedule 1 to the 2010 Act on any proposal to establish a new nursery school or a new nursery class which provides early learning and childcare. This suspension would therefore apply where the education authority is under a duty to deliver early learning and childcare under section 47(1) of the Act.

169. This means that in practice, where an education authority would previously have been obliged to consult on the establishment of a new nursery school or a new nursery class, the requirement to consult under the terms of the 2010 Act will no longer apply; and, any school or local authority facility can be adapted or new facility built with a view to establishing early learning and childcare provision there without the need to consult. This suspension will be in place until 31st March 2017¹⁰³.

170. This suspension of the 2010 Act requirements does not apply to education authority proposals to relocate a nursery school or nursery class or proposals to close a nursery school or all the nursery classes in a school¹⁰⁴.

171. While consultation under section 50 of the Act¹⁰⁵ has a wider purpose to consult on how early learning and childcare should be made available, such consultation could usefully inform decisions to open or establish early learning and childcare provision.

¹⁰² SSI 2014/132 which is available via this link: <http://www.legislation.gov.uk/ssi/2014/132/contents/made>

¹⁰³ The effect of article 3(2) of the Children and Young People (Scotland) Act 2014 (Ancillary Provision) Order 2014 is that the requirements of the 2010 Act continue to be suspended in relation to decisions made by an education authority before 31st March 2017 to establish a new nursery school or new nursery class,

¹⁰⁴ In those circumstances the requirement to consult under paragraphs 1 and 3 of Schedule 1 to the 2010 Act continue to apply.

¹⁰⁵ Section 50 of the Act makes provision about the duty to consult and plan on the delivery of early learning and childcare. It requires an education authority, at least once every 2 years, to consult representative populations of parents about how it should make early learning and childcare available and having considered the views expressed in that consultation prepare and publish plans for how it intends to make early learning and childcare available.

Delivery of Rural Early Learning and Childcare

172. It is recognised when planning that there are increased barriers that families in rural areas face in accessing early learning and childcare; and, that expansion will have particular challenges for education authorities as well as presenting opportunities through more integrated service delivery. Local authorities in rural areas will therefore be aware of the need to work closely with partners from the private, third and independent sectors to deliver integrated and accessible services. *The Commission on the Delivery of Rural Education* (April 2013)¹⁰⁶ made 38 recommendations including that local authorities should:
- 173. Work with their partners to support the development of rural schools as community hubs offering integrated early years services;
 - 174. Recognise the importance of accessible early years provision in rural areas and work with rural schools and other providers to ensure this is available aligned with school areas where appropriate;
 - 175. Work closely with voluntary and third sector services to facilitate viable wrap around care provision seeking innovative solutions to support families; and
 - 176. Consider, with health and other community planning partners, rural education holistically from early years to further and higher education, actively seeking solutions to enhance the viability of rural communities.

Transport

177. Flexibility and access also depend upon locality of provision and the need for transport. Transport is recognised as a key issue for access, most recently in the *Commission on the Delivery of Rural Education* (April 2013). Compressing days and integrating services may reduce the need for travel. Under section 37 of the 2000 Act education authorities are able to make arrangements for transport, although they are not under a duty to do so. Therefore transport is discretionary. Local authorities can look at other ways of supporting access to transport through planning and integration within the context of wider transport plans such as travel to work plans and bus routes.

