

# Education, Children and Young People Committee

5th Meeting, 2022 (Session 6), Wednesday 9  
February

## Consideration of subordinate legislation

1. This note provides information about the [Nutritional Requirements for Food and Drink in Schools \(Scotland\) Amendment Regulations 2021](#).
2. These regulations may also be referred to by their Scottish Statutory Instrument number which is SSI 2021/481.
3. These regulations are being considered under the negative procedure.

### Timeline for considering these regulations

4. These regulations were laid before the Scottish Parliament on **20 December 2021**.
5. They were considered by the Delegated Powers and Law Reform Committee (DPLRC) at its meeting on [18 January 2022](#). The Committee had no comments and the minutes from the meeting are [available here](#).
6. The Regulations were first considered by the Education, Children and Young People Committee at its meeting on [26 January 2022](#).
7. At that meeting the Committee asked for further information from the Cabinet Secretary for Education and Skills.
8. The letter from the Committee and the response from the Cabinet Secretary are both attached in [Annexe C](#). Further consideration of the regulations will take place on **9 February 2022**.
9. If the Committee wishes to produce a report on these regulations, it must do so by **14 February 2022**.

### Is there a requirement to hear evidence from the Cabinet Secretary on these regulations?

10. No.

### Purpose of the regulations

11. Purpose of the instrument: The aim is to set out the circumstances, relating to supply chain disruption in the provision of food and drink, in which an

education authority or grant aided school can provide food and drink which does not comply with the Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020.

12. A copy of the Scottish Government's Policy Note is included in [Annexe A](#).

13. A letter from the Learning Directorate of the Scottish Government regarding the regulations is provided in [Annexe B](#).

### **Consultation**

14. The policy note states that the Scottish Government has consulted with ASSIST (local authority catering representatives), Convention of Scottish Local Authorities (CoSLA) and Association of Directors of Education in Scotland (ADES).

### **Impact Assessment**

15. The policy note states all relevant impact assessments were considered and deemed unnecessary for this SSI.

### **Financial Impact**

16. The policy note states that a Business and Regulatory Impact Assessment (BRIA) is deemed not to be necessary for this SSI as it does not significantly impact on the legislative duties in the 2020 Regulations due to the very limited circumstances in which the provision would apply.

### **Procedure**

17. These regulations are being considered by Education, Children and Young People Committee under the negative procedure.

18. This means that the regulations become law immediately, i.e. as soon as they have been laid before the Scottish Parliament. These regulations can, however, be annulled up to 40 days after this has happened.

19. Rule 10.4 of the Scottish Parliament's standing orders states that any Member of the Scottish Parliament can lodge a Parliamentary motion within the 40-day time period seeking an annulment of regulations.

20. All regulations considered under the negative procedure are scrutinised by both the Delegated Powers and Law Reform Committee (on various technical grounds) and by a lead committee (on policy grounds).

21. If a motion to annul is lodged, the lead committee will consider this and then hold a vote. If the motion is disagreed to (i.e. MSPs believe the regulations are OK as they are), then the regulations will remain in their current form.

22. If, however, the majority of MSPs on the lead committee agrees the regulations should be annulled, then a further motion is lodged by the Parliamentary Bureau. This is then voted on by the whole Parliament.
23. If that is also agreed to (i.e. the majority of MSPs agree with it), then Scottish Ministers must revoke (withdraw) the instrument. It will no longer be law and the Scottish Government must lay a new set of regulations before the Scottish Parliament.
24. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence.
25. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.
26. The Committee is invited to consider the instrument.

**Jane Davidson**  
**Committee Assistant**  
**Education, Children and Young People Committee**  
**3<sup>rd</sup> February 2022**

## Annexe A

### POLICY NOTE

# The Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021

## SSI 2021/481

The above instrument was made in exercise of the powers conferred by sections 56A, 56B and 56D of the Education (Scotland) Act 1980(a) and all other powers enabling them to do so. The instrument is subject to negative procedure.

**Purpose of the instrument. The aim is to set out the circumstances, relating to supply chain disruption in the provision of food and drink, in which an education authority or grant aided school can provide food and drink which does not comply with the Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020.**

### Policy Objectives

This instrument amends the Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020 (“2020 Regulations”) which have been in force since April 2021 and which place duties on education authorities and the managers of grant aided schools in Scotland.

