

**Establishing pupil yields from housing development and securing developer contributions for education**

**Guidance for local authorities**

**Consultation Draft – September 2018**

**Introduction**

Government is committed to ensuring that there are enough good new school places to meet local needs, while also driving forward an ambitious housing agenda to increase housing delivery, home ownership and the creation of new Garden Communities. The timely provision of infrastructure with new housing is essential in meeting these objectives to secure high quality school places where and when they are needed.

The Department for Education expects local authorities to seek developer contributions towards school places that are created to meet the need arising from housing development, when there are not enough places available in existing schools within a suitable distance of the development. The Department is working with the Ministry for Housing, Communities and Local Government (MHCLG) to develop guidance for local planning authorities on securing, maximising and sustaining contributions for education where relevant and reasonable.

You already provide evidence of education need and demand for use by planning authorities in plan- and decision-making. This guidance draws on existing good practice and is intended to assist you in establishing a robust and consistent evidence base, underpinned by the following principles:

* Housing development should mitigate its impact on community infrastructure, including schools;
* Pupil Product Ratios (PPRs) should be based on up-to-date evidence from recent housing developments;
* Developer contributions should, where possible, cover the full cost of providing the new school places required, based on viability assessment when strategic plans are prepared and using up-to-date cost information;
* The early delivery of new schools within strategic developments should be supported where it would not undermine the viability of the school, or of existing schools in the area.

1. **Mechanisms for securing developer contributions** 
   1. Developer contributions for education are usually secured by means of a planning obligation under Section 106 of The Town and Country Planning Act 1990, or the Community Infrastructure Levy (CIL). CIL revenues are intended to help fund the supporting infrastructure needed to address the cumulative impact of development across a local authority area. CIL can be used to fund the provision, improvement, replacement, operation or maintenance of a wide range of infrastructure, including education. Alternatively, a Section 106 planning obligation secures a contribution directly payable to the local authority for education, though it must comply with the following tests set out in the CIL Regulations[[1]](#footnote-1), requiring it to be:

* Necessary to make the development acceptable in planning terms
* Directly related to the development
* Fairly and reasonably related in scale and kind to the development
  1. The use of Section 106 planning obligations is limited by legislation preventing the pooling of five or more contributions for a specific infrastructure project. The Government has consulted on proposals to lift this restriction in low housing demand areas, or where CIL has been adopted, or where there are strategic developments planned (subject to amended legislation). You are advised to work with local planning authorities in devising their approaches to securing developer contributions, to consider the most appropriate mechanism (Section 106 planning obligations and/or CIL) to secure contributions from developers towards education alongside other infrastructure funding priorities.
  2. Planning obligations commonly include trigger points that limit the number of houses that can be occupied before developer contributions are paid and school places delivered. It is important that agreed trigger points do not make development undeliverable. Nonetheless, there is some risk to local authorities that developments will stall or planning obligations be renegotiated, resulting in a loss of education funding that had been considered secured.
  3. Central government basic need grant and the DfE free school programme do not negate the responsibility of housing developers to mitigate the impact of their development on education. Where you have a reasonable expectation of developer funding being received for certain school places,[[2]](#footnote-2) and you have declared this in your SCAP return (or plan to do so), then basic need funding should not be considered available for those school places other than as forward-funding to be reimbursed by the developer later.

1. **Evidence of pupil yields from housing development**
   1. Local authorities usually determine a Pupil Product Ratio (PPR) from new housing developments using surveys of recent developments, Census/School Census data and benchmarking against their neighbours. The level of detail varies, with some local authorities differentiating between flats and houses and by the number of bedrooms, as well as the ages of children. Local authorities are sometimes unable to analyse a large sample of completed developments, or obtain development data from the local planning authority, which can undermine the robustness of PPR evidence.

