

# EXEMPT EARLY-YEARS (EY) PROVISION IN SCHOOLS: “GOVERNOR-RUN EARLY YEARS PROVISION” IN MAINTAINED SCHOOLS

## Issue:

Our work with schools on expanding their early years (EY) provision has revealed a historical anomaly caused by legislative changes, which means that some governor-run early years provision (often known as governor-run pre-schools) set up under section 27 of the Education Act 2002 ('s27 community powers'), have continued to be separately registered with Ofsted. These provisions have, therefore, been using the staffing ratios and qualification requirements appropriate to registered EY providers.

It is our intention to amend the statutory framework for the Early Years Foundation Stage (EYFS Framework) to allow all governor-led early years provision for three and four-year-olds established by schools under section 27 community powers to operate with a ratio of 1:8, where at least one member of staff holds a full and relevant L3 qualification, and at least half of all other staff hold a L2 qualification. Schools may continue to use these ratios and, therefore, do not need to make any changes to their staffing mix as a result of becoming exempt from Ofsted registration.

## Q&A Briefing

### ***Why is governor-run early years provision (such as pre-schools) exempt from separate registration?***

If a school's EY provision meets the criteria for exemption from registration with Ofsted, it should not be registered on the EY register. The criteria for a school's exemption from registration are set out in the Childcare Act 2006.

As governor-run EY provision, this type of provision automatically meets the requirement to be directly run by the school (under the auspices of the governing body) and linked to the school's activities. The other requirement is for at least one child attending the school's EY provision to be a registered pupil of the school. For most primary and infant schools the presence of reception pupils means that the school will meet this requirement. There is no requirement for the reception pupils to be in the same room.

### ***What is the impact of being 'exempt provision'?***

This depends on the type of school and the age of the child. For children aged two, the staffing ratios and requirements in the EYFS Framework are the same for all provider types.

For academies and free schools the staffing ratios and qualification requirements for children aged three are the same as for registered EY providers (paragraphs 3.33-3.36 of EYFS Framework). So, there is no impact other than academies and free schools will no longer be inspected twice. The inspection will cover all of the EY provision run by the governing body and will include a separate judgement on the effectiveness of early years provision.

For maintained schools, for children aged three, exempt EY provision in a maintained school would come under the requirements set out in paragraph 3.37 (that is 1:13 ratio led by school teacher with at least one other member of staff holding a L3). There is currently no flexibility to allow a 1:8 ratio and so this is the issue we are addressing.

As with academies and free schools, the school inspection will cover all of the early years provision run by the governing body and will include a separate judgement on the effectiveness of early years provision.

***Why are we telling schools and LAs that they can use these ratios now?***

If governor-run EY provision had to follow the ratio and qualification requirements set out in paragraph 3.37 of the EYFS Framework, they will have to make staff redundancies and recruit school teachers. This would have had a significant impact on provision, particularly in some areas, where there are large numbers of these pre-schools.

As we have signalled our intention to amend the EYFS Framework in this way, we would not want schools to make such staffing changes for an interim period. As governor-run EY provision it will be meeting the requirements for registered early years providers, so we do not consider that this poses a safeguarding risk. However, any provision for registered pupils in maintained schools will still have to be led by a school teacher as laid out in the EYFS Framework.

***How can schools set up provision for two, three and four-year olds?***

In summary, schools are able to set up nursery provision in the following ways:

- a. **section 27 community powers** – these powers allow schools to provide any charitable purpose (such as early education) for the benefit of families of pupils at the school, or families who live or work in the locality of the school. The children attending this provision are not usually registered as pupils.
- b. **As pupils** – schools who have altered their age-range to include early years, can register the children as pupils.

***How can we justify letting maintained schools operate without a teacher leading provision?***

This flexibility (to operate with a L3 leading provision) will only apply where the children are not registered pupils – so it will only apply to community provision and schools will be able to choose which staffing model is most appropriate to their situation. We expect that as the governor-run EY provision is part of the school, and will be inspected as part of the school, that the head and governing body will ensure that the provision is adequately supervised and run, even if a school teacher is not working directly with the children. Furthermore, independent schools, academies and free schools already have the option to choose a 1:8 ratio, led by Level 3. So, giving this degree of flexibility to maintained schools does not set a precedent. It could also allow maintained schools in rural areas to operate small-scale nurseries that would not be viable using a 1:13 teacher-led model. We have been advised by some LAs that this would be a valuable delivery model.