The 2020 Regulations set out requirements in relation to certain types or items of food and drink that can, cannot or must be provided in schools. The requirements in the 2020 Regulations are based on scientific evidence and dietary advice and designed to ensure that children and young people are provided with an appropriate amount of energy and nutrients as part of their school day to support healthy growth and development.

The SSI amends the 2020 Regulations to set out the limited circumstances in which an education authority or grant aided school can provide food and drink which does not comply with the 2020 Regulations. Those circumstances are where they cannot procure a product that complies with a requirement in the 2020 Regulations as a direct result of local or national disruptions to the supply of food which are outwith their control, despite their best efforts.

The overarching aim of school food and drink policy continues to be the provision of balanced and nutritious food, drink and meals to children and young people to support their healthy growth and development.

Where education authorities or managers of grant aided schools cannot, despite best endeavours, procure food and drink which complies with a standard set out in the 2020 Regulations, the amendment made by this SSI can be relied on. However, food or drink which is not compliant with the 2020 Regulations should only be provided where all other action has failed and the expectation, as set out in the statutory guidance that accompanies this SSI, is that such provision should be for as short a time as necessary with the aim of returning to full compliance as quickly as possible.

The statutory guidance which accompanies the SSI is designed to provide clarity of expectation for education authorities and grant aided schools in these circumstances. It sets out the steps they are expected to take and the considerations that should be thought about as they take action to address the effects on their ability to provide food, drink and meals under the circumstances set out in the SSI.

The 2020 Regulations are designed to keep salt, sugar, fat and saturated fats in food and drink that is provided to pupils to an appropriate level. As such, the overarching expectation when dealing with unavailability of usual items or equivalent alternatives is to find a substitute which is as close as possible to the standards set out in the 2020 Regulations.

When using a substitute product that does not comply with the requirements of the 2020 Regulations, it is expected that consideration will be given to whether menu redesign could compensate for the loss of a particular nutrient, for example by using beans to add more fibre to a meal which uses bread with a lower fibre content.

In the circumstances where no close alternatives are available, the expectation is that education authorities and managers of grant aided schools will choose the best possible provision to maintain as balanced and nutritious overall provision as possible.

This amendment will apply to food and drink provided under schedule 1, which applies to primary schools and schedule 2, which applies to secondary schools.

It will also apply to schedule 3, which sets the nutrient standards for meals provided in primary and secondary schools and in school hostels.

This amendment is intended to be a temporary response to specific circumstances and Ministers intend to revoke it as soon as circumstances allow.

### Consultation

Consultation with ASSIST (local authority catering representatives), Convention of Scottish Local Authorities (CoSLA) and Association of Directors of Education in Scotland (ADES) has taken place.

### Impact Assessments

All relevant impact assessments were considered and deemed unnecessary for this SSI as it does not significantly impact on the legislative duties in the 2020 Regs due

to the very limited circumstances in which the provision would apply. All relevant impact assessments were undertaken when the 2020 Regs were being developed and this SSI is designed to preserve the intention of those Regulations.

### Financial Effects

A Business and Regulatory Impact Assessment (BRIA) is deemed not to be necessary for this SSI as it does not significantly impact on the legislative duties in the 2020 Regs due to the very limited circumstances in which the provision would apply. A BRIA was carried out when the 2020 Regs were being developed and this SSI is designed to preserve the intention of those Regulations.

Scottish Government  
Learning Directorate

20 December 2021

Annexe B

Learning Directorate

Improvement, Attainment and Wellbeing Division

The Presiding Officer

c/o The Chamber Desk

Room G10

Scottish Parliament

Edinburgh

EH99 1SP

20 December 2021

Dear Presiding Officer

**THE NUTRITIONAL REQUIREMENTS FOR FOOD AND DRINK IN SCHOOLS  
(SCOTLAND) AMENDMENT REGULATIONS 2021**

The Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021, SSI 2021/481 was made by the Scottish Ministers under sections 56A, 56B and 56D of the Education (Scotland) Act 1980 on 20 December 2021. It is being laid before the Scottish Parliament today, 20 December 2021 and comes into force on 21 December 2021

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) of that Act, this letter explains why.