* 1. To assist local authorities, we are considering publishing details of residential addresses completed since 2008, breaking down by Unique Property Reference Number (UPRN) the type of dwellings and whether they are affordable or sold on the open market, combined with pupil yield information from the National Pupil Database. We propose that you supplement and update this data using the School Census and local planning records, working with neighbouring local authorities to understand any cross-border pupil migration patterns.[[3]](#footnote-3) If new pupils arising from a housing development are most likely to attend schools in another local authority area, local authorities are advised to inform each other when relevant planning applications are received and work together to seek developer contributions to mitigate this impact if necessary. If you do not already attribute UPRNs to your pupil home address records in the School Census, we advise you to start doing this.
  2. You may decide to enhance your matched development and pupil data with a more detailed survey of families living in selected developments. For example, you may wish to understand more fully the number of students aged 16-19 attending college, in addition to those attending sixth forms within secondary schools. You should ensure that any such surveys and reports are updated regularly, and new housing developments are added to the data we have provided, as it becomes available.
  3. Some local planning authorities discount education contributions from affordable housing, on the basis that children living in these homes are already in the local authority area and do not require new school places. We advise you to challenge this when you can demonstrate that additional school places will be required in the catchment areas relevant to the development and there is insufficient capacity to accommodate the pupils. Evidence of net in-migration of pupils may also help to demonstrate that vacated properties will be occupied by additional children, so new affordable housing will still result in new school places being required in your area, as well as the direct need and demand for school places arising in the school catchment areas relevant to the development.
  4. We recommend that you establish a PPR for children with an Education, Health and Care (EHC) plan or SEN statement, requiring provision within a special school or SEN unit attached to a mainstream school. The PPR should take into account the proportion of the school cohort that currently has an EHC plan or SEN statement in the local authority area, projections of future pupil numbers following long-term trends, and our data on SEN pupil yields from recent housing developments (if published). It is reasonable to seek developer contributions for SEN provision when a development would yield at least one child with an EHC plan, according to your evidence-based assumptions. For example, a SEN PPR of 0.01 would equate to one child in a development of 100 homes.
  5. We advise you to identify all relevant SEN projects and ensure that planning obligations allow you the flexibility to direct funds appropriately. While the Government has consulted on proposals to lift pooling restrictions on planning obligations in some circumstances, legislation will be required before this can be implemented, and in the meantime you will only be able to collect up to four contributions for a single SEN project. Therefore, you may decide only to seek contributions from very large developments until such time as new legislation allows for greater pooling of contributions, or seek funds from CIL. We advise you to work with local planning authorities to help them meet the conditions for pooling restrictions to be lifted, where this would improve your ability to secure contributions for education.
  6. It is not necessary to disaggregate the SEN PPR according to different complex needs, in order to meet the tests in paragraph 1.1. All education contributions are based on an assessment of probability and averages, recognising that the precise mix of age groups and school choices cannot be known before a development is built. An increase in housing will generate an increase in SEN; a robust local authority-wide PPR should be sufficient to demonstrate that this need is reasonably related in scale and kind to the development.[[4]](#footnote-4)
  7. Local authorities employ different approaches to calculating planning obligation requirements for education, but there are key stages to this assessment. Once the pupil numbers arising from new development are known, the local authority establishes baseline school capacity. You are advised to take account of existing surplus school places, the extent to which these will be taken up by children already living in your area, and the number of school places that will be taken up by existing planning permissions (factoring in capacity provided via planning obligations). Developers will be expected to provide for additional school places arising from their development, minus net capacity within a suitable distance of the development.[[5]](#footnote-5)