¹⁰⁶ <http://www.scotland.gov.uk/Resource/0041/00418669.pdf>

Cross boundary arrangements

178. Education authorities have admission policies for those children entitled to early learning and childcare. This can include cross boundary arrangements such as prioritising children from their own authority; parents from other education authority areas who work in their education authority area; and, other parents who choose for proximity or other reasons to seek a place in a host authority other than their home authority. Where an education authority accepts children from neighbouring authorities, this can impact on funding as well as responsibilities for quality assurance, staff training and CPD in host authorities.
179. Larger cities may experience the most placements of children from other authorities, but, may also benefit from the inward employment and economic benefits.
180. Where smaller education authorities may generally experience even smaller numbers of importing and exporting children for places, administrative procedures to recover costs may be disproportionate to the benefits.
181. It is recommended that a cross-boundary no charging policy is implemented uniformly by education authorities. However this clearly only works where authorities consistently implement a cross boundary no charging policy. Reciprocal arrangements will work best where there is a balance of children in and out of an education authority area. It is recommended that local authorities meet on a regional or neighbouring basis to identify movement and places across boundaries; and, reach sustainable and mutually beneficial arrangements. Where there is an imbalance of children, there needs to be a clear agreement on funding and admission policies. On-going work will be required to resolve those issues.
182. It is important to note that in addition to the benefits that early learning and childcare brings to young children, it is also essential to removing barriers and increasing flexibility for those parents who are working, training or studying. Reciprocal cross boundary arrangements are therefore fundamental to realising the social and economic benefits of early learning and childcare for families and society.

Partner providers – securing high quality provision

183. Under section 47 of the Act, it is the duty of the local authority to secure the mandatory amount of early learning and childcare for each eligible young child. Under section 35 of the 2000 Act, the local authority can enter into arrangements with any persons to make that provision for children under school age. Under section 66(1A)¹⁰⁷ of the 1980 Act, Scottish Ministers have the power to cause inspection by Education Scotland of those providing early learning and childcare under a section 35 arrangement. .
184. In addition, under the Public Services Reform (Scotland) Act 2010 (the PSR Act), all care services classed as day care of children including nurseries, children's centres, crèches, and childminders must be registered with the Care Inspectorate. The Care Inspectorate has a statutory responsibility to inspect and regulate all registered providers of day care and childminding against the National Care Standards¹⁰⁸; and, under section 50 of the PSR Act, Scottish Ministers are required to keep any standards under review.
185. Therefore, all providers of early learning and childcare delivering the entitlement to early learning and childcare can be inspected by Education Scotland and will be inspected by Care Inspectorate¹⁰⁹.
186. It is envisaged that the expansion in early learning and childcare may increase the use of childminders as partner providers, especially for younger 2 year old children. In consideration of how best to exercise their powers of inspection in relation to new providers and expanded cohorts of children, Education Scotland will focus initially on building capacity and providing support to childminders to deliver early learning and childcare as envisaged under the Act. Further detail on what is meant by early learning and childcare is contained in the National Practice Guidance on Early Learning and Childcare: Building the Ambition¹¹⁰.
187. Under section 3 of the 2000 Act, Scottish Ministers and local authorities (the education authority) 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, local authorities are under a duty to endeavour to secure improvement in school education (which includes early learning and childcare) which is provided by partner providers under arrangements made under section 35 of the 2000 Act.

¹⁰⁷ Subsection (1A) was inserted into section 66 of the Education (Scotland) Act 1980 by section 36 of the 2000 Act.

¹⁰⁸ National Care Standards for early education and childcare up to the age of 16 - link

¹⁰⁹ Under section 115 of the Public Services Reform (Scotland) Act 2010, Scottish Ministers may request Education Scotland to carry out a joint inspection with Social Care and Social Work Improvement Scotland in relation to the provision of children's services. The Public Services Reform (Joint Inspections)(Scotland) Regulations 2011 (SSI 2011/183) makes provision about how joint inspections will take place.

¹¹⁰ National Practice Guidance on Early Learning and Childcare: Building the Ambition – link once published

188. Therefore local authorities also have a key role in securing improvement of quality in their own and partner provider early learning and childcare services. Local authorities undertake this through quality improvement, learning and development, CPD and other forms of support. This is most effective when carried out jointly with their own and partner providers. Local authorities should develop an integrated approach to work through forums and networks with their partner providers 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.
189. Representative bodies of private and third sector providers also contribute significantly to quality assurance and improvement; and, work in partnership locally and nationally to achieve this.

