

**From:**

**Sent:** 05 September 2022 13:31

**To**

**Cc:**

**Subject:** RE: Petition of Bright Stars Nurseries UK Limited & The Pumpkin Patch Nursery Scotland Limited for Judicial Review & Interim Orders BRIG/23/3

**CAUTION:** This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear

I acknowledge your email and note the position.

I will take instructions and in particular our client's intention concerning the motion, attached, which were proposing to lodge with the petition today.

I also attach a copy of the Petition with the Schedule of Documents attached. The Inventory of Productions is also sent.

Kindly acknowledge receipt.

Regards

**Accredited Specialist in Data Protection and FOI Law**

Solicitors LLP

**From:**

**Sent:** 05 September 2022 13:17

**To:**

**Cc:**

**Subject:** RE: Petition of Bright Stars Nurseries UK Limited & The Pumpkin Patch Nursery Scotland Limited for Judicial Review & Interim Orders BRIG/23/3

I acknowledge receipt of your e-mail below enclosing Judicial Review which I note you indicated not to have yet lodged.

In order to provide sufficient time to consider the points raised within the petition I hereby confirm and undertake on behalf of East Lothian Council that we will not take steps to communicate our decision not to renew 1140hours funding until 13 September 2022 at which point the Council will consider its position further.

Yours faithfully,

**Service Manager - Governance  
Solicitor**

**East Lothian Council | John Muir House | Haddington | EH41 3HA**

**From:**

**Sent:** 05 September 2022 12:20

**To:**

**Cc:**

**Subject:** RE: Petition of Bright Stars Nurseries UK Limited & The Pumpkin Patch Nursery Scotland Limited for Judicial Review & Interim Orders BRIG/23/3

**Importance:** High

**CAUTION:** This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear

I attach a petition for judicial review which we intend to present this afternoon together with a motion for interim interdict.

The Petition is substantially in final form but we reserve the right to make changes given the time frame. Copies of the productions referred to in the body of the petition will follow: you have copies of these already.

Please will the Council provide an immediate undertaking not to communicate or publicise the decision to refuse to renew funding.

We have advised the Keeper's Office that a hearing may be required later today, caveat notwithstanding.

Please will you acknowledge receipt?

Regards

**Accredited Specialist in Data Protection and FOI Law**

Solicitors LLP

**From:**

**Sent:** 05 September 2022 11:54

**To:**

**Subject:** Petition of Bright Stars Nurseries UK Limited & The Pumpkin Patch Nursery Scotland Limited for Judicial Review & Interim Orders BRIG/23/3

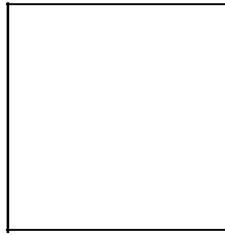
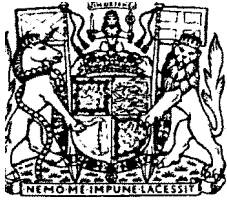
Dear ,

I shall be intimating a copy of a judicial review petition to you very shortly. Do you wish the email copied to any external solicitors or other recipients?

Regards,

**Accredited Specialist in Data Protection and FOI Law**

Solicitors LLP



Form 58.3

Form of Petition for Judicial Review

**UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION**

**THE PETITION**

**OF**

**(First) PEAR TREE NURSERIES LIMITED**, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, West Lothian, EH54 6AX; and **(Second) THE PUMPKIN PATCH NURSERY (SCOTLAND) LIMITED**, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, West Lothian, EH54 6AX

**Petitioners**

for

Judicial review of a decision of East Lothian Council to refuse to renew arrangements in relation to the 1,140 hours of funding for eligible children relating to four nurseries

*HUMBLY SHEWETH:-*

**Parties and jurisdiction**

1. That the first petitioner is Pear Tree Nurseries Limited, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, Scotland, EH54 6AX. The second petitioner is The Pumpkin Patch Nursery (Scotland) Limited, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, West Lothian, EH54 6AX. The first petitioner owns and operates three nurseries in East Lothian, being: (i) Pear Tree Nursery, West Road, 1 West Road, Haddington ("**Pear Tree West Road**"); (ii) Pear Tree Nursery, Church Street, 19 Church Street, Haddington ("**Pear Tree Church Street**"); and (iii) Pear Tree Nursery, Meadow Park, 32 Meadow Park, Haddington ("**Pear Tree Meadow Park**") (collectively the "**Pear Tree Nurseries**"). The second petitioner owns and operates Pumpkin Patch Nursery, 28 St Andrew Street, North Berwick ("**Pumpkin Patch**"). The respondent is East Lothian Council, as more fully designed in the Schedule for Service. The respondent is the education authority for East Lothian. The decision sought to be reviewed directly affects the petitioners. Accordingly, the petitioners have standing. The petitioners and respondent are domiciled in Scotland. Accordingly, this Court has jurisdiction.

2. That the date on which grounds giving rise to the petition first arose was 31 August 2022. On that date, the respondent confirmed that it would not renew the funding agreements in relation to the 1,140 hours funding for eligible children within the Pear Tree Nurseries and Pumpkin Patch and that all such funding would cease on 30 September 2022 (the “**Decision Letter**”).

### **Remedy**

3. That the petitioner seeks orders:
  - 3.1. For reduction of the decision of the respondent dated 31 August 2022 in terms of which the respondent refused to enter into new funding arrangements in relation to each of (i) Pear Tree Nursery, West Road, 1 West Road, Haddington (“Pear Tree West Road”); (ii) Pear Tree Nursery, Church Street, 19 Church Street, Haddington (“Pear Tree Church Street”); and (iii) Pear Tree Nursery, Meadow Park, 32 Meadow Park, Haddington (“Pear Tree Meadow Park”); and (iv) Pumpkin Patch Nursery, 28 St Andrew Street, North Berwick (“Pumpkin Patch”) for the provision of the funded early learning and childcare entitlement under section 48 of the Children and Young People (Scotland) Act 2014, failing which for reduction of said decision to the extent that it relates to Pear Tree Church Street, Pear Tree Meadow Park and Pumpkin Patch.
  - 3.2. For an order *ad interim* requiring the respondent, pending determination of this Petition or further order of Court, to maintain funding in relation to each of (i) Pear Tree Nursery, West Road, 1 West Road, Haddington (“Pear Tree West Road”); (ii) Pear Tree Nursery, Church Street, 19 Church Street, Haddington (“Pear Tree Church Street”); (iii) Pear Tree Nursery, Meadow Park, 32 Meadow Park, Haddington (“Pear Tree Meadow Park”); and (iv) Pumpkin Patch Nursery, 28 St Andrew Street, North Berwick (“Pumpkin Patch”) in relation to the provision of the funded early learning and childcare entitlement under section 48 of the Children and Young People (Scotland) Act 2014 on the same terms and conditions that applied to the funding agreements with said nurseries which expired on 31 July 2022.
  - 3.3. For interdict *ad interim*, pending determination of this Petition or further order of Court, prohibiting the respondent from promulgating or otherwise advertising the contents of the respondent’s letter dated 31 August 2022.

The petitioners crave the Court to pronounce such further order, decrees or orders (including an order for expenses) as may seem to the Court to be just and reasonable in all the circumstances of the case.

4. That the petitioners challenge the Decision Letter on the following grounds.

## Statutory and policy context

5. That in terms of section 1(1) of the Education (Scotland) Act 1980 (the “**1980 Act**”), it is the duty of every education authority to secure that there is made for their area adequate and efficient provision of school education. In relation to children who are under school age, the duty imposed on education authorities is exercisable only to the extent required by section 47(1) of the Children and Young People (Scotland) Act 2014 (the “**2014 Act**”). In terms of section 47 of the 2014 Act, an education authority must, in pursuance of its duty under section 1(1) of the 1980 Act, secure that the mandatory amount of early learning and childcare (“**ELC**”) is made available for each eligible pre-school child belonging to its area.
6. That in terms of section 48 of the 2014 Act, education authorities are required to make 1,140 hours of funded ELC available for eligible children, being all 3- and 4-year-olds (and eligible 2-year-olds), in each year and a pro rata amount for each part of a year (the “**funded ELC entitlement**”). In terms of section 51 of 2014 Act, the funded ELC entitlement must be delivered in sessions of 10 hours or less and must be delivered over a minimum of 38 weeks in any given year.
7. That under section 33(1) of the Standards in Scotland Schools etc. Act 2000 (the “**2000 Act**”), the funded ELC entitlement must be provided without the payment of fees. This includes where the funded ELC entitlement is delivered through a third party (e.g. providers in the private sector) under an arrangement entered into in terms of section 35 of the 2000 Act.
8. That in August 2020 the Scottish Government in agreement with COSLA have promulgated “A Blueprint for 2020: The Expansion of Early Learning and Childcare in Scotland” (the “**Operating Guidance**”). The Operating Guidance introduced a “Funding Follows the Child” policy framework for the provision of the funded ELC entitlement. This approach is “provider neutral”. This allows parents to choose the setting for their children’s childcare, so long as the setting is entitled to provide the funded ELC entitlement. All ELC providers who wish to deliver the funded ELC entitlement must meet a national standard (the “**National Standard**”), which comprises a set of minimum quality criteria. A provider of ELC is therefore entitled to deliver the funded ELC entitlement so long as the provider (i) meets the criteria set out in the National Standard (and no additional criteria will be applied), (ii) wishes to deliver the funded ELC entitlement, (iii) has space available, and (iv) is willing to enter into a contact with the education authority.
9. That education authorities are responsible for assessing and monitoring compliance with the National Standard in all funded providers. In terms of the Operating Guidance, if a funded provider is not meeting one or more of the National Standard criteria, the education authority should begin relevant procedures to improve the quality of the service. In those circumstances, when a setting fails to meet the National Standard, the funded provider would be subject to a “service improvement period” and may need enhanced improvement support. The local authority will need to be clear

about the criteria which are not being met and how the service can improve this to ensure children receive high quality ELC.

### **Bright Stars Nursery Group**

10. That in June 2022 Bright Stars Nurseries UK Limited purchased the first petitioner's entire share capital. In July 2022, Bright Stars Nurseries UK Limited purchased the second petitioner's share capital. Bright Stars Nursery UK Limited is part of the Bright Stars Nursery Group ("Bright Stars"). Bright Stars currently operates 84 nurseries in the United Kingdom, including 13 nurseries in Scotland. When Bright Stars acquires a new nursery or collection of nurseries, its ethos is to keep the nursery's existing identity while, if necessary, improving the standards of the nursery. Bright Stars employs a \_\_\_\_\_, who is actively involved in this process alongside her colleague, \_\_\_\_\_, \_\_\_\_\_ of Bright Stars.

### **Funded provider agreements**

11. That the respondent entered into a series of one-year funded provider agreements in relation to each of the Pear Tree Nurseries and Pumpkin Patch. The latest of these ran from 1 August 2021 to 31 July 2022. As hereinafter condescended upon, the respondent has extended the funding arrangements in relation to these nurseries until 31 September 2022. The funded provider agreements are the means by which the respondent pays a funded provider (i.e. each individual setting) for delivering the funded ELC entitlement. The withdrawal of funding means that parents will no longer be able to use their chosen setting in order to receive their funded ELC entitlement.

### **Pear Tree West Road**

12. That on 27 April 2022, being before Bright Stars' involvement, the Care Inspectorate undertook an unannounced inspection of Pear Tree West Road (the "**April inspection**"). In relation to each of the four criteria assessed by the Care Inspectorate, Pear Tree West Road was assessed as "2 – Weak". In its report, the Care Inspectorate also noted that children with additional needs were not effectively supported and that "there was potential for children's health and wellbeing to be compromised as staff did not always have the right skills and knowledge". At the time of the April inspection,

At the time of the April inspection, adjustments had already been put in place in respect of staff ratios to address specific issues \_\_\_\_\_.

13. That prior to the April inspection, \_\_\_\_\_ . Education authorities have a duty under the Education (Additional Support for Learning) (Scotland) Act 2004 to identify, provide for and review the additional support needs of their children. As at the date of the April inspection, the respondent had not made any decision \_\_\_\_\_.

. After the April inspection, the first petitioner attempted to recruit suitably skilled staff but was unable to do so. The first petitioner formed the view that, in order to properly accommodate without adversely affecting the other children in the nursery, . On 22 June 2002, and met with the respondent's , and . The purpose of the meeting was to discuss the quality improvement strategy for Pear Tree West Road. raised the concerns that the Care Inspectorate had identified relating to the . highlighted that additional funding would be required in respect of children at the nursery with ASN in order for them to be properly supported.

#### **Withdrawal of funding**

14. That no additional funding was forthcoming. Accordingly, on 19 July 2022, the first petitioner that the first petitioner was terminating their respective contracts . By email dated 19 July 2022 (17:08), the first petitioner emailed , the Quality Improvement Officer for Early Years Education with the respondent, to confirm that notice had been served terminating . By email sent the following day at 10:33, , a Service Manager for Inclusion and Wellbeing within the respondent, responded:

“We are very disappointed in this decision and wish to note that this is in breach of the National Care standards [sic] for ELCC (criteria 6), the Additional Support for Learning Act (2014), the Equality Act (2010) and our contract with you.

As a result of these breaches we will not be issuing the partnership funding as planned to the Pear Tree group on the 25<sup>th</sup> July nor renewing our contract until we can resolve this situation.”

15. That by email dated 22 July 2022, the first petitioner's agents wrote to the respondent, replying to letter. A copy of the response is response is produced and referred to for its terms, which are incorporated herein for the sake of brevity. The respondent's replied by email dated 29 July 2022. suggested that the first petitioner meet Council Officers. also confirmed that the funding arrangements would remain in place until 2 September 2022. also confirmed that exceptional needs funding had been awarded to , albeit the process had completed after the first petitioner had terminated their contracts. said:



“It should also be noted that while the Pear Tree [West Road] setting is of particular concern and focus recent interactions with the other settings within the group are also raising similar concerns regarding compliance with duties under the Equalities Act 2010. It is hoped a plan can be reached in relation to [the] Pear Tree [West Road] setting and then we can discuss concerns around the other settings. To that end the Council are considering reducing the terms of the funding arrangements in place to six months for the other settings to allow time to review and consider their position in complying with all National Standard criteria.”

No indication was given of what “recent interactions” and “similar concerns” referred to or what was meant by “other settings within the group”.

16. That on 1 August 2022, a message was posted by an area manager on first petitioner’s web-based application used for providing information to parents. The message stated that Pear Tree West Road “cannot continue to offer places for children with additional support needs” and that “the local authority has also withdrawn their funding for children with additional support needs”. The message was posted at 13:08 and deleted at 20:08. By email dated 1 August 2022, the respondent’s Head of Education, \_\_\_\_\_, wrote to \_\_\_\_\_ and \_\_\_\_\_ expressing concern at these statements and requesting the statement about the withdrawal of funding be corrected. By email dated 3 August 2022, \_\_\_\_\_ responded by saying that the first statement should have explained that it was limited only to the provision of places where one-to-one support was required and the nursery remained in a position where that level of support could not be accommodated. \_\_\_\_\_ accepted that the statement about the respondent withdrawing funding was inaccurate. \_\_\_\_\_ confirmed that the post had been removed.
  
17. That the meeting suggested by \_\_\_\_\_ took place on 11 August 2022 (the “**August meeting**”). The purpose of the meeting was to consider the quality of provision at Pear Tree West Street. Minutes of the meeting were taken contemporaneously. Although the invitation to the August meeting had been related to the Pear Tree West Road, the minutes that were subsequently produced refer to “concerns emerging in other Bright Stars settings in East Lothian”. By email dated 15 August 2022, the respondent’s \_\_\_\_\_ wrote to \_\_\_\_\_, stating that “At our meeting last Thursday, we discussed several documents/pieces of information that we require from you.” The information requested by \_\_\_\_\_ related \_\_\_\_\_ and proof that a “revised statement to families has been sent out clearly stating that East Lothian Council has not withdrawn funding for children with ASN”. \_\_\_\_\_ made it clear that, without this information, “we will be unable to make a final decision about renewing our contract with you”. \_\_\_\_\_ responded on the same day, requesting a copy of the minutes of the meeting so that she could comment on \_\_\_\_\_ email. \_\_\_\_\_ was concerned that all the information that was being requested had been identified during the meeting. \_\_\_\_\_ renewed her request of the minutes of the meeting by email dated 19 August 2022. The unapproved minutes were provided by email on 22 August 2022. By email dated 25 August 2022, the respondent suggested that the petitioner had chosen “not to return the documents requested in the timescale given” and that the respondent was going to go ahead and consider the funding position. Notwithstanding the delay in producing the minutes,

copies of the documentation relating to had been delivered to the respondent on 15 August 2022 and the documentation relating to had been delivered to the respondent on 17 August 2022.

### **The Decision Letter**

18. That by letter dated 31 August 2022, the respondent intimated the Decision Letter in relation to the funding contracts. The Decision Letter is headed up “Bright Stars Nurseries Group”. The Decision Letter confirmed that the respondent would not renew the funding contracts in relation to any of the Pear Tree Nurseries or Pumpkin Patch. Although the meeting on 11 August 2022 focussed on Pear Street West Road, the Decision Letter made broad and unspecific allegations against the Bright Stars Nursery Group more generally in the following terms:

“As you are already aware, East Lothian Council has been made aware that there are serious concerns regarding Bright Stars Nurseries Group’s ability to comply with and adhere to the National Standards. This has been highlighted in a range of ways including, recent Care Inspectorate Inspections, parental concerns raised with the Local Authority, officers’ concerns, the actions taken by the group to from one of your establishments and your failure to provide any reassurance that this type of action would not be taken again in any of your settings.”

