



Department
for Education

Statutory Guidance for Local Authorities on the Delivery of Free Early Education for Three and Four Year Olds and Securing Sufficient Childcare

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Introduction

This is statutory guidance from the Department for Education for English local authorities on their duties under sections 6, 7 and 11 of the Childcare Act 2006. **It is effective from 1 September 2012** and replaces the *Code of Practice for Local Authorities on Delivery of Free Early Years Provision for Three and Four Year Olds* (September 2010) and *Securing Sufficient Childcare – Statutory guidance for local authorities in carrying out their childcare sufficiency duties* (2010).

Section 6 places a duty on English local authorities to secure sufficient childcare for working parents.

Section 7 places a duty on English local authorities to secure free early years provision. Regulations made under section 7 set out the type and amount of free provision and the age of children to benefit. This guidance refers to 'early years provision' as 'early education' or the 'free entitlement to early education'.

Section 11 places a duty on English local authorities to assess childcare provision. Regulations made under section 11 set out how the assessment must be prepared and published.

Local authorities **must** have regard to this guidance when seeking to discharge their duties under sections 6, 7 and 11 of the Childcare Act 2006 and **should not** depart from it unless they have good reason to do so.

The guidance seeks to assist local authorities, providers and parents by making it clear:

- what **outcomes** different measures are seeking to achieve, which should guide local authorities in their interpretation of the guidance;
- what is a legal duty **required** by legislation; and,
- what local authorities **should** as a matter of course do to fulfil their statutory responsibilities and ensure effective delivery.

This guidance does not prescribe matters which are rightly for local determination; local authorities must work with providers to plan and manage local provision to meet the needs of families and children in their area. Local authorities should not intervene in providers' private business outside of the free entitlement. This document does not provide guidance on how providers operate their private businesses, including charges for provision over and above the free entitlement.

Future policy intentions

The two year old entitlement

The Government plans to introduce a new targeted entitlement for two year olds to access free early education. This is part of the Government's Fairness Premium, to drive up social mobility and improve life chances. The primary focus will be on disadvantaged children, who are currently less likely to access the benefits of early education.

The new entitlement will be implemented in two phases. In September 2013 (phase one), around 130,000 (20%) two year olds in England will be able to access free early education places. From 2014 (phase two), the entitlement will be extended to around 260,000 (40%) two year olds.

The Government consulted between November 2011 and February 2012 on proposed eligibility criteria for the **first** phase of the entitlement. The consultation also included a number of proposals which are common across both phases of the entitlement; including proposals on start-dates for the free places and on the quality and flexibility of provision.

The Government's intentions regarding the first phase of the entitlement are set out in the Government's response to the consultation which can be found at: <http://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1782&external=no&menu=3>. Two year olds who meet the Free School Meals criteria, or who are looked after by the local authority, will be eligible for the free places in the first phase. The Government intends to make secondary legislation on the two year old entitlement, subject to parliamentary approval. The legislation for the first phase is planned for Autumn 2012 – one year in advance of the entitlement coming into force, in order to give early clarity to local authorities, providers and parents. The Government intends to publish a revised version of the current guidance alongside the secondary legislation. This will cover the free entitlement for two, three and four year olds, and will contain sub-sections on the specific requirements relating to two year olds.

New eligibility criteria will be required for the extension of the entitlement to more children in the second phase, from 2014. The primary focus will remain on supporting economically disadvantaged families, and the Government will also consider whether additional groups of children, such as children with special educational needs or disabilities, should be included. The Government plans to consult on proposals for the new criteria in summer 2012. The secondary legislation and guidance will then be amended to incorporate the eligibility criteria for the second phase.

Assessing the sufficiency of childcare

The Department intends to introduce measures to repeal the requirement on local authorities to assess the sufficiency of childcare in their area (section 11 of the Childcare Act 2006) and the associated regulations at the earliest opportunity.

Part A: Free early education for three and four year olds

Section A1: The Free Entitlement

Outcome:

All eligible children are able to take up high quality early education regardless of their parents' ability to pay – benefiting their social, physical and mental development and helping to prepare them for school. Evidence shows that regular, good quality early education has lasting benefits for all children.

