



Department  
for Education

# Securing developer contributions for education

**August 2023**

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## **Summary**

This publication provides non-statutory guidance from the Department for Education (DfE). Its purpose is to help local authorities secure developer contributions for education infrastructure to mitigate the impact of development. The guidance promotes good practice on evidencing these impacts, engaging with local planning authorities, and delivering expanded or new facilities with funding from housing development.

## **Expiry or review date**

This guidance will be reviewed as necessary (for example, in response to changes in legislation or government policy).

## **Who is this publication for?**

This guidance is for local authorities with a responsibility for providing sufficient school places under the Education Act 1996. It may also be a source of information for local planning authorities and other stakeholders involved in the delivery of schools.

## 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 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.

DfE expects local authorities to seek developer contributions towards school places that you create to meet the need arising from housing development. You should consider the recommendations in this guidance alongside National Planning Practice Guidance on the evidence, policies and developer contributions required to support school provision.

This guidance is for local authorities with a responsibility to provide sufficient school places under the Education Act 1996. The guidance does not:

- Advise the construction/development industry on its duties and responsibilities in paying for infrastructure.
- Replace or override any aspects of other DfE publications such as guidance on the School Capacity ([SCAP](#)) survey and the [Admissions Code](#), or policy/guidance produced by other government departments.
- Make recommendations for individual schools or academy trusts on managing their capacity or published admission numbers.
- Propose new DfE policy on setting up new schools, parental preference, or the academy system.

This guidance is not intended to be an authoritative interpretation of the law: only the courts can provide that. You should obtain your own legal advice where necessary.

## Purpose

As a local authority with education responsibilities, 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 help you establish a robust and consistent evidence base, underpinned by the following principles:

- Housing development should mitigate its impact on community infrastructure, including schools and other education and childcare facilities.
- Evidence of pupil yield from housing development should be based on data from local housing developments.
- Developer contributions towards new school places should provide both funding for construction and freehold land where applicable, subject to 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.

There is great value in detailed local methodologies and guidance that explain to all stakeholders the process and reasons for the collection of developer contributions for education in that area. This guidance is not intended to replace local approaches, which often provide detail on matters including but not limited to:

- Education projects developer contributions may fund.
- The approach to seeking contributions for education from affordable housing.
- Types/sizes of homes that will be excluded from calculations of developer contributions.
- The minimum viable size of new schools.
- Minimum surplus capacity to allow for fluctuations in demand and parental choice, not counted as available when calculating developer contributions.
- Contributions 'in kind,' including direct delivery of school infrastructure (both land and construction) by a housing developer in lieu of a financial contribution.
- Requirements on size and suitability of school sites, including checklists, exemplar layouts and facility specifications.
- Standard planning obligation clauses.

As local approaches to securing developer contributions for education are reviewed, they should take account of the latest National Planning Practice Guidance, this guidance, the department's guidance on estimating pupil yield from housing development,<sup>1</sup> and the accompanying Pupil Yield Dashboard, as well as local contextual information such as changes to local planning policy and recent appeal history. This approach will help you inform local planning authorities effectively about the need for developer contributions

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<sup>1</sup> <https://www.gov.uk/government/publications/delivering-schools-to-support-housing-growth>

towards education infrastructure, supporting them in their policy-making and decision-making functions.

## Mechanisms for securing developer contributions

1. Developer contributions for education are secured by means of conditions attached to planning permission, a planning obligation under Section 106 of The Town and Country Planning Act 1990, or the Community Infrastructure Levy (CIL). This system of developer contributions will be reconfigured over time by the introduction of a new Infrastructure Levy, with remaining use of Section 106 agreements for limited purposes and on particular sites. The detail of how the Infrastructure Levy will operate will be set out in regulations which will be consulted on.

2. The Department for Levelling Up, Housing and Communities (DLUHC) intends to introduce the Levy through a “test and learn” process, meaning that the existing system will remain in place in most areas for the foreseeable future, as the new system is rolled out incrementally over several years. That means that CIL and Section 106 will remain the standard means of securing developer contributions for local authorities before the new Infrastructure Levy is fully adopted, and therefore this guidance focuses on the existing system.

3. 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 facilities. Alternatively, a Section 106 planning obligation can secure a developer contribution by agreement with the local authority, allowing funding to be ringfenced for education facilities. A planning obligation may only constitute a reason for granting planning permission if it meets the following tests set out in the CIL Regulations<sup>2</sup>. The obligation must 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.

4. An infrastructure project may receive funding from both CIL and Section 106. We advise you 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 facilities alongside other infrastructure funding priorities. The most appropriate route for funding education infrastructure may be affected by a local authority’s other infrastructure funding priorities, and we recommend working closely with the local planning authority to agree the best approach.

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<sup>2</sup> Regulation 122 of The Community Infrastructure Levy Regulations 2010 (as amended): <https://www.legislation.gov.uk/ukdsi/2010/9780111492390/contents>

**5.** When CIL funding is known to be insufficient or will be allocated to other, non-education infrastructure projects, and development will have a direct impact on education provision, we recommend close working with local planning authorities to agree using Section 106 planning obligations to secure the contributions. In two-tier local authority areas, the county council is often a signatory on the Section 106 agreement and the agreed education contributions are paid directly to the county council. This is considered best practice, ensuring efficient transfer of land and/or funding to the relevant local authority.

**6.** Pro-active engagement with local planning authorities should be undertaken during the preparation stage of CIL charging schedules, including during the mandatory consultation stage, to ensure viability considerations are fully considered when CIL rates are being set. You can also ask a CIL charging authority to review their existing CIL rates in areas where CIL charges are already impacting on viability considerations around the development of new or improved schools. CIL charging authorities can set zero or very low rates of CIL for uses of development (“use” in its wider sense, unconstrained by the Use Classes Order) where viability evidence demonstrates this to be appropriate. This engagement with local planning authorities is essential to ensure that the development of schools, and the significant public investment in community infrastructure that a school already represents, is fully considered during the CIL rate-setting process. This includes the setting of rates for specific types of development, and the setting of catch-all rates such as rates intended to apply to “all other development,” in which it is important that the impacts on school development are fully considered.

**7.** It is important that the impacts of development are adequately mitigated, requiring an understanding of:

- The education needs arising from development, based on up-to-date pupil yield factors.
- The capacity of existing schools that will serve development, taking account of pupil migration across planning areas and local authority boundaries.
- Available sources of funding to increase capacity where required.
- The extent to which developer contributions are required and the degree of certainty that these will be secured at the appropriate time.

**8.** The local authority providing children’s services is not always the charging authority for the purposes of collecting and distributing CIL. Effective on-going communication between teams responsible for planning and education is essential to ensure that education infrastructure needs and costs are factored into decisions about policy requirements and delivery mechanisms. In two-tier areas where education and planning responsibilities are not held within the same local authority, you should discuss with the local planning authority the most effective mechanism for securing developer contributions for education. The use of planning obligations where there is a demonstrable link between the development and its education requirements can provide certainty, subject to negotiation between developers and the local authority, over the amount and timing of the funding you need to deliver sufficient school places.



**9.** Local authorities are expected to use all the funding received by way of planning obligations, as set out in individual agreements, for a period of at least 10 years from the date of last payment, in order to make development acceptable in planning terms. Agreements should normally include clauses stating when and how the funds will be used and allow for their return after an agreed period if they are not used.

**10.** Allowing enough time for developer contributions to be used is particularly important for large developments that will include a new school. The timing of school delivery is usually dependent upon the housing build rate and new schools can only open when there are enough pupils to make them viable, or the revenue shortfall will be funded by other sources such as developer contributions until the minimum viable number of pupils has been reached. Also, large developments building out over many years may not generate significant numbers of secondary school pupils until after several years, so any time limits on the use of developer contributions for secondary education should be carefully considered. You should work with the local planning authority to agree appropriate clauses in planning obligations and the timing of transfer and use of any CIL funding.

**11.** The DfE's Basic Need grant, free schools programme and other capital funding do not negate housing developers' responsibility to mitigate the impact of their development on education. When the DfE central free schools programme is delivering a new school for a development, we expect the developer to make an appropriate contribution to the cost of the project, allowing DfE to secure the school site from the local authority on a peppercorn (zero or nominal rent) basis and make use of developer contributions towards construction. National Planning Practice Guidance explains how local planning authorities should account for development viability when planning for schools within housing developments, including an initial assumption that both land and construction costs will be provided.<sup>3</sup>

**12.** Basic Need allocations do not factor in the cost of land acquisition, so it is particularly important that any land required within larger development sites for schools is provided at no cost to the local authority wherever possible, and pooled developer contributions (Section 106 and/or CIL) from cumulative developments are secured for standalone school sites if you need to purchase them on the open market.