The Decision Letter then identifies various issues under reference to three headings.

18.1. **Compliance with the National Standard – Quality.** The Decision Letter suggests that since the April inspection there had been no “demonstrable evidence of any improvement”. Criticism was made that, at the August meeting, the respondent’s action plan was simply presented back to it. This was not accurate. The action plan was revised to include a column identifying the steps that had been taken by the first petitioner in order to address the various points in the action plan.

18.2. The Decision Letter stated that had accepted at the August meeting that “the standard of the environment at [Pear Tree Church Street] fell well below your own expectations and as such the National Standard”. This was not said at the August meeting and is not recorded in the minutes (even as eventually issued).

18.3. **Compliance with the National Standard – Equality Act 2010.** The Decision Letter raised concerns about “the willingness of Bright Stars Nurseries operating in East Lothian to support specific children who require additional support”.

The Decision Letter goes on to refer to “further concerns” that had been highlighted at the August meeting, being that:

“your organisation’s representatives were unable to provide a definitive answer when asked if Bright Stars would be able to provide support for all children across any of your settings with Additional Support Needs in the future. This has resulted in East Lothian

Council having serious concerns about your organisation's policies, willingness and ability to comply with the duties as set out in the Equality Act 2010. You will note that the National Standard and Criteria 6 – Inclusion requires that the setting complies with the duties under the Equality Act 2010.”

- 18.4. \_\_\_\_\_, who addressed this issue at the August meeting, had stated that each child would be treated as an individual case. \_\_\_\_\_ had explained that, where a child with ASN could be supported through the making of all reasonable adjustments, then that child would be accepted. Such an approach is compliant with the Equality Act 2010. Nothing in the National Standard, the Equality Act 2010 or the funding agreement requires a provider of the funded ELC entitlement to accept every child with ASN, whatever the circumstances. Furthermore, the position, as explained by \_\_\_\_\_, reflects Bright Stars' current approach throughout the United Kingdom. Across Bright Stars' 13 settings in Scotland, 15 children with ASN are supported without additional funding..
- 18.5. The Decision Letter criticises the petitioner for failing to provide requested information. The requested information was provided. Furthermore, from an alleged failure to produce full documentation \_\_\_\_\_, the respondent concluded in the Decision Letter that there are “insufficient suitable policies and procedures in place across the Bright Stars Nurseries group operating in East Lothian” and that the respondent “had not been able to gather any evidence that this type of action would not be taken again in any one of Bright Stars Settings across East Lothian”. There was no basis on which the respondent could reasonably reach these conclusions.
- 18.6. **Compliance with the National Standard – Organisational Leadership.** Under this complaint, the respondent referred to said post of 1 August 2022 and to an alleged “lack of genuine partnership”.
19. That the respondent in deciding to discontinue funding has acted unreasonably and irrationally, has had regard to irrelevant considerations, has failed to have regard to relevant considerations, has acted in a way that is procedurally unfair and has proceeded under an error of law. In particular:
- 19.1. The respondent has unreasonably and irrationally required the petitioners (through \_\_\_\_\_ to confirm that the petitioners would be able in the future to provide support for all children with ASN at any of their settings in East Lothian. There is no legal basis on which the respondent can require such an unqualified undertaking from the petitioners. It would be reckless for the petitioners to give such an unqualified undertaking. The respondent has proceeded under an error of law in interpreting the Equality Act 2010 as requiring every funded provider to accept every child with ASN, regardless of the circumstances. In any event, in placing reliance on \_\_\_\_\_' refusal to give an open-ended and unconditional undertaking, the respondent has had regard to an irrelevant consideration.

- 19.2. The respondent has used the termination of the contracts relating to the provision of care as a basis for discontinuing funding for all of the petitioners' East Lothian nurseries. Such an approach is unreasonable and irrational. The decision relating was made in the context of the resource available and the reasonable adjustments that could be made there. It was not related to the first petitioner's other settings in East Lothian or the second petitioner's Pumpkin Patch nursery. Furthermore, even if the termination did breach the Equalities Act 2010 (which is denied), it was irrational and unreasonable, and procedurally unfair, for the respondent to use this as the basis for discontinuing funding to the other nurseries. Further, and in any event, the second petitioner had not been directly involved in the process until the Decision Letter was issued. Such an approach is irrational and unreasonable, and procedurally unfair.
- 19.3. The respondent had no proper basis for concluding that "there are insufficient suitable policies and procedures across the Bright Stars Nurseries group operating in East Lothian to deal with the concerns that have been raised regarding the Equality Act 2010". The respondent did not ask the petitioners for their policies and procedures and did not consider or investigate how issues relating to the Equalities Act 2010 were addressed in the petitioners' various nurseries. Further, and in any event, in approaching matters at a group level, the respondent acted unreasonably and irrationally, and in a procedurally unfair manner, in failing to request and consider Bright Star's policies and procedures in relation to the Equality Act 2010. In reaching the conclusions that it did, the respondent acted in an unreasonable and irrational, and procedurally unfair, manner.
- 19.4. The respondent, in claiming that there had been no demonstrable evidence of any improvement at Pear Tree West Road, failed to have regard to a material consideration, being the various points in the action plan handed over to the respondent at the August meeting. Further, and in any event, the respondent acted irrationally and unreasonably in discounting the use of a service improvement period in order to allow Pear Tree West Road (and, if required, the petitioners' other nurseries) in order to allow the criteria of the National Standard to be met.
- 19.5. The respondent misrepresented what had been said at the August meeting in claiming that the petitioner had accepted that Pear Tree Church Street fell below the National Standard. It was unreasonable and unfair of the respondent to have done so.

#### **Interim orders**

20. That pending determination of this Petition, the *status quo* in relation to funding should be maintained. If funding ceases on 30 September 2022, then approximately 250 children will no

longer be able to receive their funded ELC entitlement through the petitioners' four nurseries. This will result in significant upheaval for these children. It will also result in damage to the petitioners' reputation. The balance of convenience favours the petitioners.

21. That the respondent has intimated that it tends to inform the parents of the children at the petitioners' nurseries of its decision in relation to funding. Should the terms of the Decision Letter be disseminated, parents who place their children at the petitioners' nurseries in relation to their children's funded ELC entitlement will withdraw their children, causing the children significant upheaval. It will also result in damage to the petitioners' reputation. Pending determination of this Petition, the respondent should be prohibited from promulgating or otherwise advertising the terms of the Decision Letter. The balance of convenience favours the petitioners.

#### **Permission to proceed**

22. That the petitioner satisfies section 27B(2) (requirement for permission) of the Court of Session Act 1988. The petitioner has sufficient interest. Reference is made to the averments in Statement of Fact 1. Further, for all of the reasons hereinbefore condescended upon, the petition has a real prospect of success.

#### **Transfer to the Upper Tribunal**

23. That the petition is not subject to a mandatory or discretionary transfer to the Upper Tribunal.

#### **PLEAS-IN-LAW**

1. The respondent having acting unreasonably and irrationally, having had regard to irrelevant considerations and having failed to have regard to relevant considerations, having acted in a procedurally unfair manner, and having proceeded under an error of law, all as set out in statement of fact 19, the Decision Letter should be reduced, failing which it should be reduce to the extent that it relates to nurseries other than Pear Tree West Road.
2. Funding to the petitioners' nurseries being due to expire on 30 September 2022 pursuant to the terms of the Decision Letter, and the balance of convenience favouring the petitioners, funding should be maintained pending determination of this Petition.
3. The petitioners being reasonably apprehensive that the respondent will promulgate the terms of the Decision letter before determination of this Petition, and the balance of convenience favouring the petitioners, interdict *ad interim* should be granted as prayed for.

**SCHEDULE FOR SERVICE**

Respondent upon whom service is sought in common form:

1. **EAST LOTHIAN COUNCIL**, a local authority constituted under the Local Government etc. (Scotland) Act 1994 and having a place of business at John Muir House, Haddington, East Lothian, EH41 3HA

## **SCHEDULE OF DOCUMENTS**

1. Email from the Petitioners' agents to the Respondent dated 22 July 2022.
2. Letter from the Respondent to the Petitioner dated 31 August 2022.
3. Operating Guidance - "A Blueprint for 2020: The Expansion of Early Learning and Childcare in Scotland".

IN THE COURT OF SESSION

PETITION

of

(First) PEAR TREE NURSERIES LIMITED; and  
(Second) THE PUMPKIN PATCH NURSERY  
(SCOTLAND) LIMITED

for

Judicial review of a decision of East Lothian Council  
to refuse to renew arrangements in relation to the  
1,140 hours of funding for eligible children relating to  
four nurseries

2022

Solicitors LLP

PRM/MRO/BRIG/23/3





Form 23.2

**Form of motion**

*PART I* Sheet 1 of 1 sheets

(To be completed where motion enrolled  
by post or fax only)

Name of petitioners\* Pear Tree Nurseries Limited & The Pumpkin Patch Nursery (Scotland)  
Limited

Name of respondent\* East Lothian Council

Name and nature of petition (e.g. John Smith's curatory) Judicial Review, Interim Order Ad  
Factum Praestandum, Interdict and Interim Interdict

Court case number New. Date of last interlocutor None.

Is case due in court during the next seven days? No

(If Yes, state reason)

*PART II*

Name of firm enrolling motion - Solicitors LLP.....

Agent for Petitioner Ref No - PRM/BRIG/23/3.....

Town - Edinburgh.....

Tel. No. FAX No .....

Date of enrolment of motion 5 September 2022.....

Has motion been intimated? No

THE MOTION IS (state terms of motion; if necessary, use a separate sheet):-

On behalf of the Petitioners : -

(a) for an order for intimation and service;

(b) for an interim order requiring the Respondent forthwith and until determination of this  
petition or until further order of the court to provide 1140 hours of funding in respect of (i) Pear  
Tree Nursery, West Road, 1 West Road, Haddington (“**Pear Tree West Road**”); (ii) Pear Tree  
Nursery, Church Street, 19 Church Street, Haddington (“**Pear Tree Church Street**”); and (iii)

Pear Tree Nursery, Meadow Park, 32 Meadow Park, Haddington (“**Pear Tree Meadow Park**”) (collectively the “**Pear Tree Nurseries**”); and Pumpkin Patch Nursery, 28 St Andrew Street, North Berwick (“**Pumpkin Patch**”); and

(c) for interim interdict of the Respondent from publishing or publicising the Respondent’s decision in its decision letter of 31<sup>st</sup> August 2022 referred to on Record.

REASON FOR MOTION (state reason if reason required)

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*PART III*

MOTION SLIP – General Department only

Name of case – Petition of Bright Stars Nurseries UK Limited & Another

Name of firm        Solicitors LLP

**IN THE COURT OF SESSION**

**INVENTORY OF PRODUCTIONS**

For the Petitioner

In the petition of

**(First) PEAR TREE NURSERIES LIMITED**, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, West Lothian, EH54 6AX; and **(Second) THE PUMPKIN PATCH NURSERY (SCOTLAND) LIMITED**, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, West Lothian, EH54 6AX

**Petitioners**

for

Judicial review of a decision of East Lothian Council to refuse to renew arrangements in relation to the 1,140 hours of funding for eligible children relating to four nurseries

- 6/1 Email from the Petitioners' agents to the Respondent dated 22 July 2022.
- 6/2 Letter from the Respondent to the Petitioner dated 31 August 2022.
- 6/3 Operating Guidance - "A Blueprint for 2020: The Expansion of Early Learning and Childcare in Scotland".

IN THE COURT OF SESSION

PETITION

of

(First) PEAR TREE NURSERIES LIMITED, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, West Lothian, EH54 6AX; and (Second) THE PUMPKIN PATCH NURSERY (SCOTLAND) LIMITED, a company incorporated under the Companies Acts and having its registered office at Argyll House, Quarrywood Court, Livingston, West Lothian, EH54 6AX

Petitioners

for

Judicial review of a decision of East Lothian Council to refuse to renew arrangements in relation to the 1,140 hours of funding for eligible children relating to four nurseries

2022

Solicitors LLP

PRM/MRO/BRIG/23/3

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**From:**  
**Sent:** 22 July 2022 17:54  
**To:**  
**Cc:**  
**Subject:** Funding Decision and Related Matters - Pear Tree Nurseries Limited - East Lothian - BRIG/23/2  
**Importance:** High

BY EMAIL ONLY:

Dear \_\_\_\_\_,

I refer to your email of 20 July to \_\_\_\_\_ of ICP Nurseries.

I note that your email alleges breaches of criteria 6 of the National Care standards for Early Learning and Childcare, the 'Additional Support for Learning Act (2014)' (sic), the Equality Act 2010 and the contract between East Lothian and the Provider. As a result, you intimated that partnership funding for three Pear Tree nurseries will not be issued under the Contract on 25 July and that the agreements between the Council and the nurseries, which end on 31 July 2022, will not be renewed until *'the situation is resolved'*. I note that you have now reversed that decision, in relation to funding, until the end of the agreements.

As a preliminary matter, can you kindly direct me to the relevant delegated authority by virtue of which you as Education Service Manager and Principal Educational Psychologist had the necessary *vires* to take and issue these decisions on behalf and in the name of the Council?

You had previously indicated that no further discussion regarding the issue will take place prior to 1 August, when your colleagues \_\_\_\_\_, Head of Education and \_\_\_\_\_, Quality Improvement Officer for Early Years Education return to the office from annual leave.

As you are aware, the Care Inspectorate identified issues with the service provided at the West Road setting during an inspection in April 2022. At the time of the inspection, some reasonable accommodations had already been made in respect of staff ratios to address specific issues around support for the ASN children at the setting. Despite those accommodations and further changes being made to staffing, the care in place remained insufficient to address the needs \_\_\_\_\_ whilst ensuring the welfare of the other service users.

The decision communicated to the parents on 19 July was discussed with \_\_\_\_\_ prior to the parents being informed. Reference is made in \_\_\_\_\_ email to previous discussions with you as Education Service Manager and Principal Educational Psychologist regarding the service issues at West Road and the lack of the required skill set within the team to meet the needs of the children with ASN within that setting.

No formal Improvement Plan was put in place with the Council but communication with your colleagues has been open and ongoing following the Care Inspectorate report.

The decision was supported by \_\_\_\_\_ of the Care Inspectorate who discussed the matter with Regional Manager, \_\_\_\_\_. Whilst your email of 22 July states that the Care Inspectorate does not support the decision made, that is not our understanding of the position.

, there are other issues that have undermined our efforts to address the gap in provision at the setting, such as the recruitment of staff in general and in particular, those with applicable skill sets for ASN children. As a result of these factors, Pear Tree is placed in a position where the setting is no longer appropriate for as they are not able to provide any further reasonable accommodations to ensure their safety and wellbeing.

## Contract Terms

I have reviewed East Lothian Council's overarching Terms and Conditions for Funded Providers ("the Terms") and the separate, signed Early Learning and Childcare (EL&C) Funded Provider Agreements ("the Agreements") with East Lothian Council for each of the settings affected by your decision making in relation to funding until the end of this contract and discussions in relation to withdraw funding.

### *East Lothian Council's Terms and Conditions for Funded Providers*

Clause 4.1 of the Terms sets out that the Provider shall meet all of the National Standard criteria for the duration of Contract, as outlined in Schedule Part 3 (National Standard Criteria).

Paragraph 4.2 provides that, "*where a Provider fails to demonstrate that they meet any of the National Standard criteria or sub-criteria, then, at the discretion of the Council, the Provider will be placed into a Service Improvement Period as outlined in clause 5 (Service Improvement Period).*" The right of the Council to exercise its right to impose a Service Improvement Period is set out in Clause 5 and, where a complaint has been received, the right to impose such a period may be executed where the Council confirms that one or more National Standard Criteria is not being met after a review or investigation by the council. This Clause appears to have been left out of account in reaching your decision summarily to withhold funding. Please explain your reasons for disregarding, or alternatively for electing not to exercise, the SIP option?

Clause 9 of the Terms sets out the Provider's duty to comply with law and guidance in relation to the protection of children and ensuring their welfare.

Clause 10.5 requires that the Council is provided with reports from regulators. was made aware of Care Inspectorate involvement in

The Council was made aware of the 27 April 2022 Inspection Report and the Recommendations therein. Reasonable accommodations were made in accordance with the 2004 Act, however, the provisions in place did not meet the needs of and, following further work to bring the provision to the required level, including the recruitment of staff with the necessary skills, the position remained unsatisfactory

Resolution of disputes under the contract is covered in Clause 30 of the Contract Terms. It sets out that parties shall attempt in good faith to negotiate a settlement to any dispute within twenty working days and shall involve the Council's

Chief Operating Officer and a Director of the Provider in instances of a service complaint. Please explain why this process was not followed.

Clause 30.2 sets out that nothing shall prevent the parties to the Contract from complying with, observing and performing all their obligations and administrative functions in respect of the Contract regardless of the nature of any dispute, nor does it prevent referral of the dispute to a relevant Court. Accordingly, all sums due under the Contract should be paid timeously.

#### *Early Learning and Childcare (EL&C) Funded Provider Agreements*

There are separate agreements for each of the three settings within East Lothian. Your decision to withhold funding applied to all settings, including two with no complaints or ongoing issues in relation to service provision. The decision to withhold the funding is irrational and unreasonable and manifestly so for the other two sites.