To secure delivery:

Local authorities **are required** by legislation to:

1.1 Make available sufficient **free** early education places offering 570 hours a year over no fewer than 38 weeks of the year for every eligible child in their area from the relevant date following their third birthday until they reach compulsory school age (the beginning of the term following their fifth birthday) and to ensure that every place is provided free of charge.

1.2 Ensure they meet their duties under the Equality Act 2010 when securing free early education places.

1.3 Local authorities must make a place available from the start of the term beginning on or following the dates set out below.

- Children born in the period 1st January to 31st March: **1st April** following the child's third birthday.
- Children born in the period 1st April to 31st August: **1st September** following the child's third birthday.
- Children born in the period 1st September to 31st December: **1st January** following the child's third birthday.

Local authorities **should**:

1.4 Ensure that providers who charge for any goods or services, for example meals, optional extras or additional hours of provision outside of the free entitlement, do not do so as a condition of children accessing their free entitlement.

1.5 Ensure that three and four year old children moving to England from another country can access a free early education place on the same basis as any other eligible child in the local authority area.

1.6 Deliver the free entitlement in a way that reflects the local market through providers across the maintained, private, independent and voluntary sectors.

1.7 Enable children to take up a free place at a provider who, for good reason, may not be able to open for 38 weeks a year or for 15 hours a week where this suits the parent's needs.

1.8 Promote equality and inclusion, particularly for disadvantaged families, looked-after children, children in need and children with disabilities or special educational

needs by removing barriers of access to free early education and working with parents to give each child support to fulfil their potential.

1.9 Encourage take up of the free entitlement and conduct outreach activities to identify children who are not taking up their full entitlement and support them to do so.

Section A2: Flexibility

Outcome:

Children are able to take up their full entitlement to free early education at times that best support their learning, and at times which fit with the needs of parents.

To secure flexible delivery:

Local authorities **should**:

2.1 Fund providers to deliver free early years provision for three and four year olds at times and in patterns that support parents to maximise the use of their child's entitlement.

2.2 Encourage providers to offer flexible packages of free early education, subject to the following standards on flexibility:

- No session longer than 10 hours;
- No session shorter than 2.5 hours;
- Not before 7.00am or after 7.00pm.

2.3 As a minimum ensure that parents are able to access their child's free early education place in the following patterns:

- 3 hours a day over 5 days of the week;
- 5 hours a day over 3 days of the week.

2.4 Act as a broker between overall parental demand in the area and provider capacity, seeking to provide the maximum possible flexibility where demand exists beyond the guaranteed models referred to in 2.3.

2.5 Support parents to identify providers who can offer a free place on the day and hours they need, noting that the free entitlement does not offer a guarantee of a place at any one provider.

2.6 Consider the impact on continuity of care for children when enabling children to access the free entitlement at more than one provider.

2.7 Enable parents to take up patterns of hours which "stretch" their child's entitlement by taking fewer free hours a week over more weeks of the year, where there is provider capacity and sufficient demand from parents.

2.8 Publish their local flexible offer and inform the local Family Information Service (FIS) what is available.

Section A3: Quality

Outcome:

All children are able to take up their entitlement to free early education in a high quality setting. Evidence shows that higher quality provision has greater developmental benefits for children particularly for the youngest children. The biggest single indicator of high quality provision is the qualification levels of staff in a setting.

To secure and improve quality:

Local authorities **are required** by legislation to:

3.1 Improve the well-being of young children in their area and reduce inequalities between young children in their area.

3.2 Deliver the free entitlement through early years providers who deliver the full Early Years Foundation Stage (EYFS) and are registered with Ofsted or are schools which are exempt from registration with Ofsted.

3.3 Provide information, advice and training to childcare providers.

Local authorities **should**:

3.4 Not refuse free entitlement funding to providers who have not yet been inspected by Ofsted¹, where the local authority is satisfied that the provision is of sufficient quality.

3.5 Not fund providers rated 'inadequate' Ofsted unless the local authority is satisfied that the setting is likely to improve significantly at re-inspection or within an agreed timescale.²

3.6 Secure alternative provision, as soon as is practicable, for children who are already receiving their free entitlement at a provider when it is rated 'inadequate' by Ofsted, and where the local authority is not satisfied that the setting is likely to improve at re-inspection or within an agreed timescale.