1. **Costs of provision**
   1. The amount of money that you seek to secure through developer contributions for education provision should reflect the current cost of providing school places in your area, linked to the policy requirements in an up-to-date emerging or adopted plan which has been informed by viability assessment. Every year DfE publishes local authority scorecards, including underlying data on your reported costs of providing new schools and both permanent and temporary expansions.[[6]](#footnote-6) We recommend that these should be the basis for your per pupil cost assumptions and Section 106 planning obligation negotiations for mainstream school places. If the most recent scorecard includes no comparable projects or a very small sample in your region, you are advised to rely on the national average (applying the correct location factor), set out in the most recent National School Cost Delivery Benchmarking report.[[7]](#footnote-7) We advise that the cost of providing SEN places within special schools or SEN units attached to mainstream schools should be based on the national average in the National School Delivery Benchmarking report, adjusted for location. We do not recommend the continued use of outdated cost multipliers.
   2. The strategic plans of local planning authorities should set out the expectations for contributions from development towards infrastructure, including education of all phases (age 0-19).[[8]](#footnote-8) We advise you to work with local planning authorities as plans are prepared and planning applications determined, to ensure that all education needs are properly addressed, including both temporary and permanent education needs where relevant, such as school transport costs and temporary school provision before a permanent new school opens. Clauses within planning obligations should allow you enough flexibility to create, expand and alter schools in the most suitable and cost effective way.
   3. Government has consulted on proposals to lift the pooling restriction on planning obligations in some circumstances, subject to new legislation being passed. If and when pooling restrictions are removed, we recommend that you identify a preferred and ‘contingency’ school project in a planning obligation, as long as both would comply with the Section 106 tests.
   4. You are advised to carry out high-level feasibility studies to identify the realistic potential for schools in your area to expand, and include suitable projects in the local planning authority’s infrastructure funding statement to ensure that developer contributions are expected as the funding source where the expansions are due to housing growth. This background work will also minimise the risk of a specified school project in a planning obligation proving undeliverable. In areas that are likely to remain subject to the pooling restriction, we recommend you assist the local planning authority to meet the conditions for the restriction to be lifted. In the meantime, we advise you to work with local planning authorities to ensure that contributions are most effectively secured whilst working within the limit.
   5. You may wish to safeguard additional land when new schools within development sites are being planned, to allow for anticipated future expansion or the reconfiguration of schools to create a single site. You are advised to work with local planning authorities to ensure your long-term pupil place planning objectives are reflected in strategic plans, including precise site allocations that identify the total amount of land required for education. While developers cannot be expected to transfer this additional land at no cost, its allocation for education would preclude alternative uses, enabling you to acquire the site at an appropriate cost. Compulsory purchase powers could also be considered where necessary, with the allocation for educational use an important consideration in determining any compensation that would be payable to landowners.
   6. Where new schools are planned within housing developments, we advise you to consider whether direct delivery by the developer would represent the best value for money, subject to an appropriate design and quality assurance. Advice on complying with state aid and public procurement legislation is provided in the Annex.
2. **Strategic developments and new settlements**

* 1. Garden cities, towns and villages are an increasingly popular way of planning for housing growth at the scale required to meet the country’s housing needs. The Government has approved 24 garden settlements under the Garden Cities, Towns & Villages Programme, and there are plans to approve more.[[9]](#footnote-9)

* 1. Strategic planning of urban extensions and new settlements often includes place-making objectives about the early provision of infrastructure, to establish a sense of community and make the place attractive to residents. Early delivery of a school can be attractive to developers as it helps to sell houses, but problematic if it precedes new housing and draws pupils from existing schools, threatening their viability and resulting in unsustainable travel-to-school distances. We advise you to work closely with local planning authorities and other partners to agree the timing of new school provision, striking an appropriate balance between place-making objectives, education needs and parental choice.
  2. To control impacts on existing schools while supporting local planning authorities to plan new communities, you should work with school providers and the relevant Regional Schools Commissioner to, in the main, safeguard most of the new school places for residents of the development. This would entail developing suitable Admission Arrangements, Published Admission Number (PAN) and opening strategy. The Admission Arrangements might set a distance limitation (e.g. children living within two miles of the school) but must comply with the Schools Admissions Code, which requires that they are clear, fair and objective, and do not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group, or a child with a disability or special needs.
  3. If a new school opens below its full capacity while it awaits pupils moving to the development, this does not represent an available surplus in the wider local area for the purposes of other developments assessing their own impact and mitigation, unless the development delivering the new school will not be completed or generate enough pupils to fill the school. You may need to under-write the cost of surplus places until the school is full, and may wish to consider temporary complementary uses to offset this cost.[[10]](#footnote-10) To reduce risks associated with opening a school in advance of need, and the effect this will have on your basic need grant, you may prefer to deliver the school in phases using modular construction methods, linking capacity more closely to emerging need.
  4. New housing tends to attract more young families than older housing, yielding higher numbers of pupils particularly in the pre-school and primary age groups, though this stabilises over time until the development resembles the mature housing stock.[[11]](#footnote-11) You are advised to respond to initial peaks in demand, such as planning for modular or temporary classrooms, securing a large enough site to meet the maximum need generated by the development. Where new settlements are planned, you may wish to carry out demographic modelling to understand education requirements in more detail, taking account of similar developments and different scenarios such as an accelerated build rate.
  5. Where a requirement for both primary and secondary schools has been identified, we recommend you consider if there would be cost efficiency, space savings and educational benefits in providing an all-through school. There may also be sustainability, efficiency and educational benefits in relocating an existing school to the site of a proposed new school and creating a larger, single site that meets the needs of both existing and new children. We advise that you work collaboratively with local planning authorities to ensure your strategic planning of the school estate is reflected in strategic plans and planning decisions.