Clause 11 of each Agreement covers Social Inclusion and Additional Support Needs. The clause provides that the Provider shall *“make appropriate provision for children with additional support needs. The Funded Provider should refer to ‘Supporting Children’s Learning: Code of Practice’ – Guidance relating to the Education (Additional Support for Learning) (Scotland) Act 2009 (Revised 2010) and the Children & Young People Act (Scotland) 2014”*. The 2009 Act as referenced made amendments to the principal Education (Additional Support for Learning) (Scotland) Act, but it should be noted that the principle of making reasonable accommodations for children with ASN remains.

Clause 15 of the Agreement sets out the provisions of the Agreement that relate to termination. Clause 15.3 sets out that, where the Council is alerted to a quality issue that may constitute grounds for the termination of the Agreement, it *“shall endeavour to follow the steps set out in the Improvement Protocol set out at Schedule Part 2”*. Your decision to exercise discretion so as to ignore the Improvement Protocol in Schedule 2 in respect of West Road and the terms of Clause 15 in relation to Meadow Road and Church Street is again irrational and unreasonable.

Schedule Part 1 of the EL&C Funded Provider Agreements with East Lothian Council provides that, *‘subject to compliance with this Agreement, the Council shall pay the Funded Provider, £5.31 per hour, plus the cost of a meal and a snack and a meal for each eligible child for a maximum of 1140 hours per annum’*. No breach of contract has been evidenced and your decision in relation to the withholding of funding is premature.

#### *Your Decision*

Your decision to withhold funding was premature and entirely unreasonable in all the circumstances. The decision is contrary to the Terms of the contract entered into by the Council and the Agreement in place with each of the nurseries operated by Pear Tree Nurseries Limited within your boundaries. You have failed to exercise any due process as set out in the Terms or Clause 15 and Schedule 2 of the Agreements in place with each of the settings.

Please explain in the fullest terms why your decision was summarily applied to all nursery settings in light of the alleged breaches, without investigation or review as required by the relevant clauses of the Contract Terms. Your approach has also been, with respect, tainted by a disregard for natural justice in respect of the lack of opportunity presented to Pear Tree to defend itself and put its case to you before a decision was taken. Your decision to withhold funding and delay consideration of renewal of the contracts with Pear Tree will potentially impact on hundreds of children and their caregivers who will be informed of the Council’s actions prior to funding possibly being discontinued for their spaces.

We note that you have reversed your decision and you now say that you are open to holding a discussion in relation to continuation of the contracts in place for the three settings in East Lothian. That is, of course, welcomed. You will gather from the terms of this email that Pear Tree had hitherto been considering a petition for judicial review, suspension and interdict. We hope that will not now be necessary and our client looks forward to working constructively with you in relation to your provision within your council area. They hope to continue to provide the services to the required standards across all of their settings and, where improvement is required, will work with you and the Care Inspectorate



to address the issues identified.

Regards,

**Accredited Specialist in Data Protection and FOI Law**  
for  
Solicitors LLP

Email referred to:

**From:**  
**Sent:** 19 July 2022 17:08  
**To:**  
**Cc:**

**Subject:** Update- West Road

**CAUTION:** This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Hi

I hope you had a lovely holiday and are enjoying the sunshine in the UK!

I'm emailing you to inform you that today, our Managing Director served notice to terminate

We reached this decision as the team are unable to support and the are not able thrive as they should, excelling in their learning and development, being supported in the best way they can be.

As we've spoken in the past, unfortunately the team do not have the skill set to support and therefore we have been and are failing them.

We have had to consider the safety of all our staff and children in the building and unfortunately due to no specialist care for , we have been comprising this.

Happy to discuss this in more detail should you wish too.

Kind regards,

**Head of Early Years Standards, Regulation and Compliance**  
**Company Strategic Safeguarding Lead**  
**ICP Nurseries Limited**

*If you have a safeguarding concern, please confidentially contact [notifications@icpnurseries.com](mailto:notifications@icpnurseries.com)  
If you have a wellbeing concern, please confidentially contact [listening@icpnurseries.com](mailto:listening@icpnurseries.com)*

***Our Mission is to deliver exceptional education and outstanding childcare to our children and families, through our commitment to our staff and providing engaging and inclusive environments for all. We will deliver this mission through Our Core Values – integrity, dedication, and equality.***



31.08.22

John Muir House  
Haddington  
East Lothian  
EH41 3HA  
Tel 01620 827827

Dear Sir/ Madam,

**Bright Stars Nurseries Group  
Provision of 1140 hours – Decision in relation to Funding Contract**

I refer to the meeting held on 11 August 2022 which was attended by officers of East Lothian Council, \_\_\_\_\_, Managing Director of Bright Stars Nursery Group and \_\_\_\_\_ of \_\_\_\_\_ Solicitors. The purpose of the meeting was for the Council to outline its concerns in relation to the quality of provision at Pear Tree West Road and the policy position of Bright Stars Nurseries Group in supporting the needs of children with Additional Support Needs. The meeting also addressed serious concerns regarding the outbreak of E-Coli at Pear Tree Church Street. Those in attendance were informed that the meeting would also support the evidence gathering around whether or not the Council would renew its contract to fund 1140 hours at those nurseries now owned by Bright Stars Nurseries Ltd given that all contracts expired on 31<sup>st</sup> July 2022.

Having had the opportunity to consider your response to our request for information and all other available information including that gathered at the meeting, I am now writing to inform you of East Lothian Council's decision in respect of the funding arrangements for 1140 hours with Bright Stars Nurseries Group in East Lothian. Taking all available information in to consideration, East Lothian Council **will not** be renewing the contracts to fund 1140 hours with the Bright Stars Nurseries Group operating in East Lothian. This decision covers Pear Tree West Road, Church Street, Meadowpark and Pumpkin Patch Nursery in North Berwick.

Our reasons for not renewing these contracts are as follows:

The contracts in relation to the 1140 hours funding for eligible children within your organisation's settings expired on 31 July 2022. Funding for 1140 hours has continued on a short term basis to allow East Lothian Council to consider whether it is satisfied that the Bright Stars Group is able to comply with the National Standard and the terms of a contract with the Council.

As you are aware the expansion of Early Learning and Childcare in Scotland is underpinned by the National Standard. Providers of Early Learning and Childcare who are unable to meet or comply with the National Standard are not eligible to provide the funded entitlement. Local Authorities have the responsibility of monitoring the compliance of all funded providers against the National Standard, whether they are local authority, private or third sector providers, including childminders. As guarantors of quality for the National Standard, the local authority plays a key role in ensuring each child is receiving a high quality Early Learning and Childcare experience during their funded hours. In the event that the Local Authority is satisfied that the provider is able to comply with the National Standard they will enter into contracts with the Provider for each setting.

It is important for Local Authorities to act responsively when information about a funded provider is made available to them. As you are already aware, East Lothian Council has been made aware that there are serious concerns regarding Bright Stars Nurseries Group's ability to comply with and adhere to the National Standards. This has been highlighted in a range of ways including, recent Care Inspectorate Inspections, parental concerns raised with the Local Authority, officers' concerns, the actions taken by the group to exclude your establishments and your failure to provide any reassurance that this type of action would not be taken again in any of your settings.

### **1. Compliance with the National Standard - Quality**

As you are aware, the Care Inspectorate inspection of 27 April 2022 of Pear Tree West Road found this setting to be weak across all areas inspected (Care and Support, Environment, Staffing, and Management and Leadership). This setting has failed to meet the level expected and since that inspection, there has been no demonstrable evidence of any improvement. Furthermore, we would wish to note that East Lothian Council has provided very considerable additional support through a detailed action plan that has included weekly support from officers. We would also wish to point out that it was our action plan that was presented back to us at the recent meeting on the 11<sup>th</sup> August to represent your efforts to secure improvement. You should note that this lack of action and your failure to provide any level of confidence would have on its own provided grounds to terminate the contract for 1140 hours funding. Whilst the specifics of the National Standard do allow for a Service Improvement Period of up to 12 months to be initiated by the Council, these do not apply where a contract has already expired or where a local authority, as guarantor of quality, has little or no confidence that the provider will be able to fully comply.

We note that due to the date of registration of the Church Street setting, it has not yet been subject to a full Care Inspectorate inspection. However, we note that from our recent meeting on 11 August 2022, at which a representative of the Care Inspectorate was present, you indicated that the standard of the environment at your Church Street setting fell well below your own expectations and as such the National Standard. This view is also supported by Council officers who have visited the setting as part of the recent E-coli outbreak. As you

know, Council officers have expressed very serious concern about the standard of cleanliness and upkeep of the building and there has been a lack of swift action to allay these concerns.

## **2. Compliance with the National Standard - Equality Act 2010**

As you are aware, serious matters have been raised with you around your approach towards meeting the needs of children with Additional Support Needs and in particular the willingness of Bright Stars Nurseries operating in East Lothian to support specific children who require additional support. As has already been noted, you have already excluded [redacted] and have terminated [redacted] contracts, noting that in your view, your staff were unable to meet [redacted] needs. Whilst this in of itself is serious enough, further concerns were then highlighted to the Executive Director of Education and Children's Services where, at the meeting on 11<sup>th</sup> August, your organisation's representatives were unable to provide a definitive answer when asked if Bright Stars would be able to provide support for all children across any of your settings with Additional Support Needs in the future. This has resulted in East Lothian Council having serious concerns about your organisation's policies, willingness and ability to comply with the duties as set out in the Equality Act 2010. You will note that the National Standard and Criteria 6 – Inclusion requires that the setting complies with the duties under the Equality Act 2010.

You have been asked to provide further information and evidence. To date, the Council has received basic information and not that which was specifically requested during the meeting on 11<sup>th</sup> August and again requested by a follow up email to you from a Council officer on 15 August. The information provided by you was in fact requested by parents who were advised by you that it would only be released if directly requested by the Council. This request was made by telephone to Pear Tree West Road by our Early Years Quality Improvement Officer (QIO) on 15<sup>th</sup> August, with a request for information for [redacted] to be given as part of [redacted]. As Pear Tree West Road nursery was closed on 17<sup>th</sup> August, this information was handed into East Lothian Council HQ, John Muir House, by a member of West Road staff at 8.55am for collection by our QIO.

It is noted that the documents received did not include all former risk assessments, any positive support plans or strategies to support the developing needs [redacted] with evaluations and next steps. [redacted] plans, which had been written [redacted] by health and ELC education to inform planning, were in the folder but had not been used consistently across the staff team to ensure impact.

From the above, it is concluded that there are insufficient suitable policies and procedures in place across the Bright Stars Nurseries group operating in East Lothian to deal with the concerns that have been raised regarding the Equality Act 2010. The Council therefore has not been able to gather any evidence that this type of action would not be taken again in any one of Bright Stars Settings across East Lothian (as confirmed by your representative on 11<sup>th</sup> August), a situation that would be unacceptable to the Council.

### 3. Compliance with the National Standard - Organisational Leadership

The National Standard requires settings that wish to become funded providers of Early Learning and Childcare to work in genuine partnership with the local authority. East Lothian Council has been able to derive only limited assurance that this is the approach of Bright Stars Nurseries. In particular, I would draw your attention to the following:

Your management team have misrepresented the position of East Lothian Council to parents/carers and others. Despite raising these concerns with you at the time, Council Officers have not received any assurance that this inaccurate and misleading position has been rectified with an accurate account of the Council's role.

Furthermore, we have received correspondence from parents and carers who have expressed concern to us about your representations that the Council has not provided your settings with appropriate support around children with Additional Support Needs. In particular your communications to parents through your app and in termination of contract correspondence to families. For example in correspondence provided to us:

*"You will also be aware that the local authority has failed to support him with 1:1 funding as sought, despite an application for funding to provide that being submitted to East Lothian Council with input from the nursery in February 2022."*

This is incorrect as

*"[..... ] as you know, we were informed at a meeting with East Lothian Council in June 2022 that there would be no funding available for additional support at West Road, even if we were able to recruit appropriate staff to fill the role"*

This statement is also incorrect as exceptional needs funding had been allocated.

Also in correspondence through the parent app:

*"The Local Authority has withdrawn its funding for children with Additional Support Needs."*

Each of these statements is inaccurate.                      assured us that new statements had been issued but despite asking for the revised statement to be shared with the Council, none has been forthcoming. We note from the most recent correspondence from your solicitor received on 26<sup>th</sup> August that this statement is still not available. The Council can only conclude that a new statement was never issued leaving the reputation of the Council at stake. This further reinforces that lack of genuine partnership working and deliberate attempts to bring the Council in to disrepute.

We also highlighted at the said meeting, our concerns in relation to Bright Stars' lack of communication with East Lothian Council, which has continued following the meeting,

including the communication surrounding the various documentation requested by the Council in an email of 15 August. In addition there are further concerns in respect of your organisation's poor communications arising from the recent e-coli outbreaks.

**Summary**

In summary, East Lothian Council has very little confidence in Bright Stars Nurseries Group's ability to meet the National Standard as set by the Scottish Government and therefore to comply with the terms of any new contract put in place by East Lothian Council.

As guarantors of quality for the National Standard, the local authority has a key role in ensuring each child is receiving a high quality Early Learning and Childcare experience during their funded hours. For the reasons as set out above, we do not consider it possible for your organisation to remain and continue as a funded provider of 1140 hours. We therefore provide you with notice that as of Friday, 30 September 2022, East Lothian Council will cease all funding of 1140 hours for eligible children attending nurseries operated by the Bright Stars Nurseries Group. We intend to inform those parents today for whom we have contact details and that receive a funded place for their child that they will be unable to access funding for places at any nursery operated by the Bright Stars Nurseries Group from the 30<sup>th</sup> September 2022– you should also notify parents and staff. The extended date of 30<sup>th</sup> September is to allow time for parents/carers to find alternative funded Early Learning and Childcare arrangements should they choose to do so.

Please note that the Council may review this position on application after a period of 12 months, should there be evidence of improvement that is substantiated by the Care Inspectorate in respect of any of your establishments.

Yours sincerely

**Head of Education**

# A BLUEPRINT FOR 2020: THE EXPANSION OF EARLY LEARNING AND CHILDCARE IN SCOTLAND

FUNDING FOLLOWS THE CHILD AND THE NATIONAL  
STANDARD FOR EARLY LEARNING AND CHILDCARE  
PROVIDERS: OPERATING GUIDANCE



TheScottishGovernment   
@ScotGov   
@COSLA   
[www.gov.scot](http://www.gov.scot)  
[cosla.gov.uk](http://cosla.gov.uk)





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## **INTRODUCTION**

We recognise that the earliest years of life are crucial to a child's development and have a lasting impact on outcomes in health, education and employment opportunities later in life. It is widely acknowledged that the provision of universally accessible and high quality early learning and childcare (ELC) can play a vital role in helping to close the poverty-related attainment gap.

This is why the Scottish Government and local authorities have committed to making an unprecedented level of investment in early learning and childcare through the near doubling of the funded ELC entitlement from 600 to 1140 hours per year from August 2020 for all 3 and 4 year olds, and eligible 2 year olds.

This will be high quality, flexible early learning and childcare that is accessible and affordable for families.

In order to ensure that the funded entitlement is delivered in high quality ELC settings, a Funding Follows the Child approach will be introduced in August 2020 alongside the statutory roll-out of the expanded entitlement.

This approach is 'provider neutral' and will empower parents to choose from a range of high quality ELC providers, including childminders.

It will ensure financially sustainable provision across the ELC sector. The Scottish Government and COSLA agreed a multi-year funding package which includes funding to enable the payment of sustainable rates to funded providers delivering the funded entitlement – including funding to enable payment of at least the real Living Wage to all childcare workers delivering the funded entitlement.

It is underpinned by a National Standard that all settings who wish to deliver the funded entitlement will have to meet.

At the heart of the National Standard are a clear and consistent set of quality criteria, recognising that the ELC expansion is fundamentally about improving the early years' experience of our youngest children.

This ensures that all settings who are offering the funded entitlement are delivering the highest quality ELC experience for children, regardless of whether they are in the public, private or third sectors or childminders.

The criteria in the National Standard focus on what children and their families should expect from their ELC experience, regardless of where they access their child's funded hours.

This Funding Follows the Child approach was developed through the Scottish Government, COSLA and local authorities working in partnership, through a Service Models Working Group. It has been informed by a joint Scottish Government and COSLA consultation, and through extensive engagement with providers and key

stakeholders to ensure that it works for everyone in the sector and helps to improve the early learning and childcare experience for our young children.

### **Overview of this Document and Supporting Material**

This document sets out how the Funding Follows the Child approach will operate, in particular how settings will meet the National Standard criteria and what the role of local authorities will be in implementing the approach from August 2020. It also includes clarification on some of the details underpinning the approach.

This document should be read in conjunction with *A Blueprint for 2020: The Expansion of Early Learning and Childcare in Scotland – Funding Follows the Child and the National Standard for Early Learning and Childcare Providers: Principles and Practice* and *A Blueprint for 2020: The Expansion of Early Learning and Childcare in Scotland – Funding Follows the Child and the National Standard for Early Learning and Childcare Providers: Frequently Asked Questions for Local Authorities and Providers*.

## **SECTION 1: FUNDING FOLLOWS THE CHILD**

The Funding Follows the Child approach places choice in parents' and carers' hands allowing them to access their child's funded entitlement from any setting – in the public, private or third sector, including from a childminder – who meets the National Standard, has a place available and is willing to enter into a contract with their local authority.