3.7 Only fund providers rated 'satisfactory' if they also can evidence a commitment to improving the quality of their provision by meeting at least one of the following additional eligibility criteria:

- active participation in a quality improvement programme that the local authority considers appropriate;
- active participation in a peer-to-peer support network (including childminding networks) that the local authority considers appropriate;
- assessed as sufficiently high quality through a local authority quality assessment system;
- a level of workforce qualifications that indicate higher quality provision (for example, all staff having or actively working towards a level 3 qualification, or having a graduate leader).

¹ Or an independent inspection body approved by the Secretary of State

² Ofsted has recently consulted on a proposal to replace its inspection rating 'inadequate' with 'requires significant improvement or enforcement' and 'satisfactory' with 'requires significant improvement'. If this change is made to the inspection judgements, the new equivalent judgements will apply.

3.8 Consider whether to require providers rated 'satisfactory' to meet more than one of the additional eligibility criteria in para 3.7, in order to raise the quality of provision in the area or if there is sufficient high quality provision already available.

3.9 Consider whether to require providers rated good to meet one or more of the above additional eligibility criteria in para 3.7 to promote further quality improvement in their area.

3.10 Fund providers rated 'good' or 'outstanding' by Ofsted to deliver free early education places for three and four year olds, unless the local authority has reason to believe that the quality of provision has deteriorated significantly since their last Ofsted inspection, or the provider has ceased to meet any eligibility criterion (as set out in para 3.9) that the local authority required it to meet.

3.11 Ensure that providers are aware of the quality criteria they have to meet in order to deliver free places to three and four year olds.

3.12 Withdraw funding as soon as is practicable from providers who are not demonstrating the sufficient quality improvement required to deliver the free entitlement.

Section A4: Funding the Free Entitlement

Outcome:

Fair and transparent funding that supports a diverse range of providers. This diversity enables parents to choose a provider that best meets the needs of their child.

To fund the free entitlement:

Local authorities **are required** by legislation to:

- 4.1 Fund early years provision for three and four year olds in all sectors using a locally-determined, transparent formula – the early years single funding formula (EYSFF).
- 4.2 Construct a formula composed of either a single base rate for all providers or a number of base rates differentiated by type of provider according to unavoidable cost differences. The formula must also include a deprivation supplement, and must be based on a count of children attending provision conducted at least three times a year.
- 4.3 Issue all providers with an indicative budget at the beginning of the financial year which broadly reflects anticipated participation. Local authorities must also adjust budgets to reflect actual levels of participation within the financial year, across all sectors.
- 4.4 Provide Free School Meals for children who are registered pupils of a maintained school, who attend free provision both before and after lunch and whose parents are in receipt of specified benefits.

Local authorities **should**:

- 4.5 Ensure that their EYSFF is clear, simple and transparent, and in particular that:
 - the number of base rates is kept to a minimum;
 - any supplements are understood by providers and help drive positive outcomes for children;
 - rates are based, as far as is practicable, on a clear understanding of provider costs in the area.
- 4.6 Strike a balance between having suitable processes to ensure value for money and minimising administrative burdens on providers.
- 4.7 Fund children of “free entitlement” age who have already been admitted to primary school and are attending a maintained school reception class separately through the main schools budget.
- 4.8 Make clear their local policy of funding free early education places for children who move providers during the term or start later in the term.
- 4.9 Consider and determine whether to fund providers / children with exemptions from the Early Years Foundation Stage Learning and Development requirements.
- 4.10 Ensure providers do not charge parents for any hours for which the provider already receives any funding from the local authority.

4.11 Ensure providers are not penalised for short term absences of children through withdrawing funding but use their discretion where absence is recurring or for extended periods taking into account the reason for the absence and the impact on the provider.

4.12 Ensure providers are aware of the local authority policy on reclaiming funding when a child is absent from a setting during free entitlement hours.

4.13 Consider and determine whether to fund the cost of lunch when a child who would qualify for Free School Meals in a maintained school takes up their free entitlement at a private, voluntary or independent provider.

Section A5: Delivery in Partnership

Outcome:

Local authorities and providers work effectively together to ensure children can access the free entitlement in a variety of settings that meet the needs of their family.