**13.** While Basic Need capital allocations and other DfE capital funding such as the High Needs Provision Capital Allocations can be used for new school places that are required due to housing development, we would expect this to be the minimum amount necessary to maintain development viability, having considered all infrastructure requirements. When you have a reasonable expectation of developer funding being

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<sup>3</sup> Planning practice guidance on viability, paragraph 029: <https://www.gov.uk/guidance/viability>. Construction costs include ICT and furniture and equipment required for the delivery of the school.

received for school places based on relevant reports and evidence,<sup>4</sup> you should be in a strong position to secure these places through developer contributions when individual proposals come forward. Basic Need and other DfE capital funding should not be considered available in these circumstances.

**14.** When education facilities must be provided in advance of developer contributions being received (for instance, due to viability constraints), local authorities can make use of borrowing powers, including borrowing from the UK Infrastructure Bank or the Public Works Loan Board, capital reserves or other local authority funds. We recognise the inherent risks with forward funding, and it is always preferable for developer contributions to be secured upfront wherever possible, though circumstances will vary among local authorities.

**15.** When school places have been forward funded, you can secure developer contributions to recoup the monies spent, including interest, fees, and expenses as well as the principal sum spent. Where this model is envisaged, we recommend that you engage with the local planning authority before forward funding occurs to ensure they support this approach. The CIL Regulations prohibit borrowing against future CIL receipts, so this method of forward-funding only applies to planning obligations at present.

**16.** Local authorities can also bid for funding under government grant programmes as they become available, while developers delivering schools directly as an ‘in kind’ contribution may be eligible for loan funding from Homes England, allowing a new school to be delivered at an earlier stage in the development than would have been possible otherwise.<sup>5</sup>

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<sup>4</sup> For example, you have declared developer contributions in your SCAP return (or plan to do so) or in relevant school place planning strategies, or evidence documents such as Infrastructure Delivery Plans or committee reports.

<sup>5</sup> <https://www.gov.uk/guidance/levelling-up-home-building-fund-development-finance>

## Evidence of pupil yield from housing development

**17.** Pupil yield factors should be based on up-to-date evidence from previous local housing developments, so you can predict the education needs for each phase and type of education provision arising from new development. To understand how pupil yield builds up in developments over time, you can consider pupil yield from developments completed 10 or more years ago as well as those built more recently. You are under no obligation to review pupil yields continually, but we recommend refreshing your data approximately every five years.

**18.** Pupil yield factors allow you to estimate the number of early years, school and post-16 places required as a direct result of development, underpinning local plan policies and the contributions agreed in planning obligations. We have published separate research data and guidance on estimating pupil yield, to assist local authorities producing and using pupil yield evidence.<sup>6</sup>

**19.** When assessing development proposals and their impact on local education provision, you can only justify securing developer contributions for the proportion of pupils that would have no available school place when forecast local school capacity has been taken into account, unless the site is large enough to require a new onsite school, which would normally be expected to meet the full need from the development. We recognise the challenges of forecasting local school capacity when developments may commence long after your usual forecast periods, or build out more slowly than anticipated, while cumulative development in the meantime may take up this forecast capacity. Paragraphs 76-80 provide options for how you can manage this risk.

## Pupil yield from affordable housing

**20.** Affordable housing typically generates more pupils than market housing. In some locations, families occupying affordable housing may be more likely to move house within the same local area and will not necessarily lead to a net increase in the demand for school places in the short-term. However, in areas where local authorities prioritise allocation of homes to families on waiting lists, affordable housing may be more likely to be backfilled by families in need. Both market and affordable housing development increase the population in a pupil planning area<sup>7</sup> and create permanent demand for school places. Our guidance on estimating pupil yield from housing development provides further advice on developing and using affordable housing pupil yield factors, recognising that additional local analysis may be required to understand differences in

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<sup>6</sup> <https://www.gov.uk/government/publications/delivering-schools-to-support-housing-growth>

<sup>7</sup> Pupil planning areas are defined in guidance: <https://www.gov.uk/guidance/school-capacity-survey-guide-for-local-authorities>

pupil yield from different types of affordable housing such as shared ownership and affordable rent.<sup>8</sup>

**21.** When you contribute to local plan preparation and discuss developer contributions with planning colleagues, we recommend that you describe the expected pupil yield from each tenure type to ensure all parties understand the total education need arising from the development. It is particularly important that the pupil yield from affordable housing is included in any developer contributions of land being negotiated, to ensure large enough sites are secured for new schools. While local planning authorities make their own policy decisions about how and when to secure developer contributions towards education, providing evidence of the level of need from both market and affordable housing will assist in the production of the local plan evidence base and the consideration of development impacts on education infrastructure when planning applications are determined. When the proportion of affordable housing to be delivered in a development scheme is unknown, you can apply combined average pupil yield factors or an assumed housing mix instead.

**22.** Higher pupil yields and therefore higher education costs associated with affordable housing should be recognised as part of the consideration of development viability when you engage with local planning authorities on plan-making and development proposals. Local planning authorities assess development viability and may decide not to fully fund the school places from CIL or pursue Section 106 developer contributions to meet the full education need if this would compromise the delivery of housing or other essential infrastructure. However, robust pupil yield data should help you to demonstrate the level of education need generated by development. The evidence you provide to local planning authorities should enable balanced judgement and a clear understanding of how policy decisions on matters such as affordable housing targets would affect the deliverability of infrastructure that is necessary to mitigate the impact of development.

## **Pupil yield evidence by education type and phase**

**23.** While many early years settings fall within the private, voluntary, and independent (PVI) sector, local authorities have a duty to ensure early years childcare provision within the terms set out in the Childcare Acts 2006 and 2016. DfE has scaled up state-funded early years places since 2010, including the introduction of funding for eligible 2-year-olds and the 30 hours funded childcare offer for 3-4 year olds. Expanded early years entitlements for children aged nine months to three years old become available from 2024. The take-up of funded childcare entitlements is high, increasing demand for early years provision. All new primary schools are now expected to include a nursery.

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<sup>8</sup> <https://www.gov.uk/government/publications/delivering-schools-to-support-housing-growth>

Developer contributions have a role to play in helping to fund additional early years places for children aged 0-4 where these are required due to housing growth, whether these are attached to schools or delivered as separate settings.

**24.** You are also responsible for ensuring sufficient schools for pupils receiving primary and secondary education up to the age of 19, including securing sufficient education and training provision for young people with an Education, Health and Care (EHC) plan, up to the age of 25.<sup>9</sup> When assessing post-16 requirements, any pupil yield data you produce in addition to the department's own research should identify the number of learners living in previous local housing developments, aged 16-19 (without an EHC plan) and up to the age of 25 (with an EHC plan).

**25.** We advise you to seek developer contributions for expansions required to sixth form and special educational needs and disabilities (SEN) provision, commensurate with the need arising from the development. Expansions to FE colleges are unlikely to be funded through planning obligations, but local planning authorities may allocate CIL for strategic expansion or enhancement of these facilities for a growing regional or sub-regional population.

**26.** To determine the need for SEN provision, pupil yield data should identify the number of children and young people living in local housing developments who attend special schools, alternative provision including pupil referral units, and SEN units and resourced provision within mainstream schools. It is reasonable to seek developer contributions for SEN provision in direct proportion to the needs arising from planned housing development, applying the same principle to SEN provision as to mainstream. The ability of special and alternative provision schools to accommodate pupils depends on the specific needs of each child. However, an increase in housing will lead to an increase in SEN, and we advise you to seek developer contributions for all special school/SEN places generated by a development, where there is a documented need for additional SEN provision.

**27.** Pupils attending special schools and alternative provision are typically drawn from a larger area than mainstream schools, and this should not affect your consideration of whether a planning obligation meets the legal tests outlined in paragraph 3. However, if the local authority identifies a shortage of specialist places for children and young people in a local authority area, resulting in a significant number having to travel a long way to access an appropriate placement, local authorities will need to consider creating or expanding specialist provision, either attached to mainstream schools or in special schools.