Commissioning and contracting partner providers

190. Education authorities have a range of approaches to commissioning, procuring and contracting partner providers to secure positive outcomes for children, depending for example upon the size of the local authority and scale of partner provision. It is not appropriate to assess predominantly on costs when quality is paramount. Education authorities will take Care Inspectorate and Education Scotland inspection indicators into consideration when contracting partners.
191. Approaches include formal procurement processes, services level agreements, and grant funding.
192. It is essential that whatever approach is adopted by education authorities, partner providers are treated equitably; and, that there are transparent decision making processes in place. There should also be clear systems of feedback where providers are not selected as partners.
193. The Act will increase the level of flexibility in terms of patterns of hours that can be offered to parents; and, education authorities will achieve this through reconfiguration of their own services as well as being able to use the flexibility and capacity offered by partner providers including full days and non-term time days. The models of eligible provision will be decided locally by education authorities following consultation and will be made clear through published plans.¹¹¹
194. It is important to partner providers that contracts recognise the importance of sustainable business models and do not restrict this. This includes clearly agreed and prompt payments. While it is helpful for partner providers that their contracts are on longer terms such as 3 yearly, there may also be a need for one year contracts in relation to issues of quality or flexibility as provision is reconfigured following local consultation.
195. Education authorities may be able to support partner providers seeking to reconfigure their provision to meet flexible patterns determined by local authorities. There are also other organisations such as the National Day Nurseries Association (NDNA)¹¹², the Scottish Childminding Association (SCMA)¹¹³, Scottish Out of School Care Network (SOSCN)¹¹⁴, CALA Childcare Solutions¹¹⁵, and Scottish Pre-school Play Association (SPPA)¹¹⁶ who will provide support in developing, expanding and adapting provision; and providing quality assurance and improvement; and, business or organisational support.

¹¹¹ In 2014, the first year of implementation, local authorities will be prioritising the delivery of 600 hours and may not be in a position to offer a range of choice around different patterns of provision.

¹¹² NDNA: <http://www.ndna.org.uk/about-us/ndna-scotland>

¹¹³ SCMA: <https://www.childminding.org/>

¹¹⁴ SOSCN: <https://www.soscn.org/>

¹¹⁵ CALA: <http://calachildcaresolutions.co.uk/>

¹¹⁶ SPPA: <http://www.sppa.org.uk/>

Local funding arrangements – partner providers

196. Section 33 of the 2000 Act covers the provision of early learning and childcare funding. It is the responsibility of local authorities to determine fair and sustainable settlements locally with partner providers, while securing high quality provision. Partner providers are an essential and integral part of our current system of early learning and childcare; and, it is essential that provision is high quality and sustainable. It is in the interest of the local authority to reflect costs of providers in their local settlements if they are to receive high quality and sustainable services. This will impact on staff salaries and pensions, and, the quality and stability of staff themselves. It is essential that local authorities have open, transparent and collaborative relationships and arrangements with partner providers.
197. Partner providers can range from third sector organisations, to social enterprise, to private businesses and to childminders. It is not for local authorities to comment upon or seek to intervene in those organisations' business arrangements such as fees charged out-with the funded entitlement. It will be important for local authorities to have clear local arrangements with partner providers for how payments are administered to parents paying further fees for additional provision and helpful to partner providers to be consulted on those processes.
198. Partner 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 local authority providers who charge fees will be aware of other complex systems of subsidy such as childcare vouchers or the child care element of working tax credit for parents and local authorities may therefore find it helpful to work with partner providers to work out the simplest systems for parents and partner providers.
199. It would not be expected that local authorities deduct payments to partner providers 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.
200. Education authorities do have duties in relation to securing alternative early learning and childcare where a young child is absent due to prolonged ill health¹¹⁷ ¹¹⁸. 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 young child continues to receive early learning and childcare elsewhere under section 14 of the 1980 Act¹¹⁹ ¹²⁰. Consistency for the child is very important in such circumstances.
201. Local authorities should be transparent about their rates for partner providers within the terms of commercial confidentiality.

¹¹⁷ Section 14 was substituted by section 40 of the 2000 Act.

¹¹⁸ Guidance on the Education of Children Absent from Schools through ill-health, Scottish Government, 2001.

¹¹⁹ Section 14 was substituted by section 40 of the 2000 Act.