To secure delivery:

Local authorities **are required** by legislation to:

- 5.1 Work with relevant partners to secure integrated early childhood services.
- 5.2 Act in accordance with the School Admissions Code in enabling children to take up a place in a maintained reception class from the September following their fourth birthday.

Local authorities **should**:

- 5.3 Maintain a directory of providers eligible to deliver the free entitlement.
- 5.4 Maximise parental choice by admitting all eligible providers (see 3.2) who wish to deliver the free entitlement onto the directory if they meet the required quality standards and local conditions of funding.
- 5.5 Ensure providers are aware of the process for being admitted to the directory and the implications of withdrawing from delivering the free entitlement.
- 5.6 Have an appeals procedure for providers rejected for inclusion in, or facing removal, from the directory.
- 5.7 Publicise their complaints procedure so that providers know how to complain if necessary.

Part B: Securing Sufficient Childcare

Outcome:

Parents are able to work because childcare places are available, accessible and affordable and are delivered flexibly at a range of high quality settings.

To secure delivery

Local authorities **are required** by legislation to:

B.1 Secure sufficient childcare, so far as is reasonably practicable, for working parents, or parents who are studying or training for employment, for children aged 0-14 (or up to 18 for disabled children).

B.2 Assess the sufficiency of the childcare in their area at least every three years.³

Local authorities **should**:

B.3 Take into account, in assessing what sufficient childcare means in their area and what is “reasonably practicable” for them:

- the state of the local childcare market, including the level of demand for specific types of providers, in a particular locality and the amount and type of supply that currently exists;
- the state of the labour market;
- the quality and capacity of childcare providers including their funding, staff, premises, experience and expertise; and
- the local authority’s resources, capabilities, and overall budget priorities.

B.4 Report annually to elected council members on how they are meeting their duty to secure sufficient childcare and to make this report available and accessible to parents. Local authorities are responsible for determining the appropriate level of detail in their report, geographical division and the date of publication. However, the report should include:

- a specific reference to how they are ensuring there is sufficient childcare available to meet the needs of: disabled children, children from families in receipt of the childcare element of working tax credit or universal credit, children aged 2, 3 and 4 taking up free early education, school age children and children needing holiday care;
- information about the supply and demand of childcare for particular age ranges of children, and the affordability, accessibility and quality of provision;
- details about how any gaps in childcare provision will be addressed.

³ The Department intends to introduce measures to repeal the duty on local authorities to assess the sufficiency of childcare in their area at least every three years (section 11 of the Childcare Act 2006) at the earliest possible opportunity

Part C: Information to parents

Outcome:

Parents are provided with comprehensive information about their child's entitlement to free early education and childcare options in their area so that all children are able to benefit from provision which meets their needs.

Local authorities **are required** by legislation to:

C.1 Provide information, advice and assistance to parents (of children and young people up to the age of 20) and prospective parents on the provision of childcare in their area.

Local authorities **should**:

C.2 Ensure that parents are aware of:

- the entitlement to free early education for three and four year olds;
- their right to continue to take up their free 15 hour early education place at another provider until their child reaches compulsory school age if they choose not to take up a place in a state-funded school reception class in the September following their child's fourth birthday;
- childcare options available to them including childcare settings suitable for children with disabilities and special educational needs;
- how to identify high quality provision in their area.

C.3 Ensure that parents can clearly see, from the information they receive from their provider, that they have received their child's full 15 hour entitlement completely free.

C.4 Make parents aware of the quality criteria providers delivering free early education places for three and four year olds have to meet in order to deliver free places and how each provider has met those criteria.

C.5 Have a complaints procedure for parents who are not satisfied that their child has received their free place or with any aspect of the way in which they have received it and publicise this to parents.