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<sup>9</sup> <https://www.gov.uk/government/publications/participation-of-young-people-education-employment-and-training>

**28.** You can seek developer contributions towards the cost of this enhanced local provision, applying the appropriate pupil yield factors to determine the level of need generated by development. You can substantiate your requests for developer contributions by compiling additional evidence of need for specialist provision, including the proportion of the pupil population with EHC plans or receiving SEN support, and the number of specialist places needed compared to those available in state settings within your local authority. If you currently rely heavily on provision outside your area and/or independent provision at a significant distance from pupils' homes, this can indicate a shortfall in specialist provision which will be exacerbated by additional housing development and could be mitigated by developer contributions.

**29.** We advise you to identify a range of specialist SEN or other non-mainstream projects and ensure that planning obligations allow you the flexibility to direct funds within an appropriate period. Non-mainstream provision does not conform to standard class sizes, these being determined according to need. While you can pool contributions towards a new classroom in a special school or SEN unit at a mainstream school, it is equally valid to seek contributions for school building alterations that increase a school's capacity to cater for children with SEN, such as additional space for sensory rooms, facilities to teach independent living skills or practical teaching space.

**30.** It is not necessary to disaggregate the SEN pupil yield factor according to different complex needs. 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 occupied. Site-specific factors will always need to be considered, but a robust local authority-wide pupil yield factor based on evidence from local housing developments will often be sufficient to demonstrate that this need is reasonably related in scale and kind to the development.

## Costs of provision

**31.** You are not expected to produce site-specific feasibility studies or cost plans for school build/expansion projects when planning applications for housing development are under consideration, as this is extremely resource-intensive, and it is unknown if development proposals will be permitted or what circumstances will have changed by the time permissions are implemented. The amount of money that you seek to secure through developer contributions for education infrastructure should reflect the typical cost of providing school places in your region, linked to the policy requirements in an up-to-date emerging or adopted plan that has been informed by viability assessment.

**32.** We advise that you base the assumed cost of mainstream school places on the relevant average regional costs published in the DfE school places scorecard.<sup>10</sup> This allows you to differentiate between the average per pupil costs of a new school, permanent expansion or temporary expansion, ensuring developer contributions are fairly and reasonably related in scale and kind to the development. You should adjust the regional average to account for inflation since the latest scorecard base date.<sup>11</sup>

**33.** In addition, consider uplifting rates to reflect the costs associated with achieving the sort of sustainability and design standards set out in the department's updated School Output Specification 2021<sup>12</sup> (or a future update which is relevant to the timing of a project). The department has uplifted Basic Need grant funding by around 10% to support local authorities meet the costs associated with achieving these sorts of standards. This percentage may be a useful basis for an uplift to developer contributions, though current local planning context such as additional climate change, environmental or design policy requirements may justify an alternative uplift.

**34.** We recognise that scorecard costs are based on historic projects that may have been built to former standards.<sup>13</sup> This uplift approach should help deliver school capital projects to higher sustainability standards, including considerations relating to buildings that are net zero carbon in operation and with additional climate resilience measures. We recommend the use of index linking, such as the BCIS All-In Tender Price Index (TPI), when developer contributions are discussed at planning application stage and in planning obligations, so that contributions are adjusted for inflation at the point they are negotiated and when payment is due.

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<sup>10</sup> <https://www.gov.uk/government/collections/school-places-scorecards>

<sup>11</sup> Further guidance on doing this is available with the school place scorecards (see the [technical notes](#)).

<sup>12</sup> <https://www.gov.uk/government/publications/employers-requirements-part-a-general-conditions>

<sup>13</sup> Basic need allocations 2025-26: Explanatory note on methodology, <https://www.gov.uk/government/publications/basic-need-allocations>

**35.** Where you have a reasonable expectation of higher costs based on local planning policy requirements, known site abnormalities or recent trends of higher delivery costs for projects in your area, these can be used in preference to the regional average in the school places scorecard.

**36.** Developer contributions for early years provision will often be used to fund places at existing or new school sites, incorporated within primary schools. Therefore, we recommend that the per pupil cost of early years provision is assumed to be the same as for a primary school, unless you have alternative local/regional cost data for new or expanded standalone settings (either maintained or PVI sector) that more accurately reflect the type of new early years provision required in your area. Similarly, sixth form places provided within secondary schools will cost broadly the same as a secondary school place. The technical notes accompanying the school places scorecard include advice on how to apply costs per place when the local schools operate a three-tier system of education.

**37.** Special schools require more space per pupil than mainstream schools, and this should be reflected in the assumed costs of provision. Many local authorities set the costs of special or alternative provision school places at four times the cost of mainstream places, consistent with the additional space requirements in Building Bulletin 104.<sup>14</sup> You can also refer to the National School Delivery Cost Benchmarking report<sup>15</sup> and published free schools cost data<sup>16</sup> for the costs of delivering special school places. Use local or regional evidence where appropriate to demonstrate higher costs of specialist provision compared to mainstream.

**38.** Developer contributions that mitigate the impact of development on education provision should be recognised as necessary in principle. As set out in paragraph 13, while DfE capital funding can be used for new school places that are required due to housing development, we would expect this to be the minimum amount necessary to maintain development viability, having considered all infrastructure requirements. This ensures the most responsible and efficient use of limited public funds.

**39.** Planning Practice Guidance sets out the government's expectations regarding developer contributions and viability assessment with regard to education provision.<sup>17</sup> Using evidence of need and cost as advised in this guidance, viability assessments can identify a Section 106 cost for education per dwelling that development can fund

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<sup>14</sup> <https://www.gov.uk/government/publications/primary-and-secondary-school-design/primary-and-secondary-school-design>

<sup>15</sup> <https://ebdog.org.uk/article/cost-of-school-buildings-national-benchmarking-study-2021-22-now-available-and-2022-23-submissions-now-requested/>

<sup>16</sup> <https://www.gov.uk/government/publications/capital-funding-for-open-free-schools>

<sup>17</sup> Planning Practice Guidance on viability, paragraph 029: <https://www.gov.uk/guidance/viability>



alongside other infrastructure and affordable housing (testing the effect of different affordable housing policies), to ensure that any proposed CIL rate represents the realistic headroom that is available after site-specific impacts of development have been addressed.

**40.** Even if viability assessment determines that development in the area cannot fully fund the cost of education infrastructure, accurate evidence of need and cost allows all parties to plan effectively and reduces the risk of renegotiation/reduction of developer contributions in future. You should assist local planning authorities in setting out education requirements clearly in local plans and evidence base documents, such as Infrastructure Delivery Plans and Infrastructure Funding Statements.

## Identifying education projects

**41.** Local plans and other planning policy documents should set out the expectations for contributions from development towards infrastructure, including education of all phases (age 0-19) and special educational needs.<sup>18</sup> We advise local authorities with education responsibilities to work jointly with local planning authorities as plans are prepared and planning applications determined, to ensure that all education needs are properly addressed, including temporary education needs where relevant, such as temporary school expansion and any associated school transport costs before a permanent new school opens within a development site. This does not mean double funding the same school places but allows development to be acceptable in planning terms when it is not possible to open a permanent new school at the point of need. When a permanent new school is delivered (or the relevant financial contribution is received), no further contributions to temporary provision should be required.

**42.** Depending on local admission arrangements and patterns of parental preference, children living in a development might reasonably attend any school within the pupil planning area (or even an adjoining one in some cases), and you should not assume that they will all attend a particular school unless there are no likely alternatives. The best option may be to expand another school to free up capacity in the nearest school, as this reclaimed capacity would meet the need from the development (in compliance with the Section 106 tests) while balancing out admissions across the planning area and reducing school trips by car (see paragraphs 85-92).

**43.** In accordance with national planning policy and guidance, we anticipate that housing development which gives rise to additional pupils will only be planned in locations that are, or will be made, environmentally sustainable. Using connectivity metrics that indicate public transport accessibility or active travel provision can help identify what transport measures could be required to mitigate impacts and promote sustainable travel.

**44.** You should advise local planning authorities of the consequences of allocating/permitting developments that have no school within safe walking distance and will require permanent public investment in home-to-school transport or generate significant additional trips, for pupils to access their nearest available schools. As well as the cost burden this imposes on the local authority, there may be lasting harm to the environment and public health through increased carbon emissions and detrimental impacts on air quality, which the local planning authority will weigh against any perceived benefits. Consider recommending refusal of planning applications when no suitable

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<sup>18</sup> Planning practice guidance on planning obligations, paragraph 008:  
<https://www.gov.uk/guidance/planning-obligations>

solutions for sustainable access to education infrastructure can be agreed, and there would be a clear detrimental impact, either from single or cumulative housing developments.

