

## POLICY NOTE

### THE PROVISION OF EARLY LEARNING AND CHILDCARE (SPECIFIED CHILDREN) (SCOTLAND) AMENDMENT ORDER 2021

SSI 2021/67

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

**The purpose of the instrument is to amend the Provision of Early Learning and Childcare (Specified Children) Order 2014 (“the 2014 Order”) to amend the description of an eligible pre-school child so that it includes children whose 5th birthday falls in the period beginning on 1 August and ending on 31 December.**

#### Policy Objectives

1. The objective of The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2021 is to entitle all children to funded early learning and childcare (“ELC”) whose parents or carers have decided to defer their entry to school – specifically, entry to Primary 1 (P1) - until the following year.
2. This means that children whose 5<sup>th</sup> birth date falls between the school commencement date in August and 31 December, will be entitled to an additional year of funded ELC automatically when their parent defers their school entry for a year. This brings the entitlement for these children in line with the entitlement that already exists for children whose 5<sup>th</sup> birth date is in January or February.
3. The aim of amending the eligibility criteria as currently drafted is to ensure that parents’ decisions on whether to defer their child’s P1 entry can be based on the best interests of the child and not whether they automatically qualify for access to funded ELC. This was first set out by the Minister for Children and Young People, during a parliamentary debate in October 2019:

*“The decision to defer school for their child is not one that parents take easily. It is essential that that decision is based on the wellbeing of the individual child and not based on their access to early learning and childcare. For that reason, we intend to introduce legislation to entitle all children whose school start is deferred to access funded early learning and childcare in their deferred year.”<sup>1</sup>*

#### Background

4. Allowing parents to defer their child’s entry to school is a longstanding feature of the Scottish schools system. School age is defined in sections 31 and 32 of the Education (Scotland) Act 1980<sup>2</sup>. Sections 31 and 32 provide that a child is of school age where the

<sup>1</sup> Meeting of the Parliament 2 October 2019:

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12292&i=111119>

<sup>2</sup> Education (Scotland) Act 1980: <https://www.legislation.gov.uk/ukpga/1980/44/contents>

child has reached the age of 5 on the school commencement date set by the education authority (a date in August). Where the child has not reached 5 on that date, the child is deemed not to have reached statutory school age until the school commencement date next following the child's 5th birthday.

5. Where a child is not yet 5 at the school commencement date but will turn 5 on or before the 'latest appropriate date' set by the education authority (normally a date at the end of February), the authority can admit the child to start school in August before the child's 5th birthday. It is common practice for all local authorities to invite parents to register August to December-born children to start school the year in which they turn 5. The result is that all parents have the legal right to defer their child's entry to primary school if the child is not yet 5 years old at the beginning of the school year, as they have not reached statutory school age.
6. The current position, as set out in the 2014 Act and the 2014 Order prior to the amendments in this instrument coming into force, is that the entitlement for funded ELC for children whose parents have made the decision to defer their school entry is different depending on the child's birth date. Only the youngest children, i.e. those born in January and February, are automatically entitled to an additional year of funded ELC if they defer school entry. Local authorities have discretion over a further year of funded ELC for any children born between August and December who defer school entry. The Scottish Government expects local authorities to make the decision about additional funded ELC for these children based on an assessment of wellbeing, as set out in the statutory guidance<sup>3</sup> that accompanied the 2014 Act.
7. There has been considerable interest and parental concern about the discretion over the funding of the additional year of ELC for children born between August and December who defer school entry. In response to these concerns, the Scottish Government is removing this birth date related distinction. The amendments made to the 2014 Order by this instrument will extend the duty on education authorities to secure the mandatory amount of ELC and ensure that all children eligible to defer their entry to primary school will be able to access funded ELC if their parent decides that deferring entry is in the best interests of the child. The new duty will come into force on 1 August 2023.

## **Consultation**

8. We have discussed the proposed policy change with a range of stakeholders, including individual local authorities, COSLA, and childcare sector representative bodies. We have also notified our wide stakeholder network, including organisations that represent the views of parents.
9. A full formal consultation on this policy was not possible due to prioritisation of the emergency response to the COVID-19 pandemic.
10. Before the COVID-19 outbreak, draft statutory guidance for ELC<sup>4</sup> was published for public consultation between December 2019 and March 2020. This included updated

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<sup>3</sup> Early Learning and Childcare Statutory Guidance: <https://www.gov.scot/publications/early-learning-childcare-statutory-guidance/>

<sup>4</sup> Draft Statutory Guidance for ELC: <https://consult.gov.scot/children-and-families/early-learning-and-childcare-statutory-guidance/>

sections on school deferral and ELC eligibility. This consultation received feedback on the current legislation for ELC eligibility for deferred children, with many responses calling for the current legislation to change so that all deferred children can access funded ELC in their deferred year. An independent analysis of the consultation responses is currently being produced and will be published.

## Impact Assessments

11. An Equalities Impact Assessment (EQIA) (including Fairer Scotland Duty Impact and Island Communities Impact assessments) and a Children's Rights and Wellbeing Impact Assessment (CRWIA) have been completed on the provisions in this instrument. It is not considered that this instrument will be discriminatory on the basis of age, disability, race, religion or belief, sex, sexual orientation or gender reassignment. There is no negative impact on children's rights and wellbeing.
12. The Fairer Scotland Duty Assessment process did identify that current uptake of statutory ELC for deferred children (i.e. children who defer with January and February birth dates) is higher for families from the least deprived areas. National and local government both have a role to play in making sure parents/carers are aware of their child's funded ELC entitlement. Although there is no obligation for parents to take up their child's ELC entitlement and the option to defer may not be taken by all parents, it will be important that all parents are aware of their children's entitlement to funded ELC and can make an informed decision for their child so that families in the least deprived areas are equally able to take up this option if they feel it is right for their child.
13. Before the amended duty commences, we will develop a new page on Parentclub.scot<sup>5</sup> with information about the right to defer, and information to help parents and carers to make an informed choice. We will also provide printable resources to local authorities, to share locally if required. We will also examine where other materials and resources could be made available.
14. The Island Community Impact Assessment process did identify that under the current legislative framework, deferral rates for children in each age category in island communities in general, are higher than deferral rates in non-island communities. The evidence gathered does not indicate why this could be, however we are aware anecdotally, that there can be a distinct approach to deferral in island communities, due to parental concerns about how old children will be when they complete schooling and leave home. If there is a particularly sharp rise in deferral rates and ELC uptake by these children once the new duty commences, local authorities could face capacity issues, and if these challenges arise, they could be particularly acute in an island authority due to the nature of ELC and childcare provision in an island context with a small population and where settings typically rely on a smaller workforce.
15. We will be working with island authorities as part of our working group approach. This will provide us with the opportunity to further explore any effects this policy could have on an island community which is significantly different from the effect on other communities.

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<sup>5</sup> Parent Club: <https://www.parentclub.scot/>

16. We do not consider there to be any impacts on privacy or the environment.

### **Financial Effects**

17. There is a financial cost associated with entitling children who turn five years old between the August and December after the school commencement date, to funded ELC when they defer. The Scottish Government has agreed to incorporate this additional duty and associated cost into discussions with Local Government on funding for early learning and childcare beyond the current multi-year agreement (which runs up to and including the 2021-22 financial year). There is significant uncertainty over the rate of uptake and annual additional revenue expenditure could range from £33m to £82.5m as a result. These estimates will continue to be refined to inform a future funding agreement with Local Government.
18. A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The BRIA identified benefits to children, families, providers and local authorities as a result of this policy.

Scottish Government  
Early Learning and Childcare Programme Directorate

December 2020