PART D: Legal annex and other relevant information

Summary of the key provisions in the Childcare Act 2006 relating to the entitlement to free early years provision

- Sections 1-5 require local authorities and their partners to improve the outcomes of all children under 5 and reduce inequalities.
- **Sections 6 and 11 require local authorities to assess the local childcare market and to secure sufficient childcare.**
- **Section 7 places a duty on local authorities to secure free early years provision for eligible young children in their area.**
- Section 8 enables local authorities to assist others to provide childcare (including giving them financial assistance) but says that local authorities should only provide childcare themselves if not other provider is able or willing to.
- Section 9 gives local authorities the power to place conditions of funding on providers of childcare.
- Section 12 places a duty on local authorities to provide information to parents about childcare in the area.
- Section 13 places a duty on local authorities to secure the provision of information, advice and training to childcare providers and childcare workers.
- Sections 39-48 establish the Early Years Foundation Stage (EYFS)
- Sections 31-38 and 49-98 reform and simplify the childcare and early years regulation framework.
- Section 99 allows for the collection of information about young children.

Local authorities should have regard to any statutory guidance issued under the Childcare Act 2006

Section 7 – Duty to secure prescribed early years provision free of charge

- From 1st September 2008, s7 of the Childcare Act 2006 placed a **legal duty** on local authorities in England to **secure free early years provision** for each young child in their area who has attained such age as may be prescribed but is under compulsory school age.
- Under s7 (2) of the Childcare Act local authorities must have regard to statutory guidance issued by the Secretary of State when fulfilling their duty under s7.

Regulations made under section 7

Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2008 (S.I. 2008/1724) amended by the Local Authority (Duty to Secure Early Years Provision Free of Charge) (Amendment Regulations 2010 (S.I. 2010/301) are made under s7 (1) of the Childcare Act 2006. These regulations prescribe the **type** and **amount** of free provision and the **age of children to benefit** from free

provision. These Regulations came into force on 1st September 2008 and the amendments came into force on 1st September 2010.

Type of free provision

- Local authorities **must** secure that the prescribed amount of free early years provision is available for each eligible child in their area from providers who are under a duty to deliver the Early Years Foundation Stage (the EYFS - established under s.39 of the Childcare Act).
- That is: Providers who are either a) registered on the Ofsted Early Years Register (under s.40 of the Childcare Act 2006) or b) schools which are exempt from registration on the Ofsted Early Years Register (under section 34(2) of the Childcare Act 2006) that is, certain maintained schools, approved non-maintained special schools or independent schools; **and not from** providers that are exempted from delivering the EYFS learning and development requirements under s.46 (1) or (2) of the Childcare Act.
- Local authorities **must** ensure that all parents have the option to take up their child's free early education place at a provider who delivers the full EYFS learning and development requirements.
- The regulations **do not legally require** local authorities to fund providers who have an exemption from the EYFS or to fund a child who has been exempted from the EYFS. Local authorities have discretion whether to fund such provision and the amount of such provision that they wish to fund.

Age of children to benefit from free provision

- Children become eligible for the free entitlement from the beginning of the next school term on or following the date set out below:
 - Children born in the period 1st January to 31st March: **1st April** following the child's third birthday
 - Children born in the period 1st April to 31st August: **1st September** following the child's third birthday
 - Children born in the period 1st September to 31st December: **1st January** following the child's third birthday
- These dates are consistent with those used for determining the commencement of compulsory education and ensure that every child is able to access at least six terms of early education and / or reception before they reach statutory school age.
- Although they are **not required** to do so, local authorities are not prevented from making available free provision to a child before the child becomes eligible (i.e. before the start of the next school term after the child's third birthday).

Increase to amount of free provision:

- Local authorities **must** secure availability of at least 570 hours of free provision (this works out at 15 hours per week if spread over 38 weeks) for all eligible children in their area over **at least** 38 weeks, in each 12 month period from the date a child becomes eligible until the child reaches compulsory school age.

- Local authorities **must not** condense the free entitlement into less than 38 weeks. However, nothing in the legislation prevents local authorities from “stretching” the provision offering fewer hours over more than 38 weeks when parents want that and the local authority has the capacity to deliver the entitlement in this way.
- Under the current legislation parents do not have the right to demand a particular pattern of provision.

Special Educational Needs

- Local authorities should ensure that all providers in the maintained and private, voluntary and independent sectors that they fund to deliver free early education places are aware of the requirement on them to have regard to the Special Educational Needs Code of Practice and to have a written Special Educational Needs policy.