**45.** When there is no suitable solution for sustainable access to school but a local planning authority (or Planning Inspector) is still minded to approve a development, you can seek developer contributions towards the cost of home-to-school transport for an agreed period, such as three years following the occupation of dwellings to reflect the usual timescale for government revenue funding to take account of the latest pupil projections. The department does not fund most home-to-school transport directly; the majority comes under the local government settlement administered by the Department for Levelling Up, Housing and Communities. Home-to-school transport receives no ringfenced funding of its own, and there are many competing demands on funding from the local government settlement.

**46.** When housing development will create a permanent need for home-to-school transport, including transport to special schools and alternative provision, work with local planning authorities to ensure that developer contributions are identified as an expected source of funding in pre-application correspondence, Infrastructure Funding Statements, Infrastructure Delivery Plans, and any other relevant parts of the local plan evidence base. It remains our preference for new school places arising from housing development to be created only in sustainable locations, accessible either via a safe active travel route or by public transport.

**47.** We recommend that you identify a preferred and 'contingency' school expansion project in a planning obligation, or list all schools in the pupil planning area, if any of the identified options would address the needs from development and comply with the Section 106 tests. This will help you respond to changing circumstances and new information, such as detailed feasibility work leading you to abandon a preferred expansion project.

**48.** In locations where emerging or adopted local plans propose housing growth, we advise you to carry out a high level assessment of whether schools in the area can expand or increase capacity through other alterations, in discussion with schools and academy trusts, and including an assessment of whether significant changes to the schools' physical capacity would accord with the department's statutory guidance at that time.<sup>19</sup> Also identify site options for any new schools (within proposed housing developments or on standalone sites) that are likely to be required over the plan period. Including suitable projects in Infrastructure Funding Statements will ensure that developer contributions are clearly identified as the funding source where new schools,

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<sup>19</sup> <https://www.gov.uk/government/publications/making-significant-changes-to-an-existing-academy>

expansions or alterations are required. This background work will also minimise the risk of a specified school project in a planning obligation proving undeliverable. Planned expansions to academies may require an agreement between the local authority and academy trust to ensure that school places provided by developer contributions are commissioned/delivered appropriately.

**49.** You can seek developer contributions towards the cost of offsite works that are required to deliver a new school or school expansion associated with housing development, such as traffic management measures, school streets, better streets for cycling, walking and people, to promote active travel.<sup>20</sup> Alternatively, these works can be secured as highways obligations under a Section 278 agreement. Consult local highways teams on the extent and cost of offsite works, which should be carried out ahead of new school provision becoming available.

**50.** Housing developments may also provide an opportunity for Biodiversity Net Gain (BNG) to be delivered on the sites of existing or new schools.<sup>21</sup> While this is not a requirement from a school place planning perspective, housing developers that are required to provide BNG either within a large mixed use site containing a new school, or offsite when all onsite options have been exhausted, may be interested in using education land for this purpose. We recommend working with local planning authorities, schools, and environmental services to identify opportunities for housing developers to use education land to provide offsite habitats associated with the BNG requirement of development, in addition to any contributions towards the creation of new school places that are required due to housing development.

**51.** It is important that BNG provision is not seen as an alternative to the creation of additional school places that are necessary to make a development acceptable in planning terms. Your priority will be the sufficiency of school places, while the developer's obligation to provide BNG will exist regardless of whether education land is used. Any proposal for BNG on education land will require careful consideration of how its provision can be integrated alongside existing school uses and how the maintenance of BNG provision will be undertaken. Provision of any BNG areas on school land will need to be secured for 30 years. Development on any BNG areas in future will require additional improvements, posing an additional site constraint. Any use of school land to satisfy BNG requirements of housing developments should not restrict future school expansions, use of school land (current and future) to enable delivery of the curriculum, or result in a shortfall of minimum BB103/104 areas.<sup>22</sup> Any BNG provision on school land that is

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<sup>20</sup> <https://www.gov.uk/government/publications/cycling-and-walking-plan-for-england>

<sup>21</sup> The Environment Act 2021 requires a minimum of 10% Biodiversity Net Gain from development. The Planning Advisory Service provides more information about these requirements: <https://www.local.gov.uk/pas/topics/environment/biodiversity-net-gain-local-authorities>

<sup>22</sup> <https://www.gov.uk/government/publications/area-guidelines-and-net-capacity>

compatible with the site should maximise use of the school itself in terms of climate resilience and education. Development of educational facilities will also be required to meet BNG requirements under the Environment Act and local plan policies.

## Safeguarding land for schools

**52.** National Planning Practice Guidance advises on how local planning authorities should prepare plans and take account of education requirements.<sup>23</sup> We advise you to work with local planning authorities and developers to ensure your long-term pupil place planning objectives are reflected in the development plan and supplementary planning documents.<sup>24</sup> Precise policies can aid decision-making later, setting out the total amount of land required for education, and the approach to securing equitable developer contributions when one developer provides the land for a new school, though the need for the school is generated by more than one development or phase. To embed sustainable travel patterns at these sites, you can use connectivity metrics that highlight the accessibility of public transport and active travel, to inform your engagement with planning colleagues formulating local plan policies.

**53.** When development proposals come forward on non-allocated sites that are large enough to justify a new school, it is equally important that sufficient suitable land is safeguarded for education, and you should advise local planning authorities of the education requirement as early in the planning process as possible, ensuring that education land required to serve the development is provided (freehold) at the appropriate time and at no cost to the local authority.

**54.** 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. 'Future-proofing' can sometimes be achieved informally through a site layout that places open space adjacent to a school site. Where there is a forecast need for new school places that is not linked exclusively to a particular development, the development plan can allocate specific areas of land for new schools or school expansion and safeguard specific parcels of land within wider development sites for education use. Safeguarded land within larger site allocations can be made available for purchase by the local authority within an agreed timescale, after which the land may be developed for other uses.

**55.** While developers can only be expected to provide free land to meet the education need from their development, the allocation of additional land for education use within a development plan will make it more difficult for landowners to secure planning consent for alternative uses on that land, enabling you to acquire the site at an appropriate cost that reflects the site allocation. This ensures that land is reserved for education uses, and

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<sup>23</sup> Planning practice guidance on healthy and safe communities, paragraphs 007 and 008: <https://www.gov.uk/guidance/health-and-wellbeing>

<sup>24</sup> The development plan is defined in Section 38 of the Planning and Compulsory Purchase Act 2004, and comprises the spatial development strategy, development plan documents and neighbourhood development plans. <https://www.legislation.gov.uk/ukpga/2004/5/contents>

prevents such land being usurped by uses with a higher development value. Land equalisation approaches can be used in multi-phase developments to ensure the development 'hosting' a new school (and any additional safeguarded land) is not disadvantaged.

**56.** The market price for the land will depend on its permissible uses. Land allocated for educational use in a local plan would usually have limited prospect of achieving planning permission for any other uses. As a general principle, the value of education land should be considered substantially lower than that of residential land. The process and basis of valuation should be set out in the Section 106 agreement, and valuations should be conducted by an appropriately qualified valuer. National Planning Practice Guidance provides advice on land valuation for the purposes of viability assessment.<sup>25</sup>

**57.** The use of compulsory purchase powers may have a potential role in supporting the delivery of new education facilities.<sup>26</sup> However, it is a tool of last resort and compulsory purchase orders (CPOs) may only be confirmed (approved) where an acquiring authority has made efforts to acquire the land by agreement and it can demonstrate a compelling case in the public interest exists for the use of compulsory purchase powers. Where an acquiring authority seeks to acquire land for the purposes of providing education facilities via a CPO, its justification for doing so may be strengthened if the site is allocated for such a use in an up-to-date development plan.

**58.** Where new schools are planned within housing developments, consider whether direct delivery by the developer would represent the best value for money, subject to an appropriate specification and pre-application support from the local planning authority. This removes the risk for local authorities of an affordability gap between Section 106 agreed contributions and the actual cost of delivery several years later, even once adjustments for inflation have been applied. However, this approach is not without procurement challenge risk, and you may wish to take specific legal advice when developer delivery is the preferred option. General advice on complying with subsidy control and public procurement legislation is provided in the Annex.