¹²⁰ Guidance on the Education of Children Absent from Schools through ill-health, Scottish Government, 2001.

202. Local authority fees for parents for discretionary early learning and childcare should also be transparent. It is unlikely that partner provider costs will be the same as local authority fees, but it is not expected that where local authority fees are locally subsidised partner providers costs are expected to match those lower, subsidised fees.

Meals, Snacks and Drinks

203. 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 will also apply to an eligible young child who receives early learning and childcare in a nursery school¹²¹.
204. Under section 53(2) of the 1980 Act where the education authority provides a school lunch in a nursery school, they must charge for this; and, under section 53(3) of the 1980 Act they must provide a free school lunch for children whose parent(s) are or, as the case may be, the child is, in receipt of certain qualifying benefits¹²²¹²³.
205. Under section 53A of the 1980 Act an education authority must promote the availability of school lunches in nursery schools; and, encourage young children to take those lunches, especially those entitled to free school lunches.
206. Under section 53B of the 1980 Act an education authority must take reasonable steps to ensure that an eligible young child who is entitled to a free school lunch is not identified by anyone other than authorised staff at the nursery school¹²⁴.
207. Section 53(2B) of the 1980 Act provides education authorities with discretionary powers to provide food or drink at times of the day other than lunch time, either free or at a cost. Therefore education authorities can provide snacks free or at a charge.
208. The powers and duties under section 53 of the 1980 Act explained above do not extend to children who receive early learning and childcare through partner providers.

¹²¹"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 Children & Young People (Scotland) Act 2014 means schools and classes which provide early learning and childcare.

¹²² Section 53(3)(a) and (b) of the 1980 Act lists the qualifying benefits; these are where the parent or the child is in receipt of benefits such as income support, income based job-seekers allowance, support under Part VI of the Immigration and Asylum Act 1999 or employment and support allowance; and regulations made under section 53(3)(a)(iv) and (b)(iii) of the 1980 Act – the Education (School Lunches)(Scotland) Regulations 2009 and the Education (School Lunches)(Scotland) Amendment Regulation 2013 – specify child tax credits, working tax credit and universal credit as qualifying benefits.

¹²³ Note that the amendments made by Part 17 of the Act remove this requirement thereby enabling authority's to provide school lunches free of charge to those pupils who satisfy such conditions as the authority think fit. However, at the time of issuing this Guidance these amendments have not been brought into force.

¹²⁴ Paragraph 2(4)(b) of Schedule 5 to the Act inserts a new subsection (1A) into section 53B, for Ministers to prescribe, through regulations, circumstances where the duty to protect identity will not apply.

209. As early learning and childcare becomes more flexible and in some cases will include sessions that straddle lunch times in the middle of the day, more children will become eligible for a free school lunch where they are attending an education authority setting.
210. The Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2008¹²⁵ do not cover early learning and childcare¹²⁶. *Setting the Table:* Nutritional guidance and food standards for early learning and childcare providers¹²⁷ has been developed to support providers of early learning and childcare to meet the Scottish Government National Care Standards for Early Education and Childcare up to the age of 16.¹²⁸

Milk

211. Nursery milk can be provided under the Nursery Milk Scheme established under the Welfare Food Regulations 1996¹²⁹. The Nursery Milk Scheme enables children under 5 to receive free of charge 189 ml (1/3 pint) of milk for each day they attend approved day care facilities¹³⁰ for 2 hours or more.
212. The Nursery Milk Scheme is run by Department of Health on behalf of the Devolved Administrations of the UK (because it is part of the Welfare legislation which is reserved) and the milk used in Scotland is paid for by the Scottish Government.
213. The Nursery Milk Scheme is run on a pay and reclaim basis so childcare settings buy the milk and reclaim the costs from the Nursery Milk Reimbursement Unit¹³¹.

¹²⁵ SSI 2008/265.

¹²⁶ See regulation 2(1) where the definition of "pupil" expressly excludes reference to pre-school children as defined in section 1(4B) of the 1980 Act.