The National Standard, which underpins the approach, will provide parents and carers with the certainty that those settings delivering funded hours are offering high quality ELC provision.

The key aspects of the Funding Follows the Child approach are:

- [Getting It Right for Every Child](#) is at the centre of our approach to improving the experience of our children in their early years;
- It is 'provider neutral' and is underpinned by a National Standard, which all providers who wish to deliver the funded entitlement will have to meet from the full statutory roll-out of 1140 hours of funded ELC entitlement;
- Families will be able to access high quality funded ELC with the provider of their choice if that provider meets the criteria set out in the National Standard, wishes to deliver the funded entitlement, has a space available, is able to offer the funded hours in-line with local ELC delivery plans (subject to the setting's overall capacity) and is willing to enter into a contract with the local authority;
- The choice of setting available to families is not restricted to their own local authority boundary;
- Information for parents and carers will be clear and accessible to make them aware of the options available to them, in particular the different types of settings that can be chosen, when accessing their funded entitlement;
- Settings must ensure that the funded hours are free at the point of access and parents and carers are not required to purchase additional hours beyond the funded entitlement in order to access their child's funded hours at a setting;
- Local authorities will retain the statutory responsibility for ensuring that the funded entitlement is available to all eligible children in their area, and will be the primary guarantors of quality and key enablers of flexibility and choice – ensuring that there is a range of options for families in their area;
- Local authorities and providers should work together meaningfully and in genuine partnership in delivering flexible ELC provision, while continuing to ensure that a high quality experience for children is maintained and accessible to all;
- Funding to deliver the funded entitlement will continue to be channelled through local authorities;

- Local authorities will set a rate locally that is paid to funded providers in the private and third sectors, including childminders, to deliver the funded entitlement, which is sustainable and reflects national policy priorities, including funding to enable payment of the real Living Wage to all childcare workers delivering the funded entitlement;
- Funded providers who agree to deliver the funded entitlement will commit to paying the real Living Wage to all childcare workers delivering the funded entitlement and commit to operating Fair Work Practices;
- Every child receiving a funded ELC session will receive a free meal; and
- A commitment to simplifying the process for, and reducing the burden on, providers to deliver the funded entitlement. All providers will face the same National Standard for becoming, and continuing to be, a funded provider.

## Quality at the Heart of Early Learning and Childcare Entitlement

[Getting It Right For Every Child](#) is the national approach aimed at improving outcomes for all children and young people in Scotland. It is underpinned by the recognised need for shared principles and values and a common language among practitioners who provide services for children and families. It recognises the rights of children and young people, focuses on developing and supporting wellbeing and builds on the good practice evident in services across Scotland.

The wellbeing of children and young people is at the heart of Getting It Right For Every Child. We want all our children and young people to be fully supported as they grow and develop. The [Quality Action Plan](#) made it clear that the most important driver of quality is an ELC profession that is dedicated to the care, learning and development of our youngest children. The quality of children's day-to-day experience of our ELC offer, and the potential to use that offer to improve longer term outcomes for children, depend primarily on the quality of human interaction that they have with those working in the sector.

The Getting It Right For Every Child approach is reflected throughout the Funding Follows the Child approach and underpins the National Standard. International research and evidence from our own [Growing Up in Scotland Study](#) shows that all children, but especially those from more disadvantaged backgrounds, can benefit from attending ELC. However, that evidence also tells us that if our ELC offer is to help give children the best start in life and contribute to closing the poverty-related attainment gap, it must be of high quality.

The quality of ELC in Scotland is already high. [Care Inspectorate data](#) shows that, in 2017, 91.1% of all settings<sup>1</sup> providing funded ELC achieved Care Inspectorate evaluations of good or better on all four themes: Quality of care and support; Quality of staffing; Quality of management and leadership; and Quality of environment. 42.8% of all funded providers achieved evaluations that were very good or excellent across all themes.

Whilst the National Standard sets a minimum quality threshold for providers delivering the funded hours, we want to see quality enhanced further still – and more settings continuously striving to improve the quality of ELC across the sector. The [Quality Action Plan](#) published in October 2017, which contains 15 actions to further embed and strengthen quality in early learning and childcare, builds on this.

The 2017 NHS Health Scotland evidence review on [Childcare Quality and Children's Outcomes](#) highlighted a number of structural and process indicators of quality including: higher qualified staff; an experienced, competent and confident workforce; good working conditions (which include continuous development and fair pay); and

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<sup>1</sup> Nurseries, playgroup and children and family centres. The figure does not include childminders who are delivering the funded hours but we know that 92.1% of childminders were evaluated as good or better on all themes.

an age-appropriate curriculum. The Quality Action Plan also highlights the benefits of outdoor learning and play for young children, appropriate and stimulating care and learning environments, parental engagement and a focus on self-evaluation, quality assurance and improvement. All of these indicators are reflected in the quality criteria of the National Standard.

A key focus of the quality criteria are scrutiny evaluations, including those which are awarded through Care Inspectorate inspections<sup>2</sup>. This will strengthen the use of externally assessed measures of quality in the assessment decisions made by local authorities and ensure that these evaluations are used in a consistent way.

The National Standard reflects the current scrutiny and inspection frameworks of the Care Inspectorate and Education Scotland. When changes are made to these inspection frameworks, criteria relating to quality evaluations will be updated to reflect this and ensure consistency between the scrutiny work of the Care Inspectorate and Education Scotland.

### **A Financially Sustainable Sector**

The ELC sector in Scotland operates as a mixed economy model with a mixture of public, private and third sector providers. Most of these providers offer the funded entitlement.

However, for providers in the private and third sectors the [Financial Review of Early Learning and Childcare in Scotland](#) highlighted that the majority of their income comes from the fees that they charge to parents and carers for non-funded hours. This could cover fees for non-eligible children (for example those aged 0-2) or for additional hours that parents of eligible children require (e.g. non-funded hours or 'wrap-around' hours).

The share of income accounted for by the funded entitlement in these providers is expected to increase with the roll-out of 1140 hours as settings allocate more of their capacity towards delivering the funded hours.

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<sup>2</sup> Care Inspectorate evaluations can change as the result of a complaints investigation or other intelligence received and investigated by the Care Inspectorate through their scrutiny activities.

### **Box 1.1: Overview of Funded Providers**

In December 2017, the Care Inspectorate reported that there were 1,106 childcare providers in the private sector and 868 providers in the third sector, including those who were not delivering the funded entitlement. In addition, there were 5,426 childminders.

83.2% of private nurseries and 92.8% of third sector nurseries were delivering the funded entitlement.

There were also 1,727 local authority ELC settings.

The [Financial Review of Early Learning and Childcare in Scotland: The Current Landscape](#) highlighted that in 2016 around 23% of income that funded providers received was from funded hours. This share is considerably higher for funded providers located in remote areas.

The majority of funded provider income (around 77%) in 2016 was from fees paid directly by parents.

Analysis produced using data from the Financial Review highlighted that in 2016 the funding rate paid by local authorities to around 40% of funded providers in the private and third sectors did not cover their costs for delivering the funded hours.

Under a 'provider neutral' approach, it is essential that provision is financially sustainable in order to ensure that providers across all sectors are willing and able to deliver the funded entitlement.

The Scottish Government provides local authorities with the funding to deliver the funded entitlement. Agreement was reached in April 2018 by the Scottish Government and COSLA on a landmark multi-year funding agreement to fully fund the expansion to 1140 hours.

All the additional funding provided since 2017-18 for the expansion to 1140 hours has been allocated as a specific grant to local authorities. This is to ensure that it is protected for investment in ELC, and the agreed multi-year funding package will continue in this way.

This agreement provides the funding to enable providers to receive a sustainable funding rate for delivering the funded entitlement.

It is at the discretion of providers as to how they operate the non-funded hours aspects of their business, which will reflect their business model, cost structures and local market conditions.



It is not for local authorities or the Scottish Government to seek to comment on or intervene in the aspects of a funded provider's business that are out-with the funded entitlement.

In order to determine sustainable rates, it is important to have a shared understanding of the cost of delivering the funded entitlement. This will support local authorities to establish an affordable and sustainable rate for delivery of funded hours across all settings.

To support this, Scotland Excel have been working with providers, and local authorities to develop this shared understanding and to inform the development of guidance on sustainable funding rates.

### **A Commitment to Paying the Real Living Wage**

Guided by the evidence, the Scottish Government believes that employers whose staff are treated fairly, who are well-rewarded, well-motivated, well-led, have access to appropriate opportunities for training and skills development, and who are a diverse workforce are likely to deliver a higher quality of service. This can be supported by the adoption of fair work practices across the sector, which includes ensuring that staff are fairly remunerated.

There is a gap between average earnings in local authorities and funded providers in the private and third sector. Public sector staff working in ELC settings already receive at least the real Living Wage. However, the [Financial Review of Early Learning and Childcare](#) in Scotland found that, in 2016, around 80% of practitioners and 50% of supervisors in private and third sector settings delivering the funded entitlement were paid an hourly rate below the real Living Wage.

Relatively low levels of pay can present a barrier to some people entering the sector, resulting in recruitment challenges, and can also result in higher levels of staff turnover. This could have potential implications for the continuity of care experienced by children and families.

### **The Scottish Government's aspiration is for all workers in early learning and childcare settings to be paid the real Living Wage as a minimum.**

To support this funded providers will, from 2020, receive sustainable funding rates that are set at a level that enables them to pay the real Living Wage to childcare workers delivering the funded entitlement.

We acknowledge that implementing this commitment may present a number of challenges for both funded providers and for local authorities.

However, these need not be prohibitive. **For example, there are already ELC providers in the private and third sector who are paying the real Living Wage.**

As part of their work to develop guidance on transition options, Scotland Excel will include guidance to support providers and local authorities to implement the real Living Wage commitment.

### **Meaningful and Genuine Partnership Working**

It is expected that local authorities and funded providers will work together meaningfully and in genuine partnership to deliver flexible ELC provision. This will be done while ensuring a high quality ELC experience is maintained and accessible to all children. There are already good examples of partnership working between local authorities and funded providers in the private and third sectors, including childminders. We would encourage everyone to build upon this work.

The National Standard sets out the requirements for all funded providers, regardless of whether they are in the public, private or third sectors, including childminders. However, whilst there is, rightly, a high expectation on providers delivering the funded entitlement, settings should also have high expectations of the support that they can expect to receive as part of their agreement with the local authority.

Under a 'provider neutral' approach, there should be a clear and consistent level of support that funded providers across all settings can expect from local authorities. The approach is built on partnership, and by entering into agreements with providers to deliver the funded entitlement, local authorities will be accepting the expectations on them to support funded providers through – in particular, but not limited to:

- a sustainable funding rate that reflects the cost of delivery and allows for delivery of national priorities including payment of the real Living Wage to all childcare workers delivering the funded entitlement;
- additional funding to providers to ensure every child attending a funded ELC session is provided with a free meal;
- giving appropriate consideration to the potential impacts of their policy and investment decisions on the competitiveness and business sustainability of providers;
- fair and transparent payment practices for parents and carers and funded providers;
- working closely with, and supporting, funded providers to make reasonable changes to the care and learning environment in order to meet any additional support needs that a child may have (in accordance with duties under the Additional Support for Learning Act 2004 and the Equality Act 2010);
- providing clarity on the overall support available to funded providers and how this support is reflected in the rate, including support for staff;
- supporting parents and carers to make informed choices; and

- monitoring compliance of all funded providers against the National Standard.

Equally, under a 'provider neutral' approach, there should also be a clear and consistent level of service delivery that all funded providers should be expected to maintain, including continuing to meet the criteria set out in the National Standard. This will not only ensure the proper use of public funds, but will also guarantee consistency of high quality provision across all provider types.

By entering into an agreement with local authorities to deliver the funded entitlement, funded providers will be accepting the expectations on them to comply with certain requirements. The detailed requirements will be agreed with the local authority when entering into the agreement and should include:

- a guaranteed standard of high quality ELC for children, including continued compliance with the National Standard criteria;
- ensuring that all funded hours are free at the point of access;
- a commitment to pay the real Living Wage to staff delivering the funded entitlement;
- a commitment to work within the parameters of the local authority's model of delivery;
- attending local authority development and consultation sessions or equivalent;
- a commitment to ongoing and constructive communication with the local authority, including compliance with local authority quality monitoring arrangements; and
- open and regular communication with parents and carers.

## **SECTION 2: THE NATIONAL STANDARD FOR EARLY LEARNING AND CHILDCARE OPERATING GUIDANCE**

This section includes guidance to assist settings in interpreting and demonstrating the National Standard criteria and highlights key supporting documents to aid with implementation.

The criteria focus on what children and their families should expect from their ELC experience, regardless of where they access their funded entitlement in local authority, private, or third sector settings, or through a childminder. This will ensure that, as part of the 'provider neutral' Funding Follows the Child approach, there is consistency of high quality provision across all funded provider types. It is also underpinned by the regulations in the [Public Services Reform \(Scotland\) Act 2010](#) which applies to all care services across Scotland, including daycare of children and childminding settings.

### **CRITERIA 1 - Staffing, leadership and management**

The single most important driver of the quality of a child's ELC experience is a high quality workforce. The 2017 NHS Health Scotland evidence review on [Childcare Quality and Children's Outcomes](#) found that higher qualified practitioners, leadership and an experienced, competent and confident workforce provide a better quality environment for children. We also know from the [Growing Up in Scotland Study](#) that Care Inspectorate evaluations on quality of staffing are linked to children's outcomes.

#### **Criteria for ALL SETTINGS (EXCLUDING CHILDMINDERS):**

- **Sub-criteria 1.1 - Care Inspectorate quality evaluations are good or better on themes that relate to quality of staffing, management and leadership.**

#### **How do settings meet this criteria?**

The setting is evaluated by the Care Inspectorate as good or above in the quality themes of; Quality of management and leadership; and Quality of staffing.

- **Sub-criteria 1.2 - All support workers, practitioners and lead practitioners/managers working in the setting and included in the adult:child ratios must have either obtained the benchmark qualification for their role or, if they are still within their first 5 years of registering with the SSSC, have started to work towards this.**

#### **How do settings meet this criteria?**

We recognise that staff qualifications are not the only factor that will affect the quality of staffing. Experience, motivation and the ability to build positive, loving and trusting relationships will also have an important impact alongside key skills in engaging, interacting and enriching children's ELC experiences. However, the recent [NHS Health Scotland evidence review](#) on quality of ELC and child outcomes found that highly trained staff are better equipped through training and professional development to deliver the necessary care, nurturing, love and support required for children's holistic developmental needs.

The registration of the ELC workforce is regulated by the Scottish Social Services Council (SSSC). Since 2011, all registered ELC managers/lead practitioners must either hold the SCQF level 9 benchmark qualification or agree that their registration is subject to a condition that they secure this within their first period of registration. For practitioner grade, the benchmark qualification is SCQF level 7, and for support workers, the benchmark qualification is SCQF Level 6.

Those working with children in daycare of children settings are required to register with SSSC within six months of beginning employment in the ELC sector. They must maintain their registration in line with SSSC guidance. The period of registration is five years and it is expected that staff achieve their qualification within this timeframe or before. It is therefore possible for someone to be employed for several years before they secure the relevant qualification. The introduction of this sub-criteria ensures that all support workers, practitioners and lead practitioners working in settings delivering the funded entitlement have at least started to work towards their qualification.

The criteria does **not** apply to support workers or to practitioners who are not included in the adult:child ratios, who may wish to gain some experience of working in the sector before committing to undertaking a professional qualification. It also does not apply to volunteers who work within the setting carrying out non-routine activities on an occasional basis.

If any practitioners or lead practitioners are unable to obtain a place on a qualification course and are, therefore, unable to start working towards their benchmark qualification, they must provide evidence of application and response from the training provider.

### **What support will be available to help settings meet this criteria?**

We are working with delivery partners to consider options to most effectively support private and third sector providers to recruit and train additional staff to fill vacancies, including supporting providers with the cost of training.

We are working with COSLA to enable providers in the private and third sector to post job opportunities for free on My Jobs Scotland (MJS) in the period up to 2020.

We are continuing to increase the number of ELC Modern Apprenticeships by 10% each year to 2020, and to encourage a broader age profile, including more older workers into the sector, we have increased the contribution rate for over 25s from £700 to £1,700 from April 2018.

- **Sub-criteria 1.3 - Sustainable staffing structures are in place which meet the recommended adult: child ratios.**

### **How do settings meet this criteria?**

The [Health and Social Care Standards](#), which set out what families should expect when using any service within the health or social care sector, including ELC, make it clear that children's needs should be met by the right number of people and that staff working in the setting should have time to support, care for and to speak with children and their families.

Settings will be expected to plan their staffing structures to meet these ratios:

- For two year olds this is 1:5; and
- For those aged 3 and over it is 1:8 where children attend for more than 4 hours per day, and 1:10 if they attend for less than 4 hours per day.

It should be noted that the Care Inspectorate will be able to vary the ratios where, for example, there are a number of children with additional support needs or the layout of premises means that extra staff are required to ensure children are adequately supervised.

Staff included in the ratios need not have secured their benchmark qualification but they must be registered with the SSSC as either a support worker, lead practitioner or practitioner grade and, as sub-criteria 1.3 makes clear, should have started to work towards the qualification.