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<sup>25</sup> Planning practice guidance on viability, paragraph 013: <https://www.gov.uk/guidance/viability>

<sup>26</sup> Section 8 of CPO guidance on enabling powers for educational purposes: <https://www.gov.uk/government/publications/compulsory-purchase-process-and-the-crichel-down-rules-guidance>

## Strategic developments and new settlements

**59.** New communities are one way of planning for housing growth at the scale required to meet the country's housing needs. In recent years, the government has supported a number of garden communities and other strategic developments under the Garden Communities Programme, Housing Infrastructure Fund, Levelling Up Fund, and other programmes/initiatives.

**60.** 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 problematic if it precedes new housing, risking unacceptably low pupil numbers or drawing pupils from existing schools, threatening their viability and resulting in unsustainable travel patterns. We advise local authorities with education responsibilities to work jointly 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 preference. Many local authorities find the best approach is to open a school at the stage in the development where there is expected to be a viable number of pupils to admit into Reception (which varies but can be around 20 pupils), adding one new year group each academic year until all seven year groups are in place.

**61.** Regardless of the opening strategy (filling from the bottom up or opening all year groups simultaneously), schools can be constructed in single or multiple phases; the best approach will depend on local circumstances and characteristics of the development. Where appropriate, for instance in the early stages of development while the need for school places is growing, developer contributions can be secured for temporary expansions to existing schools if these are required, and transport costs for pupils travelling further than the statutory walking distance.<sup>27</sup> This will allow a permanent new school to be provided in a single construction phase once the development has generated sufficient pupil numbers, rather than phased construction over a longer period. While the existing pupil cohort may not switch schools initially, if the admission arrangements for the school offer a high priority for admission for children living in the development area, subsequent pupils will usually take up these new school places over time.

**62.** As far as possible (and often in relation to primary schools only), new settlements and urban extensions large enough to require a new school should be expected to meet their full education requirement. Where an onsite school is required, it should be large

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<sup>27</sup> The statutory walking distances are set out in Section 444(5) of the Education Act 1996 and the Home to School Transport guidance: <https://www.gov.uk/government/publications/home-to-school-travel-and-transport-guidance>



enough to meet the need generated by the development, based on standard class sizes and forms of entry. For example, a development that generates 400 primary school places would require a standard two forms of entry (2FE) school.

**63.** The capacity of existing primary schools beyond reasonable and safe walking distance does not need to be considered when calculating developer contributions for permanent onsite schools in new settlements and urban extensions. This promotes sustainable and healthy travel patterns for young people, while helping housing developments mitigate their impact on the environment by reducing the need for pupils to travel by private car or school transport. We recognise that secondary school planning areas are larger and there may be no realistic option for walking or cycling to school, but this is mitigated by local planning policies that direct most development towards locations with access to public transport. We advise you to engage in both local development plan and local transport plan-making processes to help ensure that new education infrastructure is in as sustainable a transport location as possible.

**64.** When a new onsite school is proposed to be built early in the development of an urban extension or new settlement, you will naturally consider the effect this might have on parental demand and the viability of existing schools. To minimise detrimental impacts on existing schools while supporting local planning authorities to plan new communities, you should work with school providers and the relevant Regional Director to promote opening strategies that will maintain equilibrium in school populations across your area. This can include phased delivery, with the initial phase future-proofed for future expansion (such as an oversized assembly hall and dining area) and land safeguarded for the school's expansion when need builds up over a lengthy period, though it is important to secure commitment to the delivery of later phases. Any subsequent conversion of non-teaching space into teaching space capacity would be subject to the 'significant change' process, if the works create space for more than 30 pupils.<sup>28</sup>

**65.** You should also work with local planning authorities to ensure that planning policies and planning obligations require a suitable school site to be made available at the appropriate time. If early school delivery is required, the school site must be identified and agreed at an early stage, giving consideration to its accessibility and condition at the point of transfer.

**66.** If a new school opens in a single phase below its full capacity while it awaits pupils moving to the development, this does not represent an available surplus for other developments assessing their own impact and mitigation unless circumstances have changed for the original development, such as a redesign of later phases which will give rise to fewer pupils than previously planned. Complementary uses that share the school

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<sup>28</sup> <https://www.gov.uk/government/publications/making-significant-changes-to-an-existing-academy>

site can be considered for a temporary period while a new school fills. In practice, you may prefer to deliver the school in phases using modular construction methods, linking capacity more closely to emerging need, though the initial phase must still provide a viable sized school.

**67.** 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 can stabilise over time until the development resembles the mature housing stock. We advise you to respond to forecast peaks in demand, such as planning for modular or temporary classrooms where appropriate, working with schools to consider admitting above the Published Admission Number (PAN) for a limited period, and securing a large enough site to meet the maximum need generated by the development. Our guidance on estimating pupil yield from housing development provides further advice on planning for peaks in pupil numbers.<sup>29</sup> Where new settlements are planned, we recommend that demographic modelling is conducted to understand education requirements in more detail, taking account of similar developments and different scenarios such as an accelerated build rate.

**68.** Also consider if there are sustainability, efficiency, and educational benefits in relocating an existing school, for example where a development is large enough to require a new secondary school, but it would be too close to an existing secondary school, both of which would be relatively small. Such reorganisation of the school estate, relocating and expanding an existing school on a development site, may be necessary to make the development acceptable in planning terms, if the alternative distribution, size, or condition of schools would be unsustainable. In some cases, multiple developments are creating this need for a new/relocated school, and you should work with local planning authorities and developers to identify the most suitable site (provided at no cost) and equitable contributions from the other development sites towards the cost of construction. Proposed changes to an existing school are subject to following the relevant process, depending on the category of the school.<sup>30</sup> We advise that you work collaboratively with local planning authorities to ensure your objectives for the school estate are reflected in planning policies and decisions.

**69.** There is often a degree of uncertainty around the delivery of urban extensions and new settlements, in view of the long timescales involved, multiple developers and changeable market conditions. The build rate of development may be slower than anticipated, while land provided for a school may need to be returned to a developer if it is not used within an agreed period. Therefore, consider the clauses within planning obligations if they impose any time restriction on the use of transferred education land,

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<sup>29</sup> <https://www.gov.uk/government/publications/delivering-schools-to-support-housing-growth>

<sup>30</sup> <https://www.gov.uk/government/collections/school-organisation>

and the potential for the overall phasing of developer contributions to cause delays. Where land must be returned to a developer, this should be on the same terms as it was given; land provided by free transfer should be returned as such.

**70.** We recommend that you work with local planning authorities to agree Section 106 templates recognising The National Design Guide<sup>31</sup> and associated National Model Design Code to achieve well-designed places, and the department's Design Standards,<sup>32</sup> to develop standard education clauses, schedules and annexes regarding site specifications and any other relevant matters, to form the basis for early negotiations with developers and other interested parties.

**71.** To support the delivery of strategic development at pace, you may decide to forward-fund school provision within an urban extension or new settlement, using Basic Need funding or local authority borrowing if necessary and recouping these costs later through developer contributions secured by a planning obligation. While we recognise there are some inherent risks to this, our position on the use of Basic Need funding and other forward-funding options is set out in paragraphs 13-16. There should be an audit trail to demonstrate that developer contributions were planned as the funding source from the outset, such as references in Infrastructure Delivery Plans or other evidence documents, and pre-application correspondence. The fact that a local authority has delivered a school in advance of receiving agreed developer contributions is not a justification for renegotiating a Section 106 agreement or withholding CIL.

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<sup>31</sup> <https://www.gov.uk/government/publications/national-design-guide>

<sup>32</sup> <https://www.gov.uk/government/collections/school-design-and-construction>

## Assessing capacity in existing mainstream schools

**72.** Children moving into non-strategic/cumulative developments will usually attend existing schools rather than new provision if those schools have sufficient capacity or can be expanded. When it is not feasible for local schools to accommodate pupils from new housing development either through surplus places or expansion, developer contributions may be required towards a new school, including site acquisition where necessary.<sup>33</sup>

**73.** The department publishes the recorded built capacity (the number of pupils the school can accommodate) for all schools in England.<sup>34</sup> In practice, the number of places available in a school is determined by the PAN for that academic year, based on standard class sizes and multiplied across all year groups. For instance, a primary school might admit 60 Reception pupils per year (two classes of 30 pupils), aggregated to 420 pupils across all seven year groups. When there is strong local demand for places, schools may increase their PAN or admit pupils above PAN if they have the space to do so, subject to the procedures set out in the Admissions Code.<sup>35</sup> When considering capacity for the purposes of securing developer contributions, we recommend you use aggregated PAN as the capacity figure unless built capacity is far in excess of PAN, as this capacity should be utilised before developer contributions are required for new school places. We recognise that the admission authority for an academy is the academy trust and you do not control their PAN, but you should seek to negotiate and agree changes with academy trusts where appropriate as part of your coordination of admissions across your area.