All education authorities and managers of grant-aided schools are required to comply with the Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020 ("the 2020 Regulations). On April 2021, the 2020 Regulations came into effect replacing the previous 2008 Regulations of the same name. The 2020 Regulations specify the food and drink standards and lunch nutrient standards for schools and are therefore very specific about what food and drink can and cannot be provided.

Education authorities have raised concerns at being unable to procure certain food and drinks as a result of current disruption to the school food supply chain and the effect this would have on their ability to meet their duties under the 2020 Regulations. For example, the 2020 Regulations prescribe a minimum fibre content for bread and in the event that only bread with a lower fibre content could be provided to pupils, that would result in a breach of the statutory requirements.

The SSI amends the 2020 Regulations to make provision for the circumstances where an education authority or the managers of a grant aided school, despite their best endeavours, are unable to provide food or drink that complies with a requirement in the 2020 Regulations because of local or national disruptions to the supply of food that are outwith their control. In such circumstances, food or drink that is not compliant with the 2020 Regulations may be provided.

Education authorities are already experiencing difficulties in procuring compliant products and as such the risk of them failing to comply with one or more of the requirements in the 2020 Regulations is significant. Ministers consider that it is necessary to take proactive steps to address and manage this risk and that, consequently, this SSI should be brought into force as soon as possible rather than waiting for the 28-day period to elapse.

Statutory guidance, published today, has been developed to assist education authorities and managers of grant aided schools with the implementation of the provision created by the Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021.

**Alison Taylor**  
**Deputy Director**



## Annexe C



The Scottish Parliament  
Pàrlamaid na h-Alba

### Education Children and Young People Committee

Shirley-Anne Somerville  
Cabinet Secretary for Education and Skills

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26 January 2022

Dear Shirley-Anne,

The Education, Children and Young People Committee considered the [Nutritional Requirements for Food and Drink in Schools \(Scotland\) Amendment Regulations 2021](#) at its [meeting this morning](#).

During the discussion, several Members raised questions about the regulations. The Committee therefore agreed to write to ask for further information before considering the regulations again. These questions include—

- Why are the changes set out in the regulations required at this time, as opposed to earlier in the pandemic?
- What reporting methods are in place to track when education authorities are ordering / using food and drink that would not meet the 2020 regulations, due to the circumstances set out in the 2021 regulations?
- How often have education authorities used the flexibility that the 2021 regulations provide since their introduction on 21 December 2021?
- In the information provided about the instrument, the Scottish Government states that the 2021 regulations are temporary and will be revoked as soon as

circumstances allow. How long does the Scottish Government anticipate that the 2021 regulations will be in force?

- In what circumstances will these regulations be revoked?
- The Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020 came into force in April 2020. Given the supply chain issues at that time, why did the 2020 regulations not provide for a situation whereby the required food stuffs could not be secured?

A video of the Committee's full discussion is available [online](#).

The Committee requests this information, in a Word format, by **Monday 31 January**. I appreciate that this is a short deadline, however, this information is required to ensure that the Committee can reflect on it ahead of its next consideration of the instrument.

The Committee also agreed to request an update on the progress of the '[Food for Life](#)' programme. This information is not as time sensitive. The Committee would therefore welcome this information by Wednesday 23 February.

Yours sincerely,

Stephen Kerr MSP  
Convener

Cabinet Secretary for Education and Skills

Shirley-Anne Somerville MSP

Stephen Kerr MSP

Convener

Education, Children and Young People's Committee

31 January 2022

Thank you for your letter dated 26 January 2022, on behalf of the Education, Children and Young People's Committee, regarding your considerations of the Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021 (hereafter referred to as "the 2021 Regulations") at your meeting on 26 January.

Your letter sought responses to questions raised by members of the Committee during your meeting and my responses to those questions are set out below.

Firstly, the Scottish Government introduced the 2021 Regulations in response to concerns raised by education authorities about difficulties they were experiencing with school food supply chains, which they felt may affect their ability to provide food and drink products that complied with the 2020 school food and drink Regulations. These challenges arose in part as a result of COVID-19 and the EU Exit affecting supply chains, as well as the very specific nature of the nutritional standards for food and drink to be served in schools for example only bread which meets the specified criteria can be served rather than any bread available on the market.