***Why do you think it is important to give schools this additional flexibility now rather than waiting until EYFS is updated?***

It will ensure that early education of the children attending these schools is not disrupted. As we set out above, we would not want to cause individual staff the distress of potential unnecessary redundancies.

***How will exempt provision be inspected?***

Ofsted will inspect all exempt EY provision at a school when they carry out a whole school inspection. So the early years (whether for pupils or non-pupils) will be covered in the separate EY judgement.

***What is the difference between pupils and non-pupils for early years children?***

A young child becomes a pupil of the school when their name is on the register of pupils. If a school is operating early years provision under S27 community powers, even if the child is within the school's published age range, they do not become a pupil just because they are receiving early education at the school. Schools should amend their Edubase record to indicate that there is nursery provision at their school. Schools should follow the School Organisation Guidance if they need to lower their age range.

***What will be the impact on admissions?***

Admission to any nursery provision is independent of the Admissions Code but should be fair and transparent. The governing body will be responsible for setting any published criteria and ensuring the system is operated responsibly. All children attending nursery provision at a school still to have apply through the normal admissions process to gain a reception place at that school.

**Funding for exempt provision in maintained schools**

***Who sets the funding rate for governor-run exempt provision in maintained schools?***

Funding rates for all types of early years providers are set locally, by LAs in conjunction with the Schools Forum, who may apply different funding criteria to different types of provider to reflect unavoidable costs.

***If governor-run exempt provision doesn't meet the required quality as judged by Ofsted, can local authorities refuse to fund places for 2, 3 and 4 year olds or withdraw funding?***

No. Although local authorities are required to base their funding decisions on the provider's Ofsted inspection judgement, this does not apply to early years provision in maintained schools. This is because funding arrangements between a local authority and a maintained school are not governed by contract but by statute, in particular the School Standards and Framework Act 1998 and the finance regulations made under that Act. The school's EY provision will be included in the whole school inspection – although the separate effectiveness of the early years provision judgement will now include all exempt provision. Governor-run exempt provision must therefore be treated in the same way as maintained school provision. There are a range of measures that local authorities can take to improve the quality of provision at a local authority maintained school [Guidance on schools causing concern](#) can be found on GOV.UK.

***Can local authorities place conditions on the funding they provide to exempt governor -run provision?***

No. The legislation does not allow local authorities to place funding conditions on the governing body of a maintained school.

***Which census should be completed?***

Schools with onsite early years funded provision make their return via **either** the school census **or** the early years census, **but not both**. This paragraph sets out which census is to be used to return data on children receiving funded early education:

- registered pupils of the school (2, 3 and 4 year olds depending on the statutory age range of the school) are recorded via the school census (and not the early years census)

- children (aged 2, 3 and 4) attending a separate Ofsted registered PVI provider on a school site, are recorded via the early years census (and not the school census)
- children attending s27 (governor run) provision should be either be:
  - recorded via the school census if they are registered pupils of the school (can include 2 year olds if the school's statutory age range covers 2-year-olds); or
  - recorded via the early years census if they are not registered pupils of the school

Children may, of course, appear on the two different censuses if their free entitlement is split between two different settings. In which case, of course, the number of funded hours for each child across all provision is limited to 15 (or 25 if they are aged 4 at the start of the academic year and attending full-time).

## **Annex: A Summary of the Legislative Framework**

2. The Childcare Act 2006 sets out when and how early years providers should register. Section 34(2) allows institutions exemption from separate registration with Ofsted, in relation to early years provision for a child or children over 2, if:

- a. the provision is made at the school as part of the school's activities;
- b. the provision is made by the proprietor or a person employed to work at the school, and
- c. there must be at least one registered pupil of the school present in the EY provision.

3. The 2006 Act does not impose a requirement on schools to register children receiving EY provision as pupils. The exemption is for a school's EY provision, which is defined in the Act as provision of childcare for a young child. A young child is defined in section 19 as a child up to the 1st September following a child's 5th birthday. This means that the requirement for 'at least one pupil' can be satisfied by reception pupils, and there is no requirement for the pupils to be in the same room.

4. Section 27 of the Education Act 2002 enables maintained schools to set up and run community facilities and services whose provision furthers any charitable purpose for the benefit of (a) pupils at the school or their families, or (b) people who live and work in the area in which the school is situated. This is the power under which school governor-run community provision has been set up.

5. The EYFS Framework sets out requirements that all EY providers, including schools, must follow. General guidance on staffing states that the staff must be available to work directly with children. From age 3, there are different staffing ratios and qualifications based on the type of provider.