### **What support will be available to help settings meet this criteria?**

[Guidance on the number of children](#) that a setting can accommodate per member of staff is available on the Care Inspectorate website.

- **Sub-criteria 1.4 - All SSSC registered staff in the setting are achieving a minimum of 12 hours per year of Continuous Professional Learning.**

#### **How do settings meet this criteria?**

Quality of staffing is not determined solely by the proportion of qualified practitioners working in a setting. Continuous Professional Learning (CPL) can be just as, if not more important than a formal qualification, especially where the benchmark qualification was achieved many years ago.

The SSSC registration requirement is that workers in daycare of children services complete 10 days, or 60 hours, of post registration training and learning over their five year registration period. This applies to support workers, practitioners and managers/lead practitioners. We would expect to see this suitably spread over each year of the registration period so that CPL is routinely embedded in practice.

**12 hours a year of CPL is the minimum requirement**, and where staff need or would like to undertake more hours of CPL than required, funded providers will be expected to support this as far as possible, given the business needs of the setting. Time that staff spend working towards their benchmark qualification can be counted towards the CPL requirement but this will not preclude them from undertaking other learning and development opportunities.

Teachers who are working in ELC will be subject to their registration conditions with the General Teaching Council of Scotland and will be expected to undertake a minimum of 35 hours a year of CPL, in line with their requirements.

#### **What support will be available to help settings meet this criteria?**

There is a wide range of CPL available to the ELC sector. To help staff identify and access this, we are currently working with the Care Inspectorate to make available, on their website, a national directory of CPL that will allow them to search for opportunities by topic and local authority area. We expect this to be available in early 2019. We are also developing a national programme of online CPL that will be free of charge for all ELC settings by the end of 2019.

- **Sub-criteria 1.5 - Staff new to delivering funded ELC within the last year are familiar with the content of the most up-to-date version of the national induction resource.**

#### **How do settings meet this criteria?**

The ELC workforce will grow significantly in the period to 2020 to deliver the expansion to 1140 hours. This includes managers/lead practitioners, practitioners

and support workers and it is vital that they are all properly inducted into their new roles and supported in their practice. To ensure that children continue to experience high quality care and support, the induction of this new workforce will need to be carefully planned and resourced.

The new national induction resource has been created for all staff who are new to delivering ELC to ensure that they are well supported in developing the skills and understanding they need in their role. New staff working in ELC will need to ensure they are familiar with this resource to meet this criteria.

The [SSSC Codes of Practice](#) for Employers already requires employers to give their staff clear information about their roles and responsibilities, relevant legislation and the policies and procedures they must follow in their work. Many employers will therefore already have a local induction programme for new staff.

### **What support will be available to help settings meet this criteria?**

The national induction resource will be available on the [Learning Zone](#) on the SSSC website. It will provide consistent information to new staff about, for example, codes of practice, standards and qualifications and will also make them aware of the range of existing and new support available. In addition, it will offer some reflective questions that new staff could explore with their mentor during their first few months in post.

To support mentors, the Scottish Government will be developing an online professional learning module on mentoring new staff in ELC. When this becomes available, this document will be up-dated to include a link. In the meantime, useful resources are [Step Into Leadership](#) which provides a range of mentoring tools to the wider social services sector and the [SSSC guide to mentoring in ELC](#).



**Criteria for CHILDMINDING SETTINGS:**

- **Sub-criteria 1.1- Care Inspectorate quality evaluations are good or better on themes that relate to quality of staffing, management and leadership.**

**How do childminders meet this criteria?**

The setting is evaluated by the Care Inspectorate as good or above in the quality themes of; Quality of management and leadership; and Quality of staffing, where applicable.

- **Sub-criteria 1.2 - From the implementation of the full roll-out of 1140 hours, childminders delivering the funded entitlement must have either obtained the benchmark qualification for ELC practitioners or, if they are still within their first 5 years of delivering the funded hours, be working towards achieving this qualification.**

**How do childminders meet this criteria?**

The introduction of a minimum qualification requirement for childminders delivering the funded entitlement will provide reassurance, in respect of quality of provision, for parents and carers when they are making their choice of ELC provider.

This will mean that childminders delivering the funded entitlement are required to hold, or be working towards, the same qualification level (SCQF Level 7 with at least 68 credits) as a practitioner working in an ELC setting. This will help ensure that, as part of the 'provider neutral' approach, there is consistency in quality across all provider types.

If a childminder is unable to obtain a place on a qualification course and is, therefore, unable to start working towards their benchmark qualification, they must provide evidence of application and response from the training provider.

The qualification requirement will **not** apply to childminding assistants.

Childminders will continue to register as settings with the Care Inspectorate.

**What support will be available to help childminders meet this criteria?**

Information about the SSSC recognised qualifications for practitioner level workers is available on the [SSSC website](#). For childminders already in practice and wishing to undertake a work-based qualification that builds on their experience and prior learning, the [SVQ Social Services \(Children and Young People\)](#) is likely to be an attractive route.

We are working with training providers and colleges to explore how relevant prior experience, training and qualifications can be recognised and accredited towards a

mandatory qualification. As a first step, the Care Inspectorate's 'Your Childminding Journey' (a learning and development resource for childminders) is being further developed to help make links to the National Occupational Standards at SCQF level 7 (on which the SVQ is based). This will help childminders gather evidence of prior learning, understand what evidence might be relevant to present to colleges and training providers and identify any gaps in their knowledge and areas for further study before deciding on a route to qualification.

The [Scottish Childminding Association](#) (SCMA) have also developed a workplace award that offers 12 credits at SCQF level 7. This qualification has been mapped by the SQA (Scottish Qualifications Authority) to the SVQ (Scottish Vocational Qualifications) practitioner level qualification which means that childminders who complete units, or the whole workplace award, will generate evidence that can be used as recognition of prior learning and give them some credits towards the full benchmark qualification.

We will also work with SVQ training providers to ensure that adequate infrastructure is in place that allows childminders to access training in a flexible way that does not require them to take time away from delivering their services to children. The SVQ Social Services (Children and Young People) is already offered by several colleges in a flexible way that meets the needs of childminders.

Provided the applicant's individual income does not exceed £25,000 per annum, fee grants for part time courses are available from the [Student Awards Agency Scotland](#) (SAAS). Another source of part-funding is the [Skills Development Scotland](#) Individual Training Account. We will explore whether other dedicated funding needs to be made available to help childminders to fund their qualifications.

- **Sub-criteria 1.3 - The staffing structure in the setting is adequate to meet the recommended adult: child ratios.**

#### **How do childminders meet this criteria?**

Childminders will be expected to plan their service to meet these ratios.

For childminders, the required ratio is 1:6 children under 12 years of whom 1:3 for those under school age and only 1 under one year old.

#### **What support will be available to help childminders meet this criteria?**

[Guidance](#) on the number of children that a childminding setting can accommodate per member of staff is available on the Care Inspectorate website.

- **Sub-criteria 1.4 - All childminders delivering the funded entitlement are achieving a minimum of 12 hours per year of Continuous Professional Learning.**

#### **How do childminders meet this criteria?**

As childminders are not required to register with SSSC, they have previously been exempt from the requirement to complete 10 days, or 60 hours, of post registration training and learning over a five year registration period.

From 2020 childminders who are delivering the funded hours will be required to achieve a minimum of 12 hours per year of Continuous Professional Learning (CPL).

This will promote parity in expectation of professional learning across all funded providers and ensure that, as part of our 'provider neutral' approach, there is consistency in quality across all provider types.

#### **What support will be available to help childminders meet this criteria?**

SCMA, The Care and Learning Alliance, and Early Years Scotland as well as a range of other organisations provide a range of flexible CPL for childminders<sup>3</sup>.

Local authorities delivering CPL to funded providers will be expected to make their training accessible (as many already do) to childminders delivering funded hours in their area.

The national programme of online CPL that we are developing for the ELC sector (see text at sub-criteria 1.4) will also be available to childminders.

- **Sub-criteria 1.5 - All childminders newly registered to deliver ELC within the last year have undertaken appropriate induction.**

#### **How do childminders meet this criteria?**

Childminders should be able to evidence that they have undertaken an appropriate induction whether through their local authority, through a national organisation or other channels.

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<sup>3</sup> To find out more about SCMA learning opportunities, including the Complete Childminding Learning Pathway see:

<https://www.childminding.org/learn-with-scma>

For details of the EYS Professional Learning Academy see:

[https://earlyyearsscotland.org/Media/Docs/What's%20New/Calendar%20AW1819%20\(3\).pdf](https://earlyyearsscotland.org/Media/Docs/What's%20New/Calendar%20AW1819%20(3).pdf)

For regular calendar of EYS professional learning opportunities see:

<https://earlyyearsscotland.org/Media/Docs/Secure/EYS%20Professional%20Learning%20web.pdf>

**What support will be available to help childminders meet this criteria?**

There is a range of induction support available to childminders. The Care Inspectorate's '[Your Childminding Journey – a Learning and Development Resource](#)', not only supports established childminders to identify professional development needs, but also provides induction guidance for new childminders. It sets out clear quality statements that childminders should aim to meet at application, registration and post-registration stages and also provides links to useful resources. The resource is free and accessible to all childminders.

In addition, SCMA offer induction support, which includes guidance on setting up and running a business as well as on how to deliver the best outcomes for children. Other organisations and some local authorities also have induction programmes which childminders may be able to access.

## **CRITERIA 2 - Development of children's cognitive skills, health and wellbeing**

We know that the socio-economic gap in children's outcomes opens up well before children start primary school. Narrowing this gap in the years before school must be part of our strategy to promote equity and excellence for all.

Development of children's cognitive development, health and wellbeing should underpin all aspects of practice in ELC and this criteria sets out how settings can demonstrate how they are supporting outcomes for children in relation to these aspects of their development.

### **Criteria for ALL SETTINGS**

- **Sub-criteria 2.1 - Care Inspectorate quality evaluations are good or better on the theme relating to quality of care and support.**

#### **How do settings meet this criteria?**

The setting is evaluated by the Care Inspectorate as good or above in the quality theme of Quality of care and support.

- **Sub-criteria 2.2 - The setting must have a framework to support children's learning that is informed by national guidance and is appropriate to support individual children's development and learning focussed on active learning through play.**

#### **How do settings meet this criteria?**

Each setting's framework for learning will be unique to that setting, taking account of local needs and circumstances and based on agreed shared values. It is within this framework that settings provide experiences and opportunities to support individual children's learning and development.

The setting's framework to support children's learning should:

- be informed by national guidance and pay close attention to achieving challenge and enjoyment, breadth, progression, depth, personalisation and choice, coherence and relevance;
- have a clear purpose which is understood by practitioners;
- provide equity of opportunity for all;
- secure children's wellbeing and rights and reflect children as capable and competent learners; and
- reflect the changing and unique needs of children, families and community.

The experiences and opportunities that settings offer to children should:

- be based firmly in play and active learning;
- be well matched to the stages of development of children attending, and build on their previous experiences;
- actively promote and develop the essential aspects for early learning: wellbeing, communication, curiosity, inquiry and creativity;
- support children to develop early literacy and numeracy skills and health and wellbeing;
- be carefully planned to ensure all children experience continuity and progression in their learning;
- take full account of individual children's needs, personalities, interests and stage of development in their personal plan;
- be flexible, responsive and provide opportunities for children to take forward their own ideas and interests;
- be enriched by contributions from partnerships with parents, carers and the wider community; and
- provide opportunities for children to experience high quality play both indoors and outdoors.

### **What support will be available to help settings meet this criteria?**

Settings will find support for self-evaluation for self-improvement in this area in Quality Indicator 2.2: Curriculum of [How Good is Our Early Learning and Childcare?](#). Professional learning resources and case studies to support practice are also available on the [National Improvement Hub](#).

The Care Inspectorate have also produced [Our Creative Journey](#) which showcases good practice examples of promoting creativity in ELC as well as other children's services. It is based on the Getting it Right for Every Child wellbeing indicators and is aimed at promoting good practice in all types of ELC settings, to help all services aspire to be the best they can be and have the greatest impact on children's lives.

We will also be developing an online programme of continuous professional learning for the ELC sector which will include a module on understanding curriculum rationale.

### **CRITERIA 3 - Physical Environment**

As we expand ELC provision, it is important that we have the right physical infrastructure, both indoors and outdoors, to improve outcomes for children. This includes capacity but also appropriate and stimulating care and learning environments for all children in ELC.

We know the benefits of outdoor learning, exercise and play for children. Playing, learning and having fun outdoors helps to improve wellbeing and resilience, increase health through physical activity, provides children with the opportunity to develop a life-long appreciation of the natural world and has a positive impact on educational attainment.

#### **Criteria for ALL SETTINGS**

- **Sub-criteria 3.1 - Care Inspectorate quality evaluations of good or better on the theme relating to quality of environment.**

#### **How do settings meet this criteria?**

The setting is evaluated by the Care Inspectorate as good or above in the quality theme of Quality of environment.

#### **What support will be available to help settings to meet this criteria?**

[Space to Grow: Design guidance for early learning and childcare and out of school care services](#) aims to maximise positive experiences for children and improve the quality of care and learning by helping ELC services to think innovatively about the design of their settings. Although the guidance provides many insights into what constitutes good design, illustrated through case studies from Scotland and further afield, it acknowledges that all environments are unique. The focus throughout remains on the positive impact a well-designed indoor and outdoor environment has on improving outcomes and experiences for children.

The concept of the environment is wider than just buildings, space and infrastructure. [Building the Ambition](#) offers a wider concept of the child's immediate environment stating it should be "flexible in offering choices and carefully selected resources which capture interest to create moments which spark children's play" and provide access to "props and spaces both inside and outside where children can play". The key is to establish a safe, secure and inspiring physical environment for children indoors and outdoors, with spaces where they can play together, be alone or with a few others, and have access to materials and resources that support creativity and learning.

- **Sub-criteria 3.2 - Children have daily access to outdoor play and they regularly experience outdoor play in a natural environment as part of their funded ELC offer.**

### **How do settings meet this criteria?**

The expansion of ELC will result in many children spending more time on a daily basis in settings, therefore, it is vitally important that outdoor play is offered daily in line with the Health and Social Care Standards which state that *‘as a child I play outdoors every day and regularly explore a natural environment’*.

Outdoor play is an essential part of developing children’s holistic wellbeing and can offer a wide range of learning as well as contributing to their skills development in a different context. When children are attending settings for full days, at least part of that day should be spent outdoors. Wherever practical this should include the freedom of choice to move between indoor and outdoor environments. The Care Inspectorate define an outdoor play area as:

*“any area out of doors, that is available to the children attending the service. The area may be shared with others or available to the wider community”*

As part of their funded entitlement, children should also have the opportunity and be encouraged to spend time outdoors within a natural environment. We would define the natural environment as ‘green space’, which could include but not be limited to, wild landscapes such as woodlands, forests, beaches, hillsides but also public parks, gardens, and open green areas.

### **What support will be available to help settings meet this criteria?**

In [My World Outdoors](#), the Care Inspectorate highlight the importance of outdoor play, provide guidance for practitioners and share best practice (including case studies) from across Scotland. This resource can be used to inform practice outdoors alongside national guidance produced by other organisations.

There are a range of resources and case studies available on the [National Improvement Hub](#) to provide support for professional development in outdoor learning across the 3-18 curriculum.

We will also be developing an online programme of continuous professional learning for the ELC sector which will include a module on outdoor learning. In addition, we will publish by the end of December 2018, in collaboration with Inspiring Scotland and the Care Inspectorate, ‘Out to Play – practical guidance for creating outdoor play experiences in early learning and childcare’ providing online step-by-step guidance and practical advice for practitioners on how to access outdoor spaces to create safe, nurturing and inspiring outdoor learning experiences.



## **CRITERIA 4 - Self-Evaluation and Improvement**

Self-evaluation (or self-assessment) has been a feature of improving ELC for many years. The Care Inspectorate and Education Scotland national self-evaluation frameworks are designed to promote effective self-evaluation as the first important stage in the process of achieving self-improvement. In addition, the self-assessment submitted to the Care Inspectorate for childminders acts as a reflective tool for these professionals alongside '[Your Childminding Journey](#)'.

Effective, collaborative self-evaluation, as part of a wider quality assurance approach, requires a cycle of activity based around answering three questions:

- How are we doing?
- How do we know?
- What are we going to do now?

Using this framework will help provide an effective structure that will support ELC settings to undertake on-going self-evaluation and to identify and set out actions to secure further improvement.

### **Criteria for ALL SETTINGS**

- **Sub-criteria 4.1 - The setting uses relevant national self-evaluation frameworks to self-evaluate and systematically identify strengths and areas for improvement.**

#### **How do settings meet this criteria?**

Settings should use relevant self-evaluation frameworks and national best practice guidance to reflect on and evaluate their current provision. This should be completed in collaboration with children, parents, carers and staff as much as possible. Systematic and responsive self-evaluation is an important part of developing the service.

Robust and transparent quality assurance systems should be used to create a culture of continuous improvement. There should be clear evidence of how decisions about change have been made and what the service plans to do to achieve this change. Any improvements identified should be focussed on improving outcomes for children and families in line with the [National Improvement Framework](#), alongside local and setting specific priorities.

#### **What support will be available to help settings meet this criteria?**

[How Good is Our Early Learning and Childcare?](#) has been developed by Education Scotland to support settings to self-evaluate and identify strengths and areas for improvement.