¹²⁷ *Setting the Table. Nutritional guidance and food standards for early years childcare providers in Scotland*, NHS Health Scotland, 2014 <http://www.healthscotland.com/documents/21130.aspx>.

¹²⁸ Ref/ link to National Care Standards Early Education and Childcare up to the age of 16

¹²⁹ SI 1996/1434; these Regulations are made under section 13 of the Social Security Act 1988 and such Schemes are reserved to the UK Government by virtue of section J5 of Schedule 5 to the Scotland Act 1998.

¹³⁰ Regulation 18(2) of the Welfare Food Regulations 1996 sets out an approved day care provider is which includes a registered child minder and a registered day care provider.

¹³¹ <http://www.nurserymilk.co.uk/>

Enforcement of Part 6 of the Act

214. Any concerns regarding whether a local authority is fulfilling its statutory obligations in relation to early learning and childcare should be pursued initially through the local authority complaints process and then ultimately the Scottish Public Service Ombudsman¹³².
215. Section 70 of the 1980 Act will also apply to the discharge of any duties relating to early learning and childcare under the 1980 Act and the Act. Where, for example, Ministers are satisfied that an authority has failed to fulfil its statutory duties relating to early learning and childcare, then section 70 enables Scottish Ministers to require education authorities to discharge those duties.