The Committee has asked about the timing of the introduction of the 2021 Regulations. Education authorities first raised concerns about experiencing issues with food supply chains around the beginning of the new academic year in 2021. My officials continued to engage with education authorities to monitor the impact of these concerns and the degree to which authorities were managing to accommodate these matters within their arrangements for the provision of school food. As we approached the Christmas period, in anticipation of increased demand for food generally; that authorities were experiencing increased challenges in exactly meeting requirements of the nutritional standards, the decision to introduce the Regulation was taken.

The Scottish Government decided to take action in recognition that education authorities were now experiencing increases in those challenges, and to proactively provide clarity to them about our expectations in the event they were unable to meet their statutory duties under the 2020 Regulations. The reason the 2021 Regulations had not been introduced earlier in the pandemic was due to those supply chain issues not arising during those periods when the schools were closed as a result of

the COVID-19 pandemic and also that the full impacts of EU Exit only began to be felt after the end of the transitional period which ended on 31 December 2020. The Committee will be aware that there have been some concerns generally, at specific points, in relation to food supply in recent months.

Prior to the introduction of the 2021 Regulations, my officials were aware that education authorities had been making substitutions in order to continue to ensure that food continues to meet the standards. Officials were made aware that in some cases education authorities were experiencing difficulty in sourcing products that meet the standards, for example bread which contains the required amount of AOAC (Association of Analytical Chemists) fibre. Subsequent discussion with education authorities revealed that they were experiencing difficulty with sourcing compliant products in other categories, such as tinned fruit, and that they expected this position to continue as we approached the winter.

With regards to the question about how often education authorities have used the flexibility that the 2021 regulations provide, schools closed for the winter break almost immediately after the 2021 Regulations came into effect and did not start to return until 5 January, as such the Scottish Government has not yet been made aware of occasions where education authorities have had to use the flexibilities provided for by the 2021 Regulations. My officials will continue to engage with authorities on this matter over the coming weeks and months, as we have done during the course of this academic year.

With regards to what reporting mechanisms the Scottish Government has in place to monitor when education authorities are using the flexibilities, Scottish Government officials are in regular dialogue with their counterparts in education authorities about both the impact of supply chain issues have on the provisions set out in the 2020 Regulations and the expansion of universal free school lunches. This will continue to provide an opportunity to gather information about the use of the 2021 Regulations. In addition, Education Scotland Health and Nutrition Inspectors monitor compliance with the 2020 Regulations and are in touch with education authorities on a regular basis in part to offer guidance and support.

In respect of the two questions relating to the circumstances under which the 2021 Regulations will be revoked, our statutory guidance states they will be in place for as short a time as necessary. They do not contain a phasing out provision, however they will be kept under constant review through regular discussions with education authorities and will be removed as soon as conditions allow. Namely when supply chains are once again able to provide products which meet the standards required by the 2020 Regulations and education authorities are no longer at risk of not meeting the 2020 Regulations due to circumstances beyond their control. Officials discussions with education authorities will inform this decision.

The Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020 were laid in May 2020 and came into force in April 2021. As you will recognise during the period of time between the Regulation passing through Parliament and coming into force, there were periods of school closures, during which free school meal alternatives were provided and other factors which may have meant that these concerns were not prominent at that time. At the point at which the Regulation was

developed and introduced, there had not been any concerns about food supply which had given rise to this type of provision being required. This applies both in relation to this Regulation, and the earlier, Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2008. The situation which this Regulation seeks to take into account is highly unusual and borne of specific circumstances, which would not usually apply.

However, the Committee will recognise that as a result of the Nutritional Standards being set out within Regulation rather than the face of an Act, it is possible to respond to these very particular circumstances when they have arisen. I would reiterate that it is not the intention that these Regulations remain in force permanently, they will be applied for the shortest period of time possible and will be revoked in due course. It is essential that there is clarity of expectation in relation to the provision of food within schools, for pupils, their families, and for school staff and those who create and provide food within schools.

Finally, I note that you have also requested an update on the progress of the 'Food for Life' programme by Wednesday 23 February. I have passed a copy of your letter dated 26 January to my colleague, Mairi Gougeon, Cabinet Secretary for Rural Affairs and Islands, who will provide you with a separate response on this matter.

**Shirley-Anne Sommerville**

Cabinet Secretary for Education and Skills