



# **The Right to Early Childhood Development**

**April 2023**

# CONTRIBUTORS

## Faculty:

### **Sandra Fredman**

Professor of the Laws of the British  
Commonwealth and the United States  
University of Oxford

## Research Co-ordinator:

### **Diya Deviah**

MPhil Candidate, University of Oxford

## Researchers:

### **Anupriya Dhonchak**

BCL Candidate, University of Oxford

### **Surbhi Karwa**

BCL Candidate, University of Oxford

### **Chelsea Wallis**

DPhil Candidate, University of Oxford

### **Valencia Scott**

MSc Criminology and Criminal Justice Candidate,  
University of Oxford

### **Elizabeth Jackson**

BCL Candidate, University of Oxford

In addition, the research co-ordinators would like to thank:

- **Professor Mindy Chen-Wishart**, Dean of the Oxford Law Faculty, for her support of this project.
- Members of the Oxford Pro Bono Publico Executive Committee, **Professor Andrew Higgins, Professor Kate O'Regan, Dr Miles Jackson, Professor Sandra Fredman, and Dr Shreya Atrey**, and the members of Student Committee, **Daniel Leyva, Diya Deviah, Emma Rowland, Israr Khan, Juana de Leon, Konstantinos Kyriakopoulos, Louise McCormack, Mihika Poddar, and Titiksha Mohanty**, for their support and assistance with the project.

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# EXECUTIVE SUMMARY

## (a) Introduction

1. The legal subcommittee of the Real Reform for ECD (RR4ECD) Campaign sought assistance in developing an advocacy brief on the Right to Early Childhood Development (ECD) that focuses on what the state's obligations should be and what the public entitlements are. RR4ECD is a broad-based alliance supported by over 200 organisations, working towards securing and strengthening the Right to ECD for millions of young children in South Africa. The Equality Collective, one of the founding members of RR4ECD and a member of its elected Steering Committee, asked OPBP to draw up a comparative report on early learning opportunities within the Right to ECD and the nature and extent of state obligations in ensuring access to them. The report will serve as a resource in developing their advocacy brief, which will form the foundation of their advocacy campaign around the right to ECD and inform any new legislation that may come out of the campaign.
2. The understanding of entitlements that substantively compose the right to early childhood development hinges primarily on the definition of early childhood, when that period begins and when it ends. The position is deliberately flexible and expansive in international law, to be able to accommodate various regional and local, cultural and institutional contexts. It thus utilises a 'working definition' of early childhood as below 8 years of age – beginning at birth, through infancy, during pre-school years and during the transition to primary school. There is a recognition, that in order for the needs of the child as a rights holder, to be met, that the dimensions of the right to early childhood be holistic – including not just early learning opportunities, but access to adequate nutrition and health services, space and time for play and an expansive environment for learning. This holistic conception is mirrored definitionally across the jurisdictions we studied, as well as in international law; though policy priorities, particularly in fiscally strapped jurisdictions, may differ in how they understand the interplay between these dimensions.
3. The scope of this current report, while focused on institutional, formal provisions and state obligations with respect to early learning opportunities within the right to ECD, has excavated insights keeping the holistic nature of the right to ECD in mind. The nature of state obligations towards fulfilling early learning opportunities, even within formal institutional frameworks is integrally intertwined with other dimensions of early childhood development. This summary provides some instances of the nature of this overlap in the sections to follow, but the specific jurisdictional reports demonstrate the same with greater nuance and detail.

4. Across the jurisdictions studied, we found that the year at which primary school began accounted for the differences in the year at which early childhood was defined to end. In Finland for instance this was 7 years of age and in countries like Brazil and the United Kingdom, 5 years of age. The integrated nature of the right to ECD with questions of care and nutrition was also a common thread across jurisdictions and played a role in how different jurisdictions defined the scope of entitlements within the right. Finland for instance envisions its right to ECD as a right to early childhood education and care (ECEC), integrating the concerns of care and education into a combined 'educare' model. This is demonstrated in the broad spectrum of policy interventions imagined in the Finnish context from 'cash for care' which is a subsidy paid directly to parents in lieu of deciding to withdraw temporarily from the workforce to care for their child, to formal day care centres. India, while it definitionally seems to construct an 'educare' model of its own, a multiplicity of contrasting and ineffective executive orders between the centre and the state have left the country in need of harmonising the policy on the right to ECD to have a common definition across the country, from which a common set of entitlements are imagined and implemented.
5. In contrast a slightly less integrated model was found in Brazil, where a great deal of ECD provisions are imagined as extensions of the right to education with day cares and pre-schools forming a part of 'basic education'. In the United Kingdom as well, with a few regional variations with Scotland and Wales, the idea of 'Early Years Foundation Stage' is dominated by a focus on preparing the child to successfully transition to formal schooling. The design of 'early learning goals' and a 'curriculum for excellence' are based on ideas of development that partially mirror the holistic understanding of the right to ECD, while being focused on the successful transition to formal schooling.