Early Years Single Funding Formula

The School Finance (England) Regulations 2012 (S.I. 2012/335) set out how local authorities must operate their Early Years Single Funding Formula (EYSSF). The Regulations require that:

- a local authority must consult their schools forum about and decide upon an EYSSF for the financial year 2012-2013, which they must use in that year.
- in operating their EYSSF local authorities:
 - must provide budgets for providers using the most recently available data;
 - must review the budgets during or after the year using either attendance data collected during three sample weeks (census week for example) or total actual hours of attendance;
 - must redetermine the provider’s budget as appropriate;
 - must notify providers within 28 days of redetermining the budget;
 - must implement the redetermination when they consider it appropriate – which may be different for different providers;
 - must not use a factor within the formula which take into account the number of places, except where places have been specifically reserved by the authority for pupils with SEN or for children in need (following the 1989 Children Act definition) with a provider;
 - may provide differential funding to types of providers to reflect unavoidable costs;
 - must use a factor within the formula which takes into account the incidence of deprivation (a deprivation supplement); and
 - may use factors within the formula which take into account:
 - the need to improve the quality of provision by particular provider or types of provider;
 - the degree of flexibility in hours of attendance the provider makes available; and

- the need to secure or sustain a sufficiency of provision within an area.

Compulsory School Age

- Compulsory School Age is defined at Section 8 of the Education Act 1996 together with the Education (Start of Compulsory School Age) Order 1998 (SI 1998: 1607).
- A child reaches compulsory school age either on or after their 5th birthday, on whichever of the following dates is either on, or the first to follow, their birthday: 31st August, 31st December or 31st March.

Equality

- The Equality Act 2010 outlaws discrimination, harassment and victimisation and covers statutory and non-statutory early years organisations and provision. It applies to a range of protected characteristics including sex, race, disability, religion or belief and sexual orientation.
- Local authorities and other listed public authorities (which include schools) must also comply with the provisions of s149 of the Equality Act, and the Equality Act 2010 (Specific Duties) Regulations 2011, in meeting their statutory responsibilities.
- While private, voluntary and independent settings are not bound by this public sector equality duty which applies to public authorities, the principles of equity and justice underpinning the law should be applied as good practice. Where provision is overseen, coordinated or advised by the local authority or a partnership with local authority membership, the local authority will have responsibility to ensure the duties are fulfilled.

School Admissions

- Local authorities must have regard to the School Admissions Code which came into force on 1 February 2012 and applies to admissions from September 2013 in all maintained schools in England.

Admission of children below compulsory school age and deferred entry to school

- Admission authorities **must** provide for the admission of all children in the September following their fourth birthday. The authority **must** make it clear in their arrangements that:
 - parents can request that the date their child is admitted to school is deferred until later in the year or until the term in which the child reaches compulsory school age, and
 - parents can request that their child takes up the place part-time until the child

reaches compulsory school age.

Free School Meals

- Entitlement to free school meals (FSM) only applies to eligible children in maintained schools, academies and free schools. It does not apply to children in the private, voluntary or independent sector.
- In order to qualify for FSM:
 - a child must be a registered pupil of a maintained school, academy or free school;
 - a child must be receiving education before and after the lunch break (if the child is receiving part-time nursery education); and
 - under **current criteria**** the child's parent must be in receipt of any one or more of the following support payments: income support (IS); income-based jobseeker's allowance (IBJSA); income-related employment and support allowance; support under Part 6 of the Immigration and Asylum Act 1999; or the guarantee element of State Pension Credit; or be entitled to Child Tax Credit but not to Working Tax Credit and have an annual income not exceeding £16,190 (as of 6 April 2012), as assessed by Her Majesty's Revenue and Customs. A child whose parent is entitled to the Working Tax Credit four-week run-on (the payment someone receives for a further four weeks after they stop qualifying for Working Tax Credit) is also entitled to FSM.
 - a child who is in receipt of a qualifying benefit in their own right is also entitled to FSM.

** On 8 March 2012 the Welfare Reform Act 2012 received Royal Assent. The Act introduces Universal Credit, which will replace current benefits with a single payment. The plan is to introduce Universal Credit from 2013, with a phased introduction over several years. It is intended to be a simpler approach and a fairer way of determining entitlement, but it will mean that the current criteria for entitlement to free school meals will eventually be replaced by new criteria.



Department
for Education

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