**74.** When predicting the impact of a proposed development on education provision, local authorities assess whether there will be enough capacity in existing schools to accommodate the number of pupils anticipated at the time the development is expected to be built. These assessments take account of birth rates, existing children in education, predicted population change and established patterns of pupil movement and parental preference. Available capacity now does not necessarily mean there will be capacity when the development is building out and being occupied, if children already living in the area are forecast to need the school places or other developments have already been approved but not yet implemented and will make use of that spare capacity. Existing temporary school capacity should not be included unless there is a funded plan to make it permanent.

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<sup>33</sup> Factors affecting the feasibility of school expansion include (but are not limited to) academy willingness to expand, school performance issues, highways/offsite issues, physical limitations of a site/building, heritage, and environmental constraints (e.g., listed buildings and flood plains), and the viability of expansion compared to a new school.

<sup>34</sup> <https://explore-education-statistics.service.gov.uk/find-statistics/school-capacity>

<sup>35</sup> <https://www.gov.uk/government/publications/school-admissions-code--2>

**75.** It is important that both academy trusts and maintained schools collaborate with local authorities to enable school expansions where and when they are needed, taking into account unused capacity. When a school is unable/unwilling to expand or there is a risk that an agreement to do so will be withdrawn, alternative options for meeting the need from a development should be considered, including requiring delivery of a new free school when justified by the level of housing growth.<sup>36</sup> Developer contributions from multiple developments may be pooled for this purpose. Planning obligations can include flexible options for meeting education needs, provided they would be directly related to the development, necessary to make the development acceptable in planning terms, and fairly and reasonably related in scale and kind to the development.<sup>37</sup>

## Deferring school capacity assessments

**76.** Forecasting schools' capacity to accommodate children from housing development is sometimes complicated by the fact that a development will not start generating pupils for many years. Due to this inherent uncertainty in predicting future school capacity at planning application stage, you may wish to adopt policies in local pupil place planning strategies and education contribution methodologies that allow for the final assessment of available school capacity to be conducted once development has been commenced or an appropriate number of properties occupied. Where local planning authorities are supportive of this approach, Section 106 agreements can make provision for a maximum developer contribution based on no local school capacity being available. The agreement can require that the local authority reviews this when the development commences, adjusting the contribution according to current school capacity and up-to-date forecasts at that time.

**77.** The Section 106 agreement can ensure that any education contributions that are not required will be redistributed to other identified infrastructure projects if contributions to these projects had previously been reduced on viability grounds. This allows greater certainty that the level of contribution is commensurate with the impact of the relevant development when it comes forward and can also take account of actual housing types and sizes relative to pupil yield and capacity. This prevents a developer contribution from being underestimated, while ensuring that the contribution payable fairly reflects the need for mitigation when the development is built.

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<sup>36</sup> This includes providing underwriting to support the school as it grows. Free schools delivered through the central free schools programme receive pre and post opening revenue funding from DfE.

<https://www.gov.uk/government/publications/mainstream-free-school-revenue-funding>

<sup>37</sup> These are the legal tests set out in Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). <https://www.legislation.gov.uk/ukdsi/2010/9780111492390/contents>

**78.** Using this approach, the maximum developer contribution for education infrastructure cannot be increased, other than through index-linking for inflation; it can only remain the same or be reduced, depending on the latest evidence of a development's impact on local education infrastructure. However, deferring final assessments of education infrastructure needs may have resource implications, as well as needing the support of planning colleagues, so the use of this approach will depend on local circumstances. Section 106 planning obligations must be mutually agreed between the developer and the planning authority, so it is for the parties to the agreement to determine the precise terms of it, taking into account wider issues such as viability and the CIL Regulation 122 tests in each case.<sup>38</sup>

**79.** The same principle can be applied to securing funding from CIL reserves, with the maximum cost of additional school provision factored into evidence documents such as Infrastructure Delivery Plans and reduced where possible at the point funding is sought from a CIL collecting authority.

**80.** This approach to deferring assessment of school capacity will require the support of local planning authorities, so you should engage positively with them when drafting new policies and standard review clauses for Section 106 agreements, ensuring that these form part of the local plan's evidence base and can influence plan preparation and decision-making. We recognise that local planning authorities can reduce education contributions due to development viability and their own prioritisation of infrastructure types, sometimes agreeing with the developer a lower total amount for education in a planning obligation. However, if you start with the maximum mitigation that could be required and commit to review this later, an insufficient total amount secured by the local planning authority may stretch further if local schools have some capacity when the development commences. This might allow the developer contribution to fund all or most of the capital cost of providing the new school places where previously that had not been considered possible. Again, it remains a matter for the LPA and developer to agree terms of the Section 106 agreement taking into account wider issues such as viability and other infrastructure needs, and the CIL regulation 122 tests in each case.

## Protected surplus

**81.** Local authorities are expected to retain a margin of unfilled places to be able to operate their admissions systems effectively. For example, to offer places to children whose families move mid-year and to provide for parental choice. Local authorities should balance this against the need to manage the local school estate efficiently and reducing or re-purposing high levels of spare capacity, in order to avoid undermining the

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<sup>38</sup> The Community Infrastructure Levy Regulations 2010 (as amended):  
<https://www.legislation.gov.uk/ukdsi/2010/9780111492390/contents>

educational offer or financial viability of schools in their area. The precise amount of surplus capacity that is appropriate will vary around the country depending on local patterns of net migration and churn in the pupil population.

**82.** The department's Basic Need funding calculation includes a 2% operating margin at planning area level to help support parental choice, churn in the pupil population, and the general manageability of the system. Local authorities may apply different operating margins at different levels, such as planning area or local authority level, to reflect their local circumstances. Such an operating margin is there to provide the kind of operational flexibility described above, rather than meet the need for additional school places arising from proposed developments. It is important that the evidence and reasoning behind capacity assessments and protected surpluses are properly explained to planning colleagues if they are to have confidence in education funding requests and be prepared to defend these at appeal if necessary.

## **Cross-border capacity assessment**

**83.** Occasionally pupil planning areas draw pupils from more than one local authority, so the schools most likely to receive pupils as a result of a development may be in a different local authority area from the one determining the planning application. When this happens, close collaboration will be required between the relevant local authorities and developer to determine what developer contributions (if any) are appropriate.

**84.** The local authority determining the planning application can secure developer contributions towards education provision for children living in its area, and this funding can be used to commission the provision of new school places in the adjoining local authority area. Local authorities are free to invest in the provision of places lying outside the local authority's boundaries, if they believe that the capital investment will improve the quality and range of provision available to the children for whom it is responsible. Otherwise, an alternative school that is within the planning area and also within the same local authority as the development might be expanded, reducing cross-border migration. The most suitable solution will depend on local circumstances, and, in areas where pupils travel regularly across local authority borders, we encourage you to work with neighbouring authorities to consider solutions that may benefit pupils on both sides of the border.

## Schools to include in capacity assessments

**85.** In many cases, assessment of mainstream school capacity available to a proposed development can be conducted at pupil planning area level,<sup>39</sup> taking into account the forecast capacity at all schools the pupils living in the development might reasonably attend, and the options for school expansion. This provides a clear functional and geographical link between the need generated by the development and the additional school capacity being created.

**86.** The amount of capacity in existing schools that should be considered 'available' can be contentious if there is a trend of out-of-catchment admissions at the schools nearest to the proposed development. A catchment area is distinct from a pupil planning area, typically only containing a single school for that education phase (primary or secondary), though not all admissions authorities operate catchment areas at all. Assessing capacity across the entire pupil planning area may help to recognise and respond to these pupil migration patterns, so if necessary you can expand another school in the planning area rather than the school nearest to the development.

**87.** Sometimes the most suitable school to expand will be a school that typically admits pupils from a wider area, such as a faith, selective, or single-sex school, even though not all families moving into the development may be prioritised for admission. Increasing capacity at a popular school of this type can free up capacity at other schools within the planning area, which will then be available to pupils from the development, although we recommend this is assessed case-by-case and such a school only expands when sufficient admissions currently come from within the pupil planning area to make that trade-off a reality.