The Care Inspectorate is also developing guidance on self-evaluation and supporting continuous improvement for settings which will be published before March 2019 in line with the new [Health and Social Care Standards](#).

The online national programme of CPL mentioned above will also include a module on improving understanding of, and approaches to undertaking, self-evaluation.

- **Sub-criteria 4.2 – The setting has a clear plan, developed in line with self-evaluation evidence, evidence from Education Scotland and Care Inspectorate scrutiny activities, research and national practice guidance, to continuously improve the quality of provision and outcomes for children and families.**

#### **How do settings meet this criteria?**

Children and families should benefit from a service which is well-led and managed. Settings should proactively recognise areas for improvement and plan effectively to make changes which will positively impact on children's ELC experience.

Developing a manageable, measureable improvement plan with a small number of well-considered priorities will support settings to continuously improve. Staff should be motivated and engaged in taking forward improvements in the setting and should be able to show how the changes they have made have improved outcomes for children and families. By planning improvements systematically and sharing this plan with everyone in the setting, the service will support the success of any improvements and minimise the risk of continuity in ELC being jeopardised.

The plan should be a working document which is regularly reviewed to help ensure progress towards achieving the identified outcomes and improvements. For settings who operate more than one type of service, for example, where a nursery is linked to a primary school, it could be developed as part of the wider improvement plan or as a stand-alone plan for the ELC setting.

Where settings have been inspected by the Care Inspectorate and/or Education Scotland, they should ensure that any areas for improvement which are identified through this process are included as a part of the improvement agenda for the setting. Clear links to these evaluations should be made within the improvement plan and key actions to address any areas for improvement included. If the service falls below 'good' in any of the areas evaluated by Education Scotland or the Care Inspectorate, the local authority, as the primary guarantors of quality should support the setting to improve. Where necessary, the Care Inspectorate and Education Scotland may also provide follow-up support to a setting to help them address any areas for development identified through their scrutiny activity.

**What support will be available to help settings meet this criteria?**

Work is underway in Education Scotland to develop improvement planning guidance aligning with the advice created on improvement planning for the National Improvement Framework.

## **CRITERIA 5 - Parent and carer engagement and involvement in the life of the setting**

High quality ELC should support parents and carers in their role as the primary influence on children's outcomes. Promoting parent and carer engagement and involvement in children's learning while they attend ELC is an important opportunity to make parents and carers feel valued, instil them with confidence in their role and demonstrate that settings involved in their child's life are accessible and approachable.

Families should feel accepted, valued and respected by the service as this is an essential part of promoting relationships that impact positively on the consistency and continuity of care and learning for children in ELC. By having these close relationships, families will feel secure and valued, promoting a collaborative culture where everyone can be involved in the life of the setting, including identifying and taking forward developments.

### **Criteria for ALL SETTINGS**

- **Sub-criteria 5.1 - There is open and regular communication with parents and carers about the work of the setting and families are meaningfully involved in influencing change.**

### **How do settings meet this criteria?**

In terms of communication and collaboration, settings should:

- create a welcoming, loving and supportive culture where everyone is accepted, valued and treated with respect and dignity;
- develop information and advice related to the setting in consultation with parents and carers, ensuring this is accessible in a format or language that is right for them;
- develop a range of simple and effective ways to communicate and collaborate with parents and carers which is in line with their needs and circumstances, including the use of social media or other forms of electronic communication;
- take a strategic approach by asking parents and carers what would work for them;
- facilitate opportunities for parents and carers to be involved in self-evaluation and planning improvements in the service, directly impacting on change and quality, for example, through Parent Forums or regular consultation strategies; and
- nurture a mutually supportive link between the home, the setting and any other organisations involved in the child's early years.

Parents and carers should understand the role they can play and feel empowered to contribute to decisions.

### **What support will be available to help settings meet this criteria?**

[Learning Together](#) is Scotland's national action plan on parent and carer involvement, parent and carer engagement, family learning and learning at home for 2018 – 2021. It makes clear that it is only through positive relationships – relationships between families and those working with children and young people, relationships based on trust, mutual respect and partnership - that we will achieve the best outcomes for children. It provides guidance and advice on how to engage with families meaningfully and in a supportive way.

- **Sub-criteria 5.2 - Parents and carers are supported to engage in their child's learning and development.**

### **How do settings meet this criteria?**

Parents and carers should be actively involved in determining and planning for the holistic wellbeing needs of their child. Being a part of creating and reviewing their child's personal plan will allow them to be involved in ensuring their child's holistic wellbeing is well supported. It is important that they, and their child, are recognised as experts in their own experiences and settings need to work closely with them to best meet the needs of the children in their care. Positive and trusting relationships between staff and families is essential to the success of this approach.

In addition, research suggests that involving parents and carers in their child's learning is a key indicator in improving outcomes for children. Settings should support parents and carers to regularly and meaningfully engage in their child's learning at home and within their setting, where possible. Consultation with parents and carers should concentrate on how they can meet the learning needs of the family as a whole as well as the child. This promotes lifelong learning in the setting. This should be planned in a way which helps families to learn and develop as a whole and focussed on ensuring children have the best start in life.

This could mean: informing and discussing with parents and carers what is happening with their children's learning; encouraging parents and carers to share skills and knowledge to enrich the curriculum; providing them with information, advice and guidance on child development generally; supporting them to engage in their children's learning at home; providing or sign-posting to opportunities for families to learn together; and offering targeted support to families to help them to engage in a variety of learning opportunities which meet their individual needs.

**What support will be available to help settings meet this criteria?**

The Care Inspectorate will publish guidance to support the development of personal plans in ELC next year. This will ensure that settings are clear on the expectations of legislation and support them to develop plans which improve children's outcomes in consultation with parents and carers.

In addition, a module on supporting parents and carers to further engage in their children's learning will be included in the national online programme of CPL being developed for the ELC sector.

The Scottish Government will develop an online resource for parents and carers to empower them to make informed choices about the right ELC setting for their child. The Scottish Government will work with parents, carers and parent organisations to develop the resource, which will be available by March 2019.

We will also work with providers and local authorities to develop a national information resource that all settings and local authorities can draw on and circulate to parents to allow for consistent messaging.

By March 2021, Education Scotland will develop and publish a range of further additions on parent and carer involvement within its professional learning resources including the 'Engaging Parents and Families Toolkit'. This will support further improvements in the levels of parental involvement with ELC settings.

## **CRITERIA 6 - Inclusion**

As the Funding Follows the Child approach offers more flexibility and increased choice for parents and carers, it is vital to ensure that provision remains accessible for all children. An inclusive approach, with an appreciation of diversity and an ambition for all to achieve to their full potential, is essential to getting it right for every child and raising attainment for all. Inclusion is the cornerstone to help us achieve equity and excellence in education for all of our children and young people.

ELC provision must therefore be delivered in a way that ensures equality of access for, and accounts for the varying needs of, all children. Children should be able to learn free from discrimination and in settings which actively tackle health and social inequalities. Additional support may be required, over the short or the long term, to overcome needs arising from the care and learning environment, family circumstances, health needs or disability or social and emotional factors. Those that may require additional support may include, for example, children with disabilities, children with English as an additional language, Gypsy/Travellers, highly able children, asylum seeking / refugee children and Service children (children from Armed Forces families).

The [Early Learning and Childcare Statutory Guidance](#) makes it clear that additional support for learning is required to help a child or young person to overcome a barrier to their learning. The support need not be provided in an educational establishment, and is directed to learning in its broadest sense. It also outlines the importance of joint partnership planning and working – for example between NHS Boards and other local authorities - to deliver additional support for learning where required.

While not every setting will be able to meet the needs of every child, settings will be expected to adhere to the following:

### **Criteria for ALL SETTINGS**

- **Sub-criteria 6.1 - The setting must comply with the duties under the Equality Act 2010.**

#### **How do settings meet this criteria?**

The setting should ensure that the practice, policies and procedures in their setting are in line with the [Equality Act 2010](#). The setting should be able to show how they are meeting the [Health and Social Care Standards](#) related to this criteria such as:

*“I am accepted and valued whatever my needs, ability, gender, age faith, mental health status, race, background or sexual orientation.”*

Training and development for staff on the main features of this Act may be beneficial and staff should be able to understand how their practice ensures excellence and equity for all.

### **What support will be available to help settings meet this criteria?**

The Equality Act 2010 protects children from discrimination and harassment based on 'protected characteristics'<sup>4</sup>. The Act makes it unlawful for a setting to discriminate against a child in relation to: admissions; the provision of education; access to any benefit, facility or service; exclusions; and any other detriment.

The Equality and Human Rights Commission have published [technical guidance on the Equality Act 2010 in relation to the provision of education](#), which also covers that provided in ELC settings.

In addition, the Care Inspectorate has launched a support resource with Zero Tolerance on [Gender Equal Play in early learning and childcare](#) which may support settings in this aspect of the Equality Act 2010.

- **Sub-criteria 6.2 - The setting will be willing to provide appropriate support, including making any reasonable changes to the care and learning environment, to ensure that children's additional support needs do not provide a barrier to them accessing a full range of experiences and meets their individual needs.**

### **How do settings meet this criteria?**

Although the setting must be willing to provide appropriate support, including making any reasonable changes required to the setting, it will not necessarily be expected to meet the costs associated with this.

Education authorities have a duty under the [Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#) (as amended) to identify, provide for and review the additional support needs of their children. The Act also applies to 'eligible pre-school children' which was extended, as a result of part 6 of the [Children and Young People's Act 2014 \(the 2014 Act\)](#), to include eligible children aged two. This applies regardless of whether the child is accessing the funded hours in a public, private or third sector setting, or through a childminder. In the context of children aged two, learning is defined as meeting developmental milestones.

The duties under section 6 of the Education (Additional Support for Learning) (Scotland) Act 2004 are explained in the [Statutory Guidance to the Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#). Additional support falls into three overlapping, broad headings: approaches to learning and teaching; support

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<sup>4</sup> See paragraph 1.10 of the [technical guidance on the Equality Act](#) in relation to the provision of education.



from personnel; and, provision of resources (which could include making changes to the setting). This makes clear that decisions regarding what can be considered adequate and efficient provision can only be judged in the light of each child's circumstances.

It also makes clear that cost should not be the primary consideration in determining what provision is to be made but that decisions have to be taken in light of the local authority's duties to secure best value and service improvement. Expenditure may therefore be unreasonable where the cost incurred would be completely out of scale with the benefits to the child or young person or where suitable alternative provision is available at a significantly lower cost. It may also be considered unreasonable where substantial expenditure on new facilities would be completely out of scale to the benefits to the wider community. For example, the local authority will wish to consider whether the expenditure in providing for a particular child may be of benefit to others in the future.

In the interest of openness and transparency, the local authority must inform the person who made the request for additional support of their decision and explain their reasons for their conclusions. They must also notify the person making the request about mediation services (in the case of parents and young people) and dispute resolution procedures.

It must be noted however that local authority settings, grant-aided schools and independent schools (including any ELC provision within these) also have duties under the Equality Act 2010 Act to make reasonable adjustments for disabled children. The Equality and Human Rights Commission have published technical guidance on the Equality Act 2010 in relation to the provision of education, which also covers that provided in ELC settings. Chapter 6 covers the duty to make reasonable adjustments and page 85 sets out factors to be taken into account when making decisions. However, funded providers in the private and third sectors, including childminders, are not covered by this. Instead, they are covered by the separate [EHRC Statutory Code of Practice on Services, Public Functions and Associations](#). Chapter 7 explains the duties with regard to making reasonable adjustments.

### **What support will be available to help settings meet this criteria?**

A module on building confidence in identifying and responding to additional support needs will be included in the national online programme of CPL being developed for the ELC sector.

In addition, Education Scotland have developed a free [online inclusion resource](#) aimed at practitioners and local authorities and provides an introduction to inclusion and equality within the Scottish educational context.

## **CRITERIA 7 - Business Sustainability**

A financially sustainable setting is important for the benefits of the child, particularly in ensuring consistency and continuity of care.

Consistency in setting and staff is key to a child's development. When young children come into a setting, they need a happy, secure environment, rich in opportunities which promote learning and physical activity which at the same time are calm, comforting and responsive.

Providing stability and continuity in provision will allow practitioners to build up strong relationships with children through consistent contact time, in a familiar and safe environment.

### **Criteria for ALL SETTINGS**

- **Settings wishing to deliver the funded entitlement must be able to demonstrate that they are financially viable providers.**

#### **How do settings meet this criteria?**

Separate technical guidance currently being developed by Scotland Excel will set out the specific information that settings have to provide to local authorities to demonstrate that they meet this criteria.

In summary:

- **Existing settings** delivering the funded entitlement must ensure that they are able to demonstrate – when required – that their business model continues to be financially viable through the provision of appropriate financial information, for example, accounts and business forecasts/projections. A Business Continuity Plan must also be in place.
- **Newly registered settings** wishing to deliver the funded entitlement will have had a financial viability check completed by the Care Inspectorate upon registration and this can be used as evidence of business sustainability in the funded provider probationary status period. When the probationary funded status is under review, the criteria for existing settings will apply.
- **Childminding settings** wishing to deliver the funded entitlement will be expected to have a contingency plan in place, detailing arrangements for the children in their care should they stop providing the service e.g. if the service was temporarily unavailable due to illness or the service was closed permanently.

**What support will be available to help settings meet this criteria?**

When registering a daycare of children service, the Care Inspectorate carry out an assessment of the financial sustainability of the proposed provider. This process ensures that the setting will be able to operate in their first year and ascertains the business model for the setting moving forward.

In addition, there is general business support available to providers through a range of routes. However, we appreciate that it is not always easy for providers to find this information. To aid providers we will bring together information on current support available in a clear format to enable easier access.

## **CRITERIA 8 - Fair Work Practices, including Payment of the Living Wage**

The single most important driver of the quality of a child's ELC experience is a high quality workforce. The promotion of fair work practices is a key way of supporting a high quality workforce.

The Scottish Government believes that employers whose staff are treated fairly, who are well-rewarded, well-motivated, well-led, have access to appropriate opportunities for training and skills development, and who have a diverse workforce are likely to deliver a higher quality of service. This can be supported by the adoption of fair work practices across the sector in each of the dimensions of fair work defined in the Fair Work Convention Framework document (Security, Respect, Opportunity, Fulfilment and Effective Voice).

The Scottish Government is committed to ensuring that Fair Work principles should extend to as many funding streams, business support grants and public contracts as possible. This means all recipients of public funding demonstrating payment of the real Living Wage, investment in skills and training, no exploitative zero hours contracts, action on gender pay and genuine workforce engagement should be considered in all aspects of our work.

Ensuring that staff are fairly remunerated – through, for example, supporting payment of the real Living Wage – is a key aspect of demonstrating commitment to fair work practices.

There is a gap between average earnings in local authority settings and settings in the private and third sectors. Public sector staff working in ELC settings already receive at least the real Living Wage. However, the [Financial Review of Early Learning and Childcare in Scotland](#) found that, in 2016, around 80% of practitioners and 50% of supervisors in private and third sector settings delivering the funded entitlement were paid an hourly rate below the real Living Wage.

Relatively low levels of pay can present a barrier to some people entering the sector, resulting in recruitment challenges, and can also result in higher levels of staff turnover. This could have potential implications for continuity of care.

The Scottish Government's aspiration is for all workers in the ELC sector to be paid the real Living Wage as a minimum. To support this for the delivery of the funded entitlement, the sustainable hourly rates set and paid by local authorities from 2020 will be set at a level that enables the payment of the real Living Wage to childcare workers delivering the funded entitlement. This commitment will be delivered in line with the supporting guidance on transition options being produced by Scotland Excel.

The Scottish Government can only provide funding for payment of the real Living Wage in relation to the hours spent delivering the funded entitlement.

It is not for the Scottish Government or local authorities to provide funding to cover the hours that staff spend delivering non-funded hours in these settings.

It is therefore a business decision for funded providers as to whether they provide the additional resource to uplift the salaries for all workers in their settings, including those not engaged in delivery of the funded entitlement, to the real Living Wage.

**Criteria for ALL SETTINGS (EXCLUDING CHILDMINDERS WHO DO NOT EMPLOY STAFF):**

- Settings, including childminders where workers are regularly employed to provide direct care to children, who agree to deliver the funded entitlement will, in accordance with the supporting guidance on Transition Options, pay the real Living Wage to all childcare workers delivering the funded entitlement and commit to adopting and demonstrating Fair Work practices in their setting. In committing to Fair Work practices, settings must take into account:
  - a fair and equal pay policy across their setting, (including a commitment to supporting the real Living Wage);
  - ELC managers/lead practitioners/employers (in the case of childminders who employ staff) have clear managerial responsibilities to nurture talent and help individuals fulfil their potential;
  - promoting equality of opportunity and developing a workforce which reflects the population of Scotland in terms of characteristics such as age, gender, religion or belief, race, sexual orientation and disability;
  - security of employment and hours of work, avoiding exploitative employment practices such as unfair zero hours contracts, or pregnancy and maternity discrimination;
  - consideration of patterns of working (including for example part-time working and/or term-time working) and support for family friendly working and wider work life balance; and
  - support progressive workforce engagement, including trade union membership or alternative arrangements to give staff an effective voice, for example, through regular staff meetings, where possible.

**How do settings meet this criteria?**

A range of information sheets on [Fair Work Practices](#) are available that set out more details on each of the aspects set out in the criteria.