**Annex**

**Developer delivery of new schools**

1. Direct delivery of new schools by housing developers may represent good value for money, subject to the agreement of the Regional Schools Commissioner, academy trust, local authority and the developer in question. This model of delivery should not contravene state aid or public procurement rules. While local authorities are advised to seek their own project-specific legal advice when necessary, this annex sets out the Department’s view on the legal position at the time of publication.

**State Aid**

1. In some cases, all relevant parties will support developer delivery of a new school, but the local authority accepts that the developer cannot fully fund the new school and its delivery would need a degree of subsidy from the local authority. It is important this this does not constitute unlawful state aid to the developer.[[12]](#footnote-12)
2. The question is whether a contribution by a local authority to the cost of the school (otherwise being funded by the developer under a planning obligation) is a grant of incompatible state aid to that developer. The answer depends on the circumstances which give rise to the local authority's contribution. There are two principal questions. Has the public contribution arisen:
3. Because planning law/policy only requires the developer to make a partial contribution; or
4. Because the local authority has otherwise volunteered to make this contribution?

**Planning law/policy only requires the developer to make a partial contribution**

1. This is unlikely to give rise to incompatible state aid (unlawful). If planning law/policy only requires the developer to make a partial contribution then no incompatible state aid should arise merely because the local authority (or another public sector body) funds the balance of those costs. This is subject to the relevant public sector body satisfying itself (through benchmarking and/or a cost consultant's report) that the developer's costs of building the school are not more than market costs. This would apply even if the initial application of planning policy dictated that the developer makes a full contribution but after applying planning viability principles the developer's contribution was reduced.
2. The rationale for this assessment is that the key state aid test to be applied to the developer is whether it has selectively benefitted from the local authority's contribution. If under planning law/policy it (or any other developer) would have only been required to fund 60% of the school's costs then it has not selectivity benefitted as another developer (in identical circumstances) would also only be required to make the same 60% contribution.

**The local authority has otherwise volunteered to make this contribution**

1. A voluntary contribution by the local authority would raise an issue that its funding may grant a selective benefit to the developer and could amount to incompatible state aid (unlawful).

**Public works contracts (OJEU procurement)**

1. It is possible to place a Section 106 planning obligation on a developer to provide a school without triggering a ‘public works contract' which would require the local authority to undertake OJEU procurement. However, it is important that a number of principles contained in relevant case law[[13]](#footnote-13) are complied with:
2. there is no positive works obligation on the developer to build the school in any event (meaning could the planning authority force the developer to build the school even if that developer never implemented its planning permission); and/or
3. The public body has no 'decisive influence' on the design of the school. (The public authority is entitled to contribute to discussions about, be consulted on and set parameters about the building (e.g. compliance with national standards) but not have the ultimate decision about the works specification).
4. Most planning obligations requiring the delivery of new schools include trigger points which link the provision of infrastructure to the occupation of homes. Section 106 planning obligations that are only triggered when planning permission is substantially implemented may be considered conditional rather than constituting a positive works obligation. The developer would not be legally obligated to perform the works and could walk away from them at any time, until the development commenced.