**88.** When children living in a proposed development might reasonably attend schools in more than one planning area, it may be appropriate to consider the proportion of pupils who are likely to attend schools in each planning area, based on an analysis of current pupil migration. When pupil planning areas are of a size or configuration that prevents their schools from being reasonable alternatives for residents of a development to access, you can consider capacity only within the development's school catchment area or an alternative area, such as a locally appropriate radius of the development. We recognise that some schools and settlements will be too distant from each other to represent reasonable alternatives for home-to-school travel.

**89.** The guiding principle is that the assessment of local school capacity includes all schools that residents of the development might reasonably attend, based on known patterns of pupil migration in that area. This may be the whole planning area or a smaller

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<sup>39</sup> Pupil planning areas are defined in school capacity guidance: <https://www.gov.uk/guidance/school-capacity-survey-guide-for-local-authorities>



area, depending on local characteristics. Paragraphs 43-46 provide advice on assessing the impact of development proposals when the schools that will serve the development are beyond reasonable safe walking distance.

**90.** Whatever geographies for capacity assessment are suited to your area, developer contributions remain necessary as mitigation for expected impact on local education provision. Accounting for patterns of pupil migration in your capacity assessment should help you demonstrate that developer contributions towards any school expansion within that area would meet the legal tests for Section 106 planning obligations<sup>40</sup> or that funding from CIL is justified. Over time, admissions should balance out across the planning area, minimising unsustainable travel patterns while enabling children living in the housing development a sufficient choice of school places, as advised by the National Planning Policy Framework.<sup>41</sup>

**91.** While allowing freedom of parental preference is essential, you may also consider the health and environmental sustainability benefits of encouraging preference for schools within walking distance of development, working with academy trusts and other partners to develop local marketing strategies, improved active travel routes and other incentives to choose the nearest school. Engage with local planning authorities on policy requirements for travel plans that encourage sustainable modes of transport, including developer contributions towards their implementation where appropriate (also see paragraph 49 on offsite works).

**92.** When large-scale housing development or other demographic factors are changing the local pupil planning landscape, you may wish to review the planning area structure to ensure they are still in line with the guidance for SCAP.<sup>42</sup>

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<sup>40</sup> These are the legal tests in Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended), set out in paragraph 3 of this guidance.

<sup>41</sup> National Planning Policy Framework, paragraph 95:  
<https://www.gov.uk/government/publications/national-planning-policy-framework--2>

<sup>42</sup> Further guidance on reviewing planning areas: <https://www.gov.uk/guidance/school-capacity-survey-guide-for-local-authorities>

# Annex

## Developer delivery of new schools

1. Direct delivery of new schools by housing developers may represent good value for money if it is possible to meet all legal requirements and it is not the local authority's prime motivation to avoid application of the Public Contracts Regulations 2015 (PCR). Sometimes the developer may be best placed to deliver the school and the department supports developer delivery of schools *in principle*. This model of delivery should not contravene subsidy control or public procurement rules. While we advise you to seek your own project-specific legal advice, when necessary, this annex sets out the department's view on the legal position at the time of publication. Local authorities should keep abreast of emerging case law that may have a bearing on this advice, and any legislative changes following the UK's exit from the European Union.<sup>43</sup>

2. High quality design and performance for developer-built schools are achievable through the planning and building control process, and compliance with national standards such as the DfE building bulletins, output specification and other design standards and guidance.<sup>44</sup>

3. When developer delivery is proposed and is considered lawful, we recommend a partnership approach between the local authority, academy trust (where relevant) and developer to negotiate a brief and design specification may help to avoid disputes, although partnership working should be carefully considered in light of the advice below regarding compliance with procurement law.

4. We recommend that planning obligations or other mechanisms provide detail on how local authorities intend to step in and deliver the school if developer delivery falls through but the school is still required. Longstop clauses should ensure that the land for the school is transferred early enough for the local authority to intervene and provide the school at the right time. In these situations, the planning obligation should also require financial contributions to be made in lieu of the 'in kind' provision of the school by the developer, making use of review mechanisms where necessary to respond to changing circumstances. Even in cases where a planning obligation is silent on this subject, Section 106(6) of The Town and Country Planning Act 1990 provides that the local authority may enter land to carry out works required by a Section 106 agreement where

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<sup>43</sup> At the time of publication, current rules are expected to be preserved in domestic law. See [The State Aid \(EU Exit\) Regulations 2019](#) (draft) and [EU Exit guidance on public-sector procurement](#).

<sup>44</sup> [School design and construction guidance](#).

the developer is in default. However, where a risk of non-delivery is identified, we recommend that specific planning obligations are secured to mitigate that risk (for example through performance bonds).

## Subsidy Control

5. If a local authority decides that it will have to make a financial contribution to a developer to support the delivery of a new school, the local authority must first conduct an analysis of the financial contribution to ensure compliance with the subsidy control regime. The guidance below sets out the key components of the subsidy control regime. However, we strongly recommend that local authorities seek their own independent legal advice on a case-by-case basis when considering making any financial contribution to a developer, or indeed any third party.

6. The first stage in assessing compliance with the subsidy control regime is considering whether the assistance actually constitutes a subsidy. To be considered a subsidy, financial assistance must meet each of the following criteria:

- a financial contribution – this is defined broadly to include any kind of support or market transaction that is considered to have a financial value for the recipient, which includes, although is not limited to, grants, tax exemptions, and relaxed planning consents.
- provided by a public authority (including within its scope any entity that exercises functions of a public nature).
- which confers an economic advantage that would not be available on commercial terms.
- which is specific either to a particular enterprise or enterprises in a particular sector.
- has a harmful or distortive effect on trade within the UK or internationally.

7. In some cases, analysis of the assistance will show that the assistance does not meet all the criteria for a subsidy, and therefore no further steps are required to demonstrate compliance with the subsidy control regime. It is important, however, that local authorities keep a record of their decision making in relation to assessing the contribution in line with the subsidy control criteria, including any independent legal advice they have received.

8. Where it has been determined that the financial assistance meets all the criteria to constitute a subsidy, further assessment is required to ensure that the subsidy aligns with each of the subsidy control principles:

- Subsidies should pursue a specific policy objective to remedy an identified market failure or address an equity rationale.

- The subsidy must be proportionate to the policy objective and limited to what is necessary.
- Subsidies should be designed to bring about a change of economic behaviour of the beneficiary which should be conducive to achieving the specified policy objective and would not happen in the absence of the subsidy.
- Subsidies should not normally compensate for costs the beneficiary would have funded in the absence of any subsidy.
- Subsidies should be an appropriate policy instrument for achieving their specific policy objective and the objective must not be capable of being achieved through other, less distortive, means.
- Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition and investment within the United Kingdom.
- The beneficial effects of the subsidy should outweigh any negative effects, including in particular negative effects on competition and investment within the United Kingdom, and international trade and investment.

9. Once compliance with the subsidy control principles has been determined, the subsidy must be registered on the subsidy database. The subsidy database provides an element of transparency to the subsidy control regime, providing a platform upon which subsidies can be displayed and therefore notified to the public. The public authority granting the subsidy has a statutory duty to upload details of the subsidy on the database. Every subsidy, save those which benefit from an exemption under Part 3 of the Subsidy Control Act 2022 must be registered on the database. The subsidy must be registered within three months of the public authority's confirmation of its decision to make the scheme. This information is then maintained on the subsidy database for a period of 6 years, or for the duration of the subsidy, whichever is longest, and must be maintained by the public authority throughout this period.

10. A failure to meet any of the subsidy control principles could result in a tribunal finding that the subsidy is unlawful. It is entirely at the discretion of the Competition Appeal Tribunal (CAT) whether a remedy is ordered where the tribunal concludes that a subsidy is not compliant with the subsidy control rules. Where the tribunal chooses to order a remedy, it may choose to order any of the following:

- **Mandatory Order:** An order to require the relevant public authority to perform its legal duties.
- **Prohibiting Order:** An order prohibiting a public authority from carrying out an unlawful act, including prohibiting a public authority from giving a subsidy.
- **Quashing Order:** An order setting aside an unlawful decision, including those decisions made by a public authority in relation to granting a subsidy.
- **Declaration:** the CAT may make a declaration to clarify a point of law.
- **Injunction:** an order requiring the public authority to either do or not do something, which can be used on an interim basis whilst investigations are underway.

- Recovery: An order requiring the public authority to take the subsidy back from the beneficiary.