Settings of different size / nature will offer Fair Work practices that are relevant to their organisational structure and focus. Whilst fair pay (including payment of the Living Wage) is a primary driver for a high quality workforce this must not be at the cost of other aspects of the [Fair Work Framework](#) which must also be recognised

through a proportionate and balanced approach (in particular when applying to the criteria to childminding settings).

### ELC Real Living Wage Commitment

Key points to note on implementing the real Living Wage commitment:

- The real Living Wage should not be confused with the National Minimum Wage (including the “national Living Wage” for those aged 25 and over) which is the legal minimum an employer must pay an employee and is set by the UK Government.
- The real Living Wage is a voluntary wage rate of pay which is estimated at a level which is sufficient to ensure that the recipient may enjoy an acceptable standard of living. These figures are calculated annually and are generally announced in November each year.
- Employers who pay the real Living Wage can, if they wish, seek to become [Living Wage accredited](#) through Living Wage Scotland. Some ELC providers in Scotland are Living Wage accredited employers, however, it is important to note that whilst the Scottish Government encourages more providers to become Living Wage accredited, it is not a requirement for becoming a funded provider.
- The commitment covers all ELC staff providing direct care to children who are receiving funded hours, regardless of age and qualification and of the setting in which they are employed.
- In line with the requirements for Scottish Living Wage accreditation, apprentices do not have to receive the real Living Wage – this is in recognition that, particularly in the earlier stages, apprentices may spend more time training than working. However, it is good practice to ensure pay rises over the course of the apprenticeship.
- In line with the Fair Work criteria above, employers must demonstrate a fair and equal pay policy.

### **What support will be available to help settings meet this criteria?**

The Scottish Government is committed to providing local authorities with the funding to allow them to set rates with providers in the private and third sectors that enables them to pay all childcare workers delivering the funded entitlement the real Living Wage from August 2020.

The guidance on Transition Options being produced by Scotland Excel will include further guidance on options for implementing the real Living Wage commitment, including how to implement this criteria when tendering.

We are also exploring, as part of the development of our Delivery Support Plan for Providers, the potential for some targeted advice and support to providers on implementing Fair Work practices, in particular, payment of the real Living Wage.

## **CRITERIA 9 - Payment Processes**

As set out in legislation, the funded hours must be free at the point of access regardless of which setting the hours are being delivered in. This duty applies to local authorities and is extended to funded providers when they enter into a contract to deliver the funded hours.

This ensures that parental choice regarding the setting where the funded hours are to be used will not be restricted by upfront payments or top-up fees in relation to the funded hours, or any requirements to purchase additional hours beyond the funded hours in order to access their child's funded entitlement at a setting<sup>5</sup>. Where parents and carers are accessing a mixture of funded and non-funded hours from a setting, it is expected that any charges are presented clearly and transparently to parents and carers.

Payment for the delivery of the funded hours is provided by local authorities to funded providers in the private and third sectors. In order to support the sustainability of funded providers, and to ensure that funded provider's cash flows are healthy, it is vital that they are paid promptly and efficiently for delivering the funded entitlement.

### **Criteria for ALL SETTINGS**

- Settings delivering the funded entitlement must ensure that access to the funded hours are free at the point of access to the child and that parents and carers are not subject to any fees in relation to the funded hours. The setting must ensure that:
  - parents and carers are not asked to make any upfront payment, including a deposit or any other payment, in respect of the funded hours, therefore ensuring that the child's funded entitlement is free at the point of access;
  - no top-up fees are charged to parents and carers relating to the funded hours;
  - parents and carers are not required to purchase additional hours beyond the funded hours in order to access their child's funded entitlement at the setting;
  - additional charges to parents and carers relating to the funded hours should be optional, and limited to, for example, snacks, costs of outings or extracurricular activities such as music classes; and

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<sup>5</sup> For example the Scottish Government's survey of parents (which had 10,571 responses) on the use of the funded entitlement, [Exploring parents' views and use of Early Learning and Childcare in Scotland](#), found that: *Several parents also referred to private providers setting a minimum number of days or hours, such that parents had to pay for more hours than they needed; there was concern that this may not always suit the child's needs, and that these providers are effectively setting a minimum cost for parents.*



- where parents and carers choose to purchase further hours in addition to the funded hours, the associated fees and hours must be transparent and clearly set out in any parental communication and invoices.

### **How do settings meet this criteria?**

It is important to note that the criteria listed above relates only to the delivery of the funded hours.

Any fees or charges not associated with the funded hours will continue to be at the discretion of individual settings. It is expected that these fees and charges will be set with reference to local market conditions, and reflect individual business models and underlying cost structures.

It is not for local authorities or the Scottish Government to seek to comment on or intervene in fees charged out-with the funded entitlement.

Some settings may offer optional extras which are in addition to the funded hours. This could be to, for example, cover the costs of outings or extracurricular activities such as music classes.

It is expected that such charges, where required, are charged for at a rate that reflects the cost of delivery.

It is important that local authorities and funded providers, as part of the partnership working approach that is central to Funding Follows the Child, work closely together to manage the take-up of places across settings within the local authority area.

### **What support will be available to help settings meet this criteria?**

We will work together with providers and Scotland Excel, drawing on existing good practice, to develop templates that funded providers may wish to utilise to support clear and transparent information for parents on fees and charges.

## CRITERIA 10 - Food

ELC experiences provide children with an important opportunity for maximising healthy eating and establishing healthy eating habits in the earliest years. The early years is identified as a crucial time to reduce health inequalities. Providing healthy and nutritionally balanced meals and snacks in ELC settings is important, particularly in meeting the needs of vulnerable families.

### Criteria for ALL SETTINGS

- **Settings must have a clear and comprehensive policy for the provision of healthy meals and snacks for children. This should be consistent with [Setting the Table](#) and the [Eatwell Guide](#) and should ensure that individual cultural and dietary needs are met. There should be consultation with parents and carers about how other dietary preferences might be accommodated.**

#### How do settings meet this criteria?

Light and main meals can be provided either as a breakfast, lunch or an early evening meal. They can be prepared by the funded provider, delivered by the local authority or purchased by an external provider (directly by the funded provider).

The meal need not be a hot meal but all meals and snacks must meet the most up-to-date nutritional guidance provided for ELC (currently included in [Setting the Table](#)). The menu and recipe suggestions that accompany Setting the Table are based on an assumption that children obtain 30% of nutritional requirements from a main meal; 20% from a light meal; and 10% of nutritional requirements from a snack.

Childminders delivering the funded entitlement who will also be providing a meal are required to register as a food business operator<sup>6</sup>. Advice and guidance is available from the Food Standards Agency, in particular through [Safer food, better business for childminders](#).

#### What support will be available to help settings meet this criteria?

In December 2018, the Care Inspectorate published good practice guidance on food in ELC titled [Food Matters: Nurturing happy, healthy children](#). It is a resource that highlights examples of good practice from across the ELC sector. They have worked alongside the sector to enable all ELC settings, practitioners and families to tell their own stories of how they are supporting children to eat well and enjoy good food every day.

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<sup>6</sup> More information can be found at the Food Standards Agency: [https://www.foodstandards.gov.scot/downloads/Legal\\_Requirements\\_for\\_Childminders\\_in\\_Scotland\\_-\\_Jun\\_10\\_1.pdf](https://www.foodstandards.gov.scot/downloads/Legal_Requirements_for_Childminders_in_Scotland_-_Jun_10_1.pdf).

Food Matters shares Unicef's core message and vision: If a child receives the right nutrition and care at the start of their lives, they'll grow up healthy and strong – and there's no limit to what they can become. This aligns with Health and Social Care Standard 1.6:

*"I get the most out of life because the people and organisation who support and care for me have an enabling attitude and believe in my potential."*

We will work with delivery partners to develop a national resource of communication materials that settings can distribute to parents and carers. This will include material on healthy eating and the free meal commitment.

From 2020, we are also proposing that nursery milk is delivered as part of the funded entitlement. Alongside this we are considering including an offer of a daily healthy snack such as a piece of prepared fruit or vegetable.

We will confirm the final details of the nursery milk and healthy snack offer in early 2019 following the confirmation of the policy position in light of the [Welfare Foods consultation](#).

We will also create online platforms for funded providers and local authorities to identify and share best practice on innovative collaborative solutions to delivering the commitment.

### **SECTION 3: ROLE FOR LOCAL AUTHORITIES IN IMPLEMENTING THE FUNDING FOLLOWS THE CHILD APPROACH**

Local authorities have a number of roles which are key to implementing the Funding Follows the Child approach.

They have the statutory duty to ensure that there is a funded place available for all eligible children in their area. Local authorities are also responsible for the provision of ELC through the medium of Gaelic for those parents who wish it for their children and for ensuring staff have adequate support in delivering a high quality experience through the medium of Gaelic.

With the exception of scrutiny quality evaluations from the Care Inspectorate and Education Scotland, local authorities will also be responsible for assessing and monitoring compliance with the National Standard in all funded providers, including those provided by local authorities, as part of their contract management arrangements and in their role as guarantors of quality.

Whilst it will be for local authorities to decide how to fulfil this responsibility, it is important that the process is transparent and that local authorities – as part of the commitment to simplify the process for, and reduce the burden on, providers to deliver the funded entitlement – share practice in order to encourage consistency of approach.

Local authorities should also work with funded providers to support meaningful and genuine partnership working. This requires clear and consistent support that funded providers can expect from local authorities (as set out in Section 1 of this document).

This section sets out the expectations of the role of the local authority in implementing the Funding Follows the Child approach.

#### **Monitoring Compliance against the National Standard**

Local authorities will have the responsibility of monitoring the compliance of all funded providers against the National Standard, whether they are local authority, private or third sector providers, including childminders.

As guarantors of quality for the National Standard, the local authority will play a key role in ensuring each child is receiving a high quality ELC experience during their funded hours. While the Care Inspectorate quality evaluations will give an insight into compliance with those criteria in the National Standard, other criteria are not directly linked to the evaluations the Care Inspectorate makes about the quality of provision in a funded provider.

It will be important for local authorities to ensure that other criteria are also being met and to gather information systematically as well as responsively when information about a funded provider is made available to them.

Education Scotland inspections will be a valuable source of evidence in understanding the quality of ELC provision in a setting. Local authorities should explore the findings from any Education Scotland inspection to ascertain compliance against the National Standard. If this information highlights that a service is not meeting one or more of the criteria, the local authority should use this information to begin relevant procedures to improve the quality of the service.

When settings fail to meet Care Inspectorate criteria or any other criteria, the funded provider would be subject to a 'service improvement period' and may need enhanced improvement support. The local authority will need to be clear about the criteria which are not being met and how the service can improve this to ensure children receive high quality ELC.

Other information such as soft information from parents, media announcements or evidence from quality support visits can also be used responsively to explore a funded provider's compliance to the National Standard. The local authority will need to gather information about the evidence and make an objective decision about whether a setting is not meeting the National Standard.

### **Setting of Sustainable Rates**

Local authorities will set an hourly rate locally that is paid to funded providers in the private and third sectors to deliver the funded entitlement which is sustainable and meets the following:

- The rate will support delivery of a high quality ELC experience for all children;
- It will be a rate that reflects the cost of delivery, including the delivery of national policy objectives;
- The rate will allow for investment in the setting – staff, resources and physical environment; and
- It will enable payment of the real Living Wage for those childcare workers delivering the funded entitlement.

Local authorities are also expected to clearly set out the support that they are providing to funded providers in the private and third sectors, including childminders, in addition to the sustainable rate as part of the agreement. More information on how this can be achieved is included under 'Support for Providers and Staff'.

Local authorities are expected to draw on the separate guidance, which will be produced by Scotland Excel to establish sustainable rates.

## **Supporting the Delivery of the Free Meal Commitment**

Every child attending a funded ELC session – which is any session that includes funded hours, regardless of whether they are mixed with ‘paid for’ hours – from 2020 will be provided with a free meal. Local authorities will provide settings with the funding to deliver the free meals, unless, in cases where a setting does not have onsite catering facilities, there may be an agreement that the local authority will provide the meals to the setting. Local authorities are expected to work in partnership with funded providers to support them in identifying solutions to deliver the free meals commitment, particularly where funded providers do not have onsite catering facilities.

Any funding provided to deliver this commitment will be additional to the sustainable rate for funded providers in the private and third sectors. Local authorities must ensure that there is transparency for funded providers as to the rate being provided for the free meal commitment.

As is the case for free school lunches, the up-take of the free meal will be optional. Parents and carers who prefer to provide their child with a packed lunch would be free to do so. As set out in the requirements of Criteria 5 – Parent and carer engagement and involvement in the life of the setting, funded providers are expected to ensure that parents and carers receive information on healthy eating habits.

Where the child’s ELC entitlement is being delivered using a blended model, involving more than one provider across the day, it will be for the individual funded providers to agree with the family and the local authority who will provide the meal.

## **Ensuring Financial Sustainability**

Local authorities must ensure that local authority funded providers delivering the funded entitlement are able to demonstrate – when required – that they are delivering their services in a manner that improves affordability for parents and carers and makes the most effective use of public funds, within the Best Value requirement of the Local Government in Scotland Act 2003. Further information on local authorities duty on Best Value is provided in the [Scottish Public Finance Manual](#).

Sustainability of funded providers is about more than just the funding rate that they receive. The competitiveness and business sustainability of funded providers may be impacted by policy and investment decisions taken by local authorities. The recruitment activity of local authorities can also impact on the sustainability of funded providers. It is important that local authorities give appropriate consideration to these potential impacts in exercising their statutory duties, undertaking recruitment activity, and in applying ELC expansion planning principles.

Investment decisions by local authorities should follow the principles set out in the [ELC Expansion Planning Guidance](#). This is focused on making the best use of assets taking account of a sequential decision-making process as follows:

- a) **Use what we have:** Making full use of existing assets within the local authority (including, workforce, potential of the natural environment, buildings and infrastructure);
- b) **Use what we purchase:** Enhancing the use of partner assets – developing and extending existing partnership models against a default assumption of a continued mixed economy – strengthening both local authority and other provision (including, for example, childminders and blended models); and
- c) **Create what we need:** where full use of existing local authority services and assets, plus enhanced commissioning, still leaves a gap, plan to create or build new capacity, including outdoor nurseries.

### **Fair and Transparent Payment Processes**

In order to ensure fair and transparent payment processes for parents and carers and for funded providers in the private and third sectors, local authorities will:

- comply with the legislation which prevents local authorities from charging parents and carers for ELC which they provide under the statutory duty;
- extend this legal obligation to funded providers through agreements, to ensure funded hours are free at point of access to the child; and
- continue to ensure that funded providers in the private and third sectors, including childminders, receive payments for the funded hours in a prompt and efficient manner.

### No Charges for Funded Hours

The [Children and Young People \(Scotland\) Act 2014, Early Learning and Childcare, Statutory Guidance](#) states:

*“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.”*

Local authorities are expected to ensure that this requirement is reflected in agreements that are set with each funded provider in the private and third sectors.

### Prompt and Efficient Payment to Funded Providers

It is vital that funded providers are paid promptly and efficiently to ensure that their cash flows are healthy.

There are already examples across local authorities of prompt payment practices, and we would encourage local authorities to share these examples of good practice with others. However, there are also examples of funded providers being paid a term in arrears, which can mean they have to wait for 2-3 months from the start of term to receive payment and this creates substantial cash flow problems for these funded providers.

As a minimum it is expected that local authorities should look to pay a funded provider within 30 days of the start of term and preferably much sooner.<sup>7</sup>

The timing of payment should be stipulated in the agreement between the local authority and the funded provider or in the general conditions governing terms of business.

### **Inclusion**

Local authorities have a duty under the Additional Support for Learning Act 2004 (as amended) to identify, provide for and review the additional support needs of their pupils. The Act also applies to 'eligible pre-school children' which was extended, as a result of part 6 of the Children and Young People's Act 2014 (the 2014 Act), to include eligible children aged two. This applies regardless of whether the child is accessing the funded entitlement in a local authority, private or third sector funded provider, including a childminder. In the context of children aged two, learning is defined as meeting developmental milestones.

The duties under section 6 of the Education (Additional Support for Learning) (Scotland) Act 2004 are explained in the [Statutory Guidance to the Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#).

Additional support falls into three overlapping, broad headings: approaches to learning and teaching, support from personnel, and provision of resources and could include making changes to the setting. This makes clear that decisions regarding what can be considered adequate and efficient provision can only be judged in the light of each child's circumstances.

It also makes clear that cost should not be the primary consideration in determining what provision is to be made but that decisions have to be taken in light of the authority's duties to secure best value and service improvement. Expenditure may therefore be unreasonable where the cost incurred would be completely out of scale with the benefits to the child or young person or where suitable alternative provision

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<sup>7</sup> Further information see the [Scottish Public Finance Manual](#)



is available at a significantly lower cost. It may also be considered unreasonable where substantial expenditure on new facilities would be completely out of scale to the benefits to the wider community. For example, the local authority will wish to consider whether the expenditure in providing for a particular child may be of benefit to others in the future.

In the interest of openness and transparency, the local authority must inform the person who made the request for additional support of their decision and explain their reasons. They must also notify the person making the request about mediation services (in the case of parents and young people) and dispute resolution procedures.

### **Support for Providers and Staff**

Along with the funded rate, local authorities provide a range of benefits to settings who become funded providers. Additional benefits, over and above the funded rate, should be clearly outlined at the time of application to become a funded provider.