#### **(b) Duties of the State**

6. It is important before we go into a discussion of state obligations that we also survey the ways in which the family is envisioned within the right to ECD in international law and the various jurisdictions studied. It is essential that parents are recognised as important stakeholders to keep in mind while conceiving of a spectrum of arrangements most conducive for the care, education and development of the child in these early years. There is of course, also a risk in some jurisdictions to shift this burden entirely onto parents, in effect privatising the state's obligations to provide services to families. This is particularly harmful for disadvantaged sections of society where families may not have the resources to successfully provide these services to their children. Across jurisdictions it is recognised that exclusions at this stage have exponential effects in reproducing inequality in

development, learning and care for children. Inequities that are demonstrated in exclusions and access through childhood and survive well into adulthood. The study of each jurisdiction has dealt with the issue of public and private service provision and the risks and balances involved in those policy arrangements. We will paint an overview of those findings in the last section of this summary.

7. General Comment 7 of the United Nations Committee on the Rights of the Child (CRC Committee) recognises that parents, as primary caregivers are children's first educators, particularly at this early stage when children have not yet transitioned into formal schooling. There is a need to optimise the complementary roles of parents and state policy in achieving equitable and holistic development of the child. The recognition of parents and primary caregivers must not be misunderstood to be a justification to absolve the state of its own obligations. This recognition in essence creates further obligations on states to support the pivotal role of caregiving by parents at this stage of the child's life, recognising differences in parents' abilities and means to provide that care adequately. It makes it the state's responsibility to assist parents across circumstances and disadvantages, in their care responsibilities.

**(c) Must the State be a provider of early learning opportunities and if so, to what extent and considering what parameters?**

8. As noted above, the widest range of state support policies exists in Finland. The Finnish ECEC model recognises, for every child below the age of seven, the right to public funded early learning facilities while also giving families the choice of arranging private ECEC through 'cash for care' payments. While ECEC in Finland is currently available in some form to all children in the country, substantial inequality concerns remain for single parent families and vast regionally divergent standards of facilities since funds and facilities are supplemented by local municipalities.
9. Brazil and India both recognise the right to ECD as a constitutional right, as a facet of the right to education. Both also have some common coordination concerns arising out of differentiated state and federal government responsibilities. In Brazil for example the duty of early childhood and elementary education are the responsibility of the municipality, while higher levels of education are the responsibility of the state and federal governments. Like Finland, the regional differences are stark, more so in the case of Brazil. This is even though the Fund for the Development of Basic Education and Appreciation of the Teaching Profession was created in 2006 to serve as an equaliser against this trend of regional disparity.

10. India is peculiar in its nutrition-based approach to ECD. The prevalence of malnutrition and adequate primary healthcare mean that food security proves to be a key incentive for families to partake in the ECD services of the state. It however raises a further problem of coordination between different government ministries, each responsible for different facets of the right to ECD. The department of education in all jurisdictions is central to the provision of the right to ECD, as it emanates as an extension of the right to education. Its essence as an interconnected, holistic right, integrally concerned with questions of care, however, complicates the allocation of responsibilities in some jurisdictions. In India, for example, the right to ECD is made up of a set of different government policies involving the following Government Ministries – Education, Women and Child Development and finally Consumer Affairs, Food and Public Distribution. This, along with discrepancies mentioned above, between centre and state programmes and within individual state programmes further intensify regional differences. It also has the effect of distributing state obligations, which may, in some cases lead to a dilution of accountability mechanisms.
11. The breadth of services contemplated by India’s policy on ECD, however, is in effect possibly the broadest across all jurisdictions. It hinges on local centres called *Anganwadis* where everything from pre-primary schooling, a free meal to pregnant women and nutritional support to children below the age of six as well as lactating mothers, immunisation services for young children to health check-ups, is provided by the state.

**(d) Is the access to the services within the right (or components of that access) compulsory and/or free?**

12. Access to early learning opportunities particularly those articulated within the right to education take the form of a stipulated minimum number of hours that every child is entitled to, for free. This is the case in the UK for example, with statutory provisions governing the regulation and quality of services provided as well as pre-school curriculum and priorities of early development. In India and Brazil, the policies stipulate free provision of education. In Brazil this extends to learning materials and other resources the child may require. In India, as flagged above, given the breadth of services provided within its Integrated Child Development Scheme, services towards the care of the mother are also stipulated to be provided for free. In Finland, access to public services is also universal and free, with the additional option of ‘cash for care’ subsidies which extend government support to private care by parents at home but are also driven by incentives for parents to return to the workforce.