11. The subsidy control regime is a complicated and developing area, hence why it is so important that local authorities seek their own independent legal advice before granting financial assistance.<sup>45</sup>

## Public contracts and FTS procurement

12. Under the Public Contracts Regulations 2015 (PCR), a ‘public contract’ means “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services”<sup>46</sup>.

13. To be considered a public contract, there must be ‘pecuniary interest’ in the contract. The concept of pecuniary interest has been found to be wider than the concept of ‘consideration’ in the law of England and Wales for the purposes of determining whether a contract amounts to a public contract<sup>47</sup>. For example, situations where a local authority is funding the building of a school through a loan, where a local authority is making very minor contributions to the development of the school or even where there is no financial contribution at all from the local authority but the opportunity to carry out the development has the effect of waiving a prior debt for the developer<sup>48</sup>, are likely to be considered to amount to pecuniary interest.

14. ‘Public works contracts’ means “public contracts which have as their object any of the following:

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2.
- (b) the execution, or both the design and execution, of a work.
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.”<sup>49</sup>

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<sup>45</sup> For further information please refer to: [www.gov.uk/government/publications/uk-subsidy-control-statutory-guidance](http://www.gov.uk/government/publications/uk-subsidy-control-statutory-guidance)

<sup>46</sup> Regulation 2(1) PCR 2015

<sup>47</sup> *R(Chandler) v SoS Children, Schools and Families* [2009] EWCA Civ 1011; *Ordine degli Architetti delle province di Milano v Comune di Milano* Case C-399/98 (La Scala).

<sup>48</sup> See *Ordine degli Architetti delle province di Milano v Comune di Milano* Case C-399/98 (La Scala)

<sup>49</sup> Regulation 2(1) PCR 2015

15. A public works contract must therefore, as well as being a public contract, also have the following characteristics:

(a) It must have as its main object, the execution of or design and execution of either:

- i. construction activities as defined in Schedule 2 to the PCR; or
- ii. a “work” as defined in Regulation 2 of the PCR, such as the outcome of a building or civil engineering works taken as a whole;

whether or not the works or work is ‘for’ the contracting authority<sup>50</sup>; and/or

(b) the contracting authority must specify the design of the relevant works; and

(c) it must include either direct obligations upon the other party to deliver the works, or an indirect obligation to deliver – i.e., to ‘procure’ the works.<sup>51</sup>

16. Although some UK case law has made a distinction between planning obligations and other contracts, recognising that the public body is motivated to exercise its planning powers in order to regulate the development of land, rather than procuring an economic benefit,<sup>52</sup> it is still possible for a Section 106 agreement to be considered to be a public works contract and fall within the scope of application of the PCR.

17. Where a Section 106 agreement places an obligation on a developer to provide a financial contribution or land/buildings for a new school because this is necessary to make the development acceptable in planning terms (a prerequisite for a planning obligation), that Section 106 agreement may not constitute a public contract. However, this is not a ‘hard and fast’ rule. The main object and motivation of the local planning authority must be to ensure that planning policies are enacted; even after the *Helmut Muller* case it was clear there could be circumstances under which a Section 106 agreement could be found to be a public works contract if the circumstances and facts indicated to the Court that it was being used to avoid a tender process.

18. In this scenario, a Court would look to see whether in fact the characteristics of a public works contract exist. For example, the Court would consider the extent to which the local authority had specified the design of the school, whether there was some form of consideration/pecuniary interest to the developer (see above), whether the developer was insisting on undertaking the works, or whether there was any other justification under

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<sup>50</sup> *Gestion Hotelera Internacional SA v Comunidad Automa di Canarias* [1994] ECR I – 1329; *Commission v Italy* (2008) Case C-412/04

<sup>51</sup> *Helmut Muller GmbH v Bundesanstalt fur Immobilienaufgaben* (C-451/08); *Jean Auroux v Roanne* (Case C-220/05)

<sup>52</sup> *Faraday Development Ltd. and West Berkshire Council and St Modwen Developments Ltd.* [2018] EWCA Civ 2532 and *Helmut Muller GmbH v Bundesanstalt fur Immobilienaufgaben* (C-451/08)

Regulation 32. The Court would require the disclosure of emails, minutes, and other evidence to understand whether the Section 106 agreement was deliberately being used to avoid the need for a PCR tender process.

19. There is limited guidance from case law regarding the extent to which a contracting authority can become involved in the design of works before it is deemed to be ‘specifying’ such works.<sup>53</sup> A contract would be likely to be deemed a public works contract if the contracting authority took measures to define the type of work to be undertaken by the developer or at the very least had a ‘decisive influence’ on its design. ‘Requirements specified by the contracting authority’ has been taken to exclude 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.

20. Further, for the purposes of procurement law, it is the entrustment by the contracting authority of the obligation to undertake the works that is relevant, not the reasons for doing so, or the beneficiary of the works. Where works are carried out corresponding to specific requirements, there could be a public works contract whether or not the ultimate beneficiary of all or part of the works is the local authority itself.<sup>54</sup> This means that if a school site is to be transferred to school site trustees or leased to an academy trust post-construction, this does not affect consideration of whether a public works contract exists.

21. Where a local authority does need to specify the design of the works to meet its own statutory obligations regarding the provision of education facilities to a certain specification, it may not be able to use a Section 106 agreement to commission the works in compliance with the PCR, for the reasons set out above, if there is any form of pecuniary interest whatsoever. However, it may be possible for the local authority to rely instead on the provisions of PCR Regulation 32 to justify its decision to commission a certain developer with pre-existing rights over the land, to carry out the works. Regulation 32(2) provides that a public contract may be awarded without prior publication in certain prescribed circumstances, including (relevant to this Annex):

“(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: —

...

(ii) competition is absent for technical reasons,

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<sup>53</sup> *Helmutt Muller GmbH v Bundesanstalt für Immobilienaufgaben* (C-451/08)

<sup>54</sup> *Jean Auroux v Roanne* (C-220/05).

(iii) the protection of exclusive rights, including intellectual property rights,

but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.”

22. A local authority’s justification for not advertising a development opportunity which would otherwise be required to be advertised under the PCR, could (depending on the facts) be based on the argument that only a certain developer can build as a result of their exclusive rights over the land (Regulation 32(2)(b)(iii)), or as a result of the absence of competition because the development must be able to fit in with the broader development scheme of that developer already in place on that land (Regulation 32(2)(b)(ii)).

23. However, local authorities should be aware that any attempts to deliberately design a procurement to avoid the application of the PCR, risks a breach of PCR Regulation 18 which is also reflected in the last condition of Regulation 32(2)(b) set out above. For Regulation 32(2)(b) to apply, the absence of competition must not be “the result of an artificial narrowing down of the parameters of the procurement”; similarly, the design of *any* procurement must not be “made with the intention of excluding it from the scope of [the PCR]” (Regulation 18(2) PCR). As noted above, if a legal challenge were brought against a local authority for failing to advertise under the PCR, disclosure of emails, meeting minutes and other evidence would be used by the Court to determine whether as a matter of fact, it was the local authority’s intent in entering into the development agreement, to avoid the application of the PCR altogether.

24. The practical application of the above guidance for local authorities, is summarised as follows: a Section 106 agreement is less likely to be considered to be a ‘public works contract’ where:

- (a) It does not contain any direct obligations on another party to deliver works – for example, it only seeks a financial contribution from a developer rather than requiring them to actually carry out the works; **or**
- (b) There is genuinely no pecuniary interest in the arrangement whatsoever and the developer will take full cost and risk for the build of the school without loan or contribution, no matter how small; **or**
- (c) It can be shown that:



- i. the essential object<sup>55</sup> of the Section 106 agreement is to ensure, through the grant of planning permission, that the local authority meets its statutory obligations as to the provision of education facilities (rather than the execution of the works to build the school); **and**
  - ii. The Section 106 agreement contains a generic design brief applicable to all schools that is unlikely to be considered to be a 'decisive influence' on the design of the works; however, specifying the more detailed DfE Output Specification is certainly likely to be considered a 'decisive influence'; **or**
- (d) The Section 106 agreement contains an option for the developer to choose to carry out the works or pay a contribution if it can demonstrate that it has exclusive rights over the site in question and or any other technical reasons why no other contractor would be appropriate pursuant to Regulation 32.

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<sup>55</sup> *Faraday Development Ltd. and West Berkshire Council and St Modwen Developments Ltd. [2018] EWCA Civ 2532 at paragraph 53*



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