It is for local authorities to decide the best package to ensure high quality ELC provision is offered to children and families, based on their own local circumstances. However, local authorities should ensure that settings have a clear and consistent understanding of the level of support they can expect. Communicating this throughout the application and assessment process would contribute positively to meaningful and genuine partnership working across the local authority.

The type of support provided by local authorities to funded providers could include (but is not limited to):

- training programme resources;
- support for workforce planning;
- marketing and recruitment support;
- funding for staff to undertake relevant qualifications;
- grant funding for specific resources;
- buildings support; and
- regular contact through local authority ELC meetings.

Funded providers will have their own ideas about how they wish to be supported and it would be beneficial for local authorities to engage with funded providers regarding the type of support that would help to improve the quality of ELC in their settings.

Improvement support is also available through a setting's membership arrangements with Care and Learning Alliance (CALA), Early Years Scotland (EYS), the Scottish Childminding Association (SCMA), National Day Nursery Association (NDNA) as well as other national organisations.

There may be circumstances in which enhanced improvement support is required. This will include circumstances in which the withdrawal of a setting's funded provider status would have a significant impact on children's ability to access their funded entitlement within their local area. In these circumstances, a bespoke package of enhanced improvement support would be provided. Enhanced forms of support will be tailored to the requirements of the setting but may include:

- facilitation of support from other professionals who work with children (such as social workers);
- facilitation of good practice visits to other settings;
- support visits focussing on aspects of practice which require improvement, including specialists from Regional Improvement Collaboratives, teacher support teams and other settings;
- increased improvement support visits from local authority representatives;
- mentoring and coaching opportunities for practitioners and/or managers; and
- access to further, relevant training and development opportunities, such as workshops based on areas for improvement.

In the spirit of partnership working, the funded provider has a responsibility to implement improvement support strategies which are offered by the local authority. It is ultimately the setting's responsibility to secure progress against given improvement priorities in relation to the National Standard criteria.

It is expected that transparency and equity is applied across all funded providers when offering improvement support.

### **Supporting Parents and Carers to Make Informed Choices**

Local authorities should provide clear and accessible information to help parents and carers to make informed choices about the best ELC setting for their child.

This will build upon the information that is provided at a national level, which will include information about the different types of ELC provision and how the Funding Follows the Child approach will work.

It is important that families understand what this will mean for them locally, and what their options are for their children.

Local authorities should make use of national resources to help parents and carers to understand the new approach. They should also having clear local information about what the local delivery plan will mean for parents and carers. This will include information about how funded hours can be allocated (e.g. with different types of providers, with different patterns of attendance, or in blended models). This will also require local authorities, as part of the partnership working approach that is a key

aspect of Funding Follows the Child, to engage regularly with funded providers and to ensure that they have access to communication resources.

Local authorities will retain the duty set out under section 50 of the Children and Young People (Scotland) Act 2014 to consult representative populations of parents and carers on how the funded entitlement to ELC should be made available. As a result of these consultations, local authorities should then publish plans on how they will make their services available. These plans should be clear and accessible, and should explain what action is being taken in response to the local consultations.<sup>8</sup>

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<sup>8</sup> 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.

## **SECTION 4: NEXT STEPS AND TRANSITIONAL ARRANGEMENTS**

### **Transitional Arrangements**

Existing funded providers will be expected to meet the National Standard from the full statutory roll-out of the entitlement to 1140 hours in August 2020. If they are unable to demonstrate that they meet the criteria, their funded provider status will be withdrawn. Existing settings who are not currently offering the funded hours but wish to start offering them, will be eligible to apply only if they meet the National Standard.

Newly registered settings will receive a full inspection from the Care Inspectorate within 12 months of being registered. The Care Inspectorate's advice is that, provided they have been approved through the Care Inspectorate registration process as fit to deliver a daycare of children service, settings need not wait for their first inspection before being able to apply to become a funded provider. The rigour of the registration process should provide reassurance that the setting is able to deliver the funded hours **on a probationary basis**, pending the outcome of their first inspection, provided the local authority is assured that they have the potential to meet all other criteria in the National Standard.

Allowing new settings to deliver the funded hours **on a probationary basis**, will be important for improving accessibility of funded provision. In some areas, especially in remote and rural areas, newly registered settings may not be financially viable without being able to offer the funded entitlement from the outset. This exception will also be important in encouraging new innovative provision, including outdoor nurseries and provision developed by community enterprises.

Funded providers who drop below the required quality criteria will be given a fair 'service improvement period' in which to address this before their funded provider status is removed. For example, where an existing funded provider falls below 'good' evaluations, they will be inspected again within 6 to 12 months (focusing on aspects of the service that require to improve). Provided the Care Inspectorate is satisfied that the setting is still fit to operate, the setting will have until that next inspection to return its evaluations to good. The 'service improvement period' will not apply to new settings who become a funded provider on a probationary basis.

### **Supporting Guidance**

As part of the implementation of Funding Follows the Child and the National Standard, an important aspect will be how settings prepare to apply to be a funded provider and how local authorities assess the eligibility of settings to become a funded provider. We will publish further supporting materials in March 2019. All settings wishing to become a funded provider in Scotland will be assessed against the same National Standard criteria and no additional criteria will be applied in specific areas of the country.

Scotland Excel have been taking forward the development of technical guidance to accompany the National Standard. This will include advice and direction on implementing sustainable rates, business sustainability and transition options.

An extensive level of engagement has been held with providers and local authorities on the development of this guidance. There has been considerable interest from the sector, in particular from providers, to input to this process and we are grateful for the continued input from the sector to inform the development of this work.

An analysis of the findings from this consultation and next steps for the work of Scotland Excel has been published alongside this document. This is available on the Scotland Excel website. We now intend to start the process of finalising the guidance notes between December and March 2019, as we continue to ensure that the guidance reflects the views of the sector.

In addition to this, further support will be given centrally from Scottish Government to support implementation. We will undertake a series of engagement events to support local authorities and providers through the transition to 2020, starting in January 2019 to consult on the supporting materials to accompany the National Standard. We will work with COSLA and Scotland Excel to take this forward and will focus on clarifying aspects of the approach as well as communicating the expectations of the Scottish Government as we move towards a 'provider neutral' approach in ELC.

In addition, we will engage with the Care Inspectorate and Education Scotland, as well as other national organisations who represent the ELC sector, to raise awareness of the National Standard amongst those involved in the provision of ELC.

We will also produce a specific question and answer publication for parents and carers to learn more about how the Funding Follows the Child approach will affect them and what they can expect when their child accesses high quality ELC.

### **Wider Support for Providers and Local Authorities**

We will set out a 'Delivery Support Plan for Providers' which focuses on supporting the financial sustainability of providers, strengthening partnership working, supporting workforce recruitment and training and improving communications with parents and carers.

A Delivery Assurance Team is being established to gather and share learning on local authority delivery models and implementation and to activate wider networks of learning and support. A new Head of Delivery Assurance is currently being recruited, and will work with local authorities and Regional Improvement Collaboratives to design delivery support arrangements.

The ELC Partnership Forum has been established to promote meaningful partnership working across the ELC sector and to provide a forum for the sharing of best practice along with exploring new ideas and perspectives, both in meetings of the Forum, and by promoting this across the sector by appropriate means. The group will also play a key role in identifying and proposing solutions to specific issues raised by providers and/or local authorities. We plan to use this forum in a meaningful, strategic and constructive way to support implementation of this approach.

If you are a provider and would like to join the ELC Partnership Forum, please email [ELCPartnershipForum@gov.scot](mailto:ELCPartnershipForum@gov.scot) to register your interest.

The [Knowledge Hub](#) is also a space to discuss and collaborate with colleagues in other local authorities, and with providers, on the implementation of the Funding Follows the Child approach. Members of the Scottish Government ELC Programme are also a part of this community and contribute to discussions where this is requested. Relevant information about the expansion to 1140 hours can be found on this site.

**ANNEX A: GLOSSARY**

<b>Term</b>	<b>Description</b>
Accessibility	The commitment to ensure that ELC capacity is sufficient and is as conveniently geographically located as possible – particularly in areas of higher deprivation and in rural communities – to support families and enable parents and carers to work, train and study, while also appropriately meeting the needs of children who require additional support and parents who request ELC through the medium of Gaelic.
Active learning	Learning which engages and challenges children’s thinking using real-life and imaginary situations. It takes full advantage of the opportunities for learning presented by spontaneous play, planned, purposeful play, investigating and exploring, events and life experiences and focused learning and teaching supported, when necessary, through sensitive intervention to support or extend learning.
Affordability	The increased access to affordable ELC which will help to reduce barriers to participating in the labour market which parents and carers face.
Blended Model	The model where children are attending two or more settings, managed by different providers, who are working together to provide them with their entitlement to ELC.
Continuous Professional Learning	Ongoing learning and development to improve and extend professional practice throughout an individual’s career. Maintaining and developing effective knowledge, skills and values helps everyone working in ELC to deliver good practice when working with children, parents and carers as well as other professionals.
COSLA	COSLA, the Confederation Of Scottish Local Authorities, is the voice of Local Government in Scotland. They provide political leadership on national issues, and work with local authorities to improve local services and strengthen local democracy. They are co-creators of the Funding Follows the Child approach and the National Standard with the Scottish Government.

Early learning and childcare / ELC	<p>The relevant legislation defines early learning and childcare as: “<i>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.</i>”</p> <p>It emphasises the holistic and seamless provision of nurture, care and the development of social, emotional, physical and cognitive skills, abilities and wellbeing. Learning cannot take place without a nurturing and caring environment.</p>
Eligible children	<p>An eligible child is defined in legislation (the Children and Young People (Scotland) Act 2014 and the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014, as amended).</p> <p>This is all 3 and 4 year olds and <a href="#">some children aged 2, from the relevant start date</a>. The date the child can access their funded entitlement depends on their birth date.</p>
Fair Work practices	<p>Practices that create an environment which offers effective voice, opportunity, security, fulfilment and respect; that balances the rights and responsibilities of employers and workers and that can generate benefits for individuals, organisations and society.</p> <p>Ensuring that staff are fairly remunerated – through, for example, supporting payment of the real Living Wage – is a key aspect of demonstrating commitment to fair work practices.</p>
Financially sustainable provision	<p>Provision which ensures that providers across all sectors are willing and able to deliver the funded entitlement, including receiving a sustainable funding rate.</p>
Flexibility	<p>Support for parents and carers in work, training or study, and a commitment to offer patterns of provision better aligned with working patterns whilst delivering this in a way that ensures a high quality experience for the child.</p>



Free at the point of access	The commitment to parents and carers that they will not have to pay for any part of their child's funded entitlement at any time and are not asked to make any upfront payment, including a deposit or any other payment, in respect of the funded hours. It also ensures that funded providers cannot charge parents and carers top-up fees to the funded entitlement or ask them to purchase additional hours to access the funded hours. This does not include additional charges such as the cost of outings or extra-curricular activities which can be charged to parents and carers if these are clearly detailed in the payment agreement.
Funded entitlement	The statutory entitlement stated in the Children and Young People (Scotland) Act 2014 for all children aged 3 and 4 years old and eligible 2 year olds to 1140 hours of early learning and childcare from August 2020 <sup>9</sup> .
Funded hours	The hours of ELC provision for children which are funded through the local authority up to the statutory entitlement of 1140 hours of ELC for eligible children.
Funded Provider	An ELC setting who meets the National Standard and offers the ELC funded entitlement to children.
Funded provider on a probationary basis	A newly registered setting which has become a funded provider before their first Care Inspectorate inspection, providing they meet the other criteria in the National Standard.
Funding Follows the Child	The approach for parents and carers to make informed choices about where they want their child to take their funded entitlement to ELC. It is defined by a 'provider neutral' approach which allows parents and carers to choose providers – regardless of whether they are in the public, private or third sectors, including childminders – if the setting meets the National Standard, has a place available and is willing to enter into a contract with the local authority.

<sup>9</sup> This legislation will be amended to change the statutory entitlement for ELC from 600 hours to 1140 hours from August 2020.

Getting It Right for Every Child	The national approach in Scotland to improving outcomes and supporting the wellbeing of our children and young people by offering the right help at the right time from the right people. It supports them and their parents or carers to work in partnership with the services that can help them. Wellbeing sits at the heart of the GIRFEC approach and reflects the need to tailor the support and help that children, young people and their families are offered to support their wellbeing. A child or young person's wellbeing is influenced by everything around them and the different experiences and needs they have at different times in their lives.
Key enablers of flexibility and choice	The role of the local authority to ensure every child in their area is able to access their funded entitlement in a high quality setting which meets their needs, through regular consultation on local parental demand and by ensuring a 'provider neutral' approach to local ELC delivery plans.
Multi-year funding package	The annual revenue investment in ELC agreed which will reach around £990 million by 2021-22. This is an increase of £567 million on 2016-17 levels. £476 million in capital funding over four years has also been provided to support the next phase of infrastructure investment in ELC. The total additional revenue and capital spend over five years from 2017-18 and to 2021-22 will reach almost £2 billion.
National Standard	The Standard that all funded providers in Scotland will need to meet to offer the funded entitlement to children from August 2020. This is regardless of whether the funded hours are provided by a setting in the public, private or third sectors, including provision offered by childminders. It is aligned to the guiding principles for the expansion to 1140 hours: quality; flexibility; accessibility and affordability. It is also underpinned by the regulations in the <a href="#">Public Services Reform (Scotland) Act 2010</a> which applies to all care services across Scotland, including daycare of children and childminding settings.

Non-funded hours	The hours of ELC provision which are <b>not paid for</b> through the local authority. These hours are likely to be in addition to the funded hours children need, hours for children who are not eligible for the funded entitlement, or are paid ELC hours in settings who are not funded providers.
Poverty-related attainment gap	The gap in attainment and children's outcomes between children in the most and least deprived areas of Scotland.
Primary guarantors of quality	The role of the local authority to ensure that ELC funded providers are meeting the National Standard through meaningful and genuine partnership working, including providing support for improvement and monitoring compliance against the quality criteria.
Provider	Any organisation offering ELC provision registered with the Care Inspectorate under daycare of children or childminding registrations.
Provider neutral	The approach which enables parents and carers to choose from a variety of ELC settings that best suits the needs of their child, in line with Funding Follows the Child. It allows parents and carers to choose from a number of different providers – regardless of whether they are in the public, private or third sectors, including childminders – if the setting meets the National Standard, has a place available and is willing to enter into a contract with the local authority.
Quality	A high quality experience for all children, which complements other early years and educational activity to close the poverty-related attainment gap and recognises the value of those we entrust to support our children to fulfil their potential.

Real Living Wage	The rate of pay for staff that is calculated based on the cost of living. Employers who pay the Living Wage to their staff can apply for Living Wage Accreditation. The real Living Wage rate at December 2018 was £9.00 an hour. The rate is updated in the first week of November each year. The real Living Wage should not be confused with the National Minimum Wage (including the “national living wage” for those aged 25 and over) which is the legal minimum an employer must pay an employee and is set by the UK Government.
Regional Improvement Collaboratives	Regional Improvement Collaboratives bring together local authority and Education Scotland resources and expertise, to enhance the educational improvement support that is provided to schools and funded ELC providers. The 6 Collaboratives across Scotland include sector and curriculum area support, including additional support for learning. They provide targeted advice and support in order to drive improvement, making use of available evidence and data. Each Collaborative sets out its work plan and regional support offer through a Regional Improvement Plan.
Scotland Excel	The Centre of Procurement Expertise for the local government sector. Their services are designed to help local authorities meet the twin challenges of reducing budgets at a time of growing demand. Collaborative procurement increases efficiency and ensures money is saved to protect front line services. By working together through Scotland Excel, local authorities work to realise a host of social, economic and environmental benefits from their spend.
Scrutiny activities	The Care Inspectorate and Education Scotland undertake a number of scrutiny activities to provide public assurance, regulate and support improvement in care and learning across ELC. This includes inspections, registrations of care services and investigating complaints made about ELC settings. Information from these activities can be used by local authorities to ascertain compliance against the National Standard criteria.

Service improvement period	The time given to a funded provider to improve the quality of ELC when they are not meeting one or more of the National Standard criteria. The length of the 'service improvement period' is 12 months or, if the criteria not met are related to Care Inspectorate quality evaluations, the 'service improvement period' will end upon publication of the next inspection report.
Service Models Working Group	A group of professionals from the ELC sector who work alongside Scottish Government officials tasked with supporting the development of the Funding Follows the Child approach and the National Standard.
Setting	Any service offering ELC provision registered with the Care Inspectorate under daycare of children or childminding registrations.
Staffing structure	The structure of staff used in services to ensure that children's health, safety and welfare needs are met. This can include how staff are deployed to ensure adequate supervision or how management structures are used to support a culture of continuous improvement.
Sustainable rate	The hourly rate that is paid to funded providers in the private and third sectors, and childminders, to deliver the funded entitlement ensuring they can remain financially viable while offering funded hours to eligible children. The rate will support delivery of a high quality ELC experience for all children; reflect the cost of delivery, including the delivery of national policy objectives; allow for investment in the setting – staff, resources and physical environment; and enable payment of the real Living Wage for those childcare workers delivering the funded entitlement.
Top-up fees	Costs which are in addition to the funded entitlement. These must be clearly stated in any payment agreement. Parents and carers are not expected to pay any top up fees in order to access their child's funded entitlement. This may apply to non-funded hours or additional costs such as outings or extra-curricular activities.



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