1. The extent to which a contracting authority can become involved in the design of works before it is deemed to be "specifying" such works is explored in the case of Muller. The parameters set out in the case were further explored by the Office of Government Commerce (OGC) in Information Note 12/10 (30 June 2010).
2. In the case of Muller, the Court confirmed that a contract would only be deemed to be a public works contract if the contracting authority took measures to define the type of work to be undertaken by the developer partner or at the very least had a "decisive influence" on its design. Importantly, the Court excluded from the scope of "requirements specified by the contracting authority" the exercise of a public authority's urban planning powers in examining building plans presented to it or the decision to apply its planning powers in relation to a particular project.
3. The OGC in interpreting the land exemption went much further than the Muller judgment. In particular they were of the view that:
4. national or local land-use planning policies, requirements or restrictions for a site would not in themselves comprise a requirement specified by the contracting authority;
5. a broad invitation that a site should be developed in accordance with applicable or national local land-use planning policies but with the developer free to put forward its own intentions, proposals and specifications within these parameters is unlikely to trigger a requirement specified by the contracting authority.
6. Although the OGC no longer exists as a distinct government department, their guidance note has been referenced by the domestic Courts and it is still considered to be useful guidance in the UK. However, reliance on OGC views may need to be reviewed if their position is overruled by the European Courts or the Commission.
7. In the 2016 domestic West Berkshire case (footnote 15) the English High Court decided that, providing the developer was under no obligation to build, the local authority would not have a decisive influence on design (even though if the developer chose to build it was required to comply with a detailed specification). Part of the court's reasoning was that if the council and developer could not agree on a particular design matter the issue would be referred to an expert for resolution. This was sufficient in the English court's opinion to prevent the local authority from exercising a 'decisive influence'.
8. English High Court procurement judgements (such as West Berkshire) do not provide particularly strong precedents. They can be overruled by the Court of Appeal and the Supreme Court (in the UK) and the EU's Court of Justice. The West Berkshire case is being appealed to the English Court of Appeal, which could decide the case differently.

1. Regulation 122, <https://www.legislation.gov.uk/ukdsi/2010/9780111492390/contents> [↑](#footnote-ref-1)
2. In accordance with a local plan’s viability assessment, policies and/or an infrastructure funding statement. [↑](#footnote-ref-2)
3. <https://www.gov.uk/government/statistics/schools-pupils-and-their-characteristics-january-2017> [↑](#footnote-ref-3)
4. Oxfordshire Appeal decision reference APP/C3105/A/13/2189896. [↑](#footnote-ref-4)
5. Local authorities often define a suitable distance as the statutory walking distances set out in DfE [guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575323/Home_to_school_travel_and_transport_guidance.pdf). [↑](#footnote-ref-5)
6. <https://www.gov.uk/government/publications/local-authority-school-places-scorecards-2017> [↑](#footnote-ref-6)
7. [Link to report.](https://www.local.gov.uk/sites/default/files/documents/F07125%20-%20National%20School%20Delivery%20Cost%20Benchmarking%20-%20Primary%20Secondary%20%20SEN%20Schools%20-%20February%202018%20Revision%204%20Final.pdf) [↑](#footnote-ref-7)
8. We are working across Government to promote planning guidance for education. [↑](#footnote-ref-8)
9. Garden Communities [prospectus](https://www.gov.uk/government/publications/garden-communities-prospectus). [↑](#footnote-ref-9)
10. Such as nursery provision. [↑](#footnote-ref-10)
11. This phenomenon is widely reported in local authority evidence, such as for [Central Bedfordshire](https://centralbeds.moderngov.co.uk/documents/s73004/170711%20CS%20OSC%20Item%2010%20App%20A%20Pupil%20yield%20report.pdf) and [North Essex Garden Communities](https://www.braintree.gov.uk/download/downloads/id/6368/garden_communities_-_negc_employment_and_demographic_studies_april_2017.pdf). [↑](#footnote-ref-11)
12. There is full guidance relating to state aid and CIL, at <https://www.gov.uk/guidance/state-aid> and <https://www.gov.uk/guidance/community-infrastructure-levy#state-aid-section>. [↑](#footnote-ref-12)
13. The Queen (on the application of Midlands Co-operative Society Limited) and Birmingham City Council [2012] EWHC 620 (admin); Helmutt Muller GmbH v Bundesanstalt fur Immobilienaufgaben (C-451/08); R (Faraday Development Ltd.) v. West Berkshire Council & Anor [2016] EWHC 2166 (Admin) [↑](#footnote-ref-13)