¹³² <http://www.spso.org.uk/>

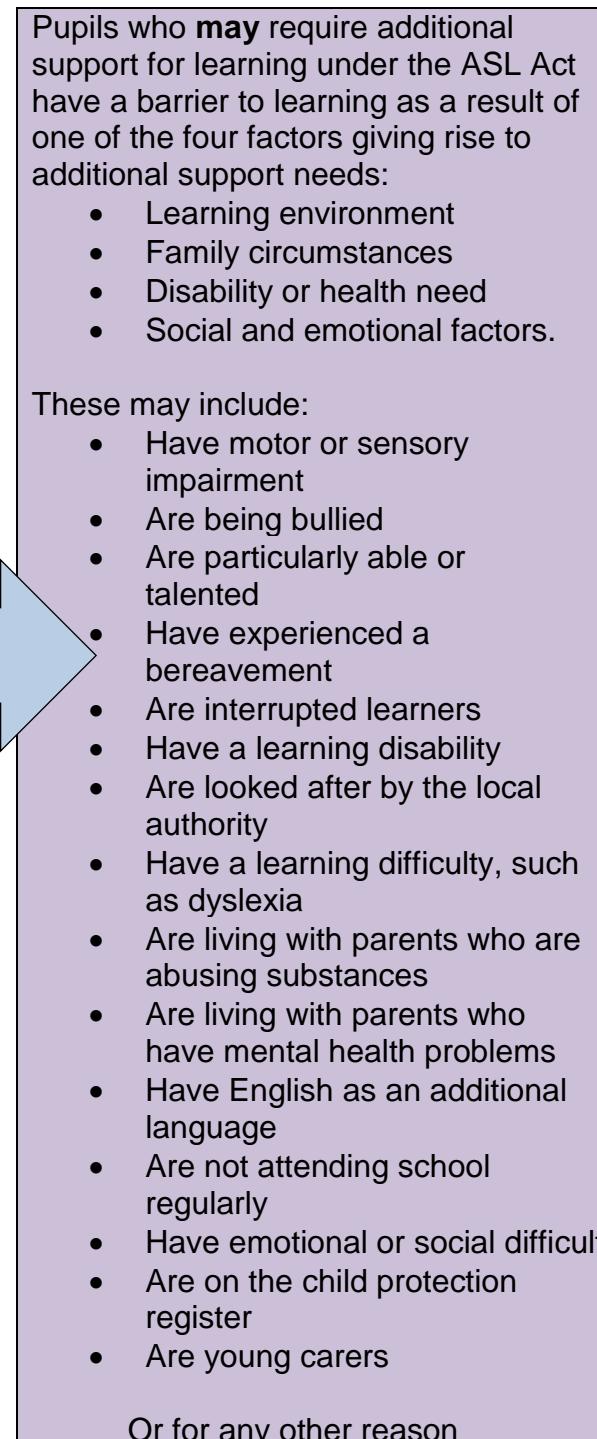
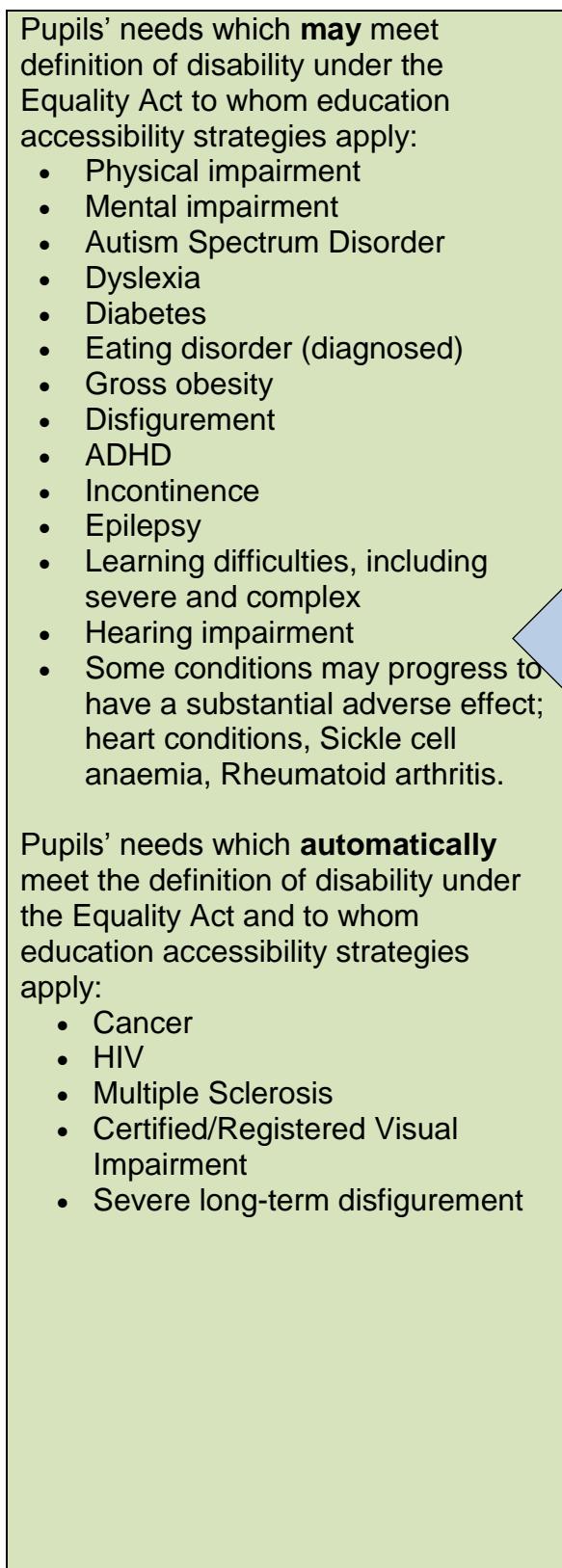
Annex A

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Annex B

Overlap between the Equality Act and the Additional Support for Learning Act definitions of children and young people



These are not exhaustive lists. The purpose is simply intended to highlight the areas where discrimination and disadvantage can occur.

Notes to Appendix B

1. Not all children who meet the definition of disabled will have additional support needs. For example, those with severe asthma, arthritis or diabetes may not have additional support needs but may have rights under the Equality Act 2010 if their impairment has a substantial and adverse, long-term effect on their ability to carry out normal day-to-day activities.
2. Similarly, as can be seen above, not all children with additional support needs will meet the definition of disability under the Equality Act 2010. In particular some children whose emotional and behavioural difficulties have their origins in social or domestic circumstances may fall outside the definition. The needs of these children would be met under the 2004 Act.
3. Some of these groups may need the provision of additional support from school staff or other professionals and possibly different methods of curriculum delivery. The important focus is that of the needs of the individual child or young person at all times.



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