### (e) Private sector's involvement

13. A positive right like the right to ECD, creates an obligation to provide material and service access. Private sector involvement becomes a tricky question – not simply because of its immediate equity concerns but also because of regulatory issues. It raises some important theoretical and policy design questions that need to be resolved before decisions on private sector involvement are made: Is it possible to share the burden of a rights-based obligation successfully and accountably with private actors? Should such an obligation be shared with actors who arrange themselves along lines of profit as opposed to universal, undifferentiated access? If such an obligation can be shared, what are the circumstances and checks that need to be placed on such a public-private partnership, to maintain standards of equity, quality and fairness, embedded in the rights-based obligation?
14. A range of subsidy and funding arrangements arise in this context. In the UK, for example, parents receive the option of receiving day-care vouchers from their employers so that payments towards those costs are made from their pre-tax incomes. In Finland, local municipalities have begun to demand that higher income families contribute to the costs of ECEC. This, in addition to the now halved entitlement of 20 hours of free day care per week, has pushed more families to opt for private day-care providers.
15. The regulatory obligation of the state over standards of service provision by the private sector is an important facet of the state's obligations within the right to ECD and could curb largescale issues of inequity that emerge in the face of parents increasingly choosing to opt for private sector services. All jurisdictions surveyed have some form of regulation in place towards ensuring minimum standards and cohesive pedagogical practices; barring India where the National Education Policy is dangerously silent on the private sector and its regulation. The efficacy of such regulation, even where it exists is however difficult to assess.
16. There are other forms of non-state participation in ECD which may form a part of state interventions and state-aid towards capacity building and infrastructure. These are usually in the form of community-based programmes or engagement. The idea of volunteer community workers however could pose significant risks to the public provision of access to ECD services, as we see in India. Here, *Anganwadi* workers, who were in effect tasked with the provision of almost all major ECD services, were considered as 'volunteers' to deny them of employment benefits and other benefits available to public sector employees. The Supreme Court intervened to read down their

categorisation as volunteers and upheld their rights as workers, but implementation of these rights remains weak on the ground.

17. The jurisdictions explored in the report were selected in consensus with RR4ECD to represent approaches taken across developed and developing countries. The following jurisdictional sections are arranged based on the three questions:
  1. How do international laws and different jurisdictions define the entitlements to early learning opportunities as part of the right to early childhood development?
  2. What are the state's duties in relation to promoting and fulfilling the right to such early learning opportunities?
    - a. Must the state be a provider of early learning opportunities and if so, to what extent and considering what parameters?
    - b. At what age or stage in a young child's development should a child have a right of access to early learning opportunities? Is it limited to two years of pre-school? If so, why? If not, why not?
    - c. Is the access to the services within the right (or components of that access) compulsory and/or free?
  3. What are the obligations of the state vis-à-vis the private sector in relation to the right to early childhood development?

# INTERNATIONAL LAW

## QUESTION 1: HOW HAS INTERNATIONAL LAW DEFINED ENTITLEMENTS TO EARLY LEARNING OPPORTUNITIES AS A PART OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?

1. Since the passing of its Constitution in 1996, South Africa has been a signatory to major international human rights treaties. These include the International Covenant on Civil and Political Rights, International Convention on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of All Forms of Discrimination against Women (CEDAW), Convention on Rights of Persons with Disability, Convention on the Rights of the Child (UNCRC), African Charter on the Rights and Welfare of the Child among various others.<sup>1</sup> Further, under the Constitution of South Africa, international law has an important place. Section 39(1)(b) of the Constitution provides that in the interpretation of the Bill of Rights, international law must be considered.<sup>2</sup> Thus, the position of international law on the right to early childhood development is relevant for us. Under Article 28 of the UNCRC, it is further acknowledged that states parties achieve universal education access on the basis of equal opportunity. Particularly, Article 28 outlines a main obligation of the state to establish compulsory and freely available primary, secondary and higher education for all. This is in line with Article 2, which notes the obligations of states to ensure these rights are provided irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.<sup>3</sup>
2. Before defining the right to early childhood development, it is important to define 'early childhood', which itself has been a subject of debate due to diverse practices in different countries. General Comment No 7 by the Committee on the Rights of the Child (CRC) on 'Implementing Child Rights in Early Childhood' provides an 'appropriate working definition' of early childhood as the period below the age of 8 years.<sup>4</sup> However, the Committee recognises that definitions of early childhood vary in different countries and regions, according to local

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<sup>1</sup> UN Treaty Body Data Base, 'Ratification Status for South Africa' <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN)> accessed 24 May 2022.

<sup>2</sup> Constitution of Republic of South Africa, 1996.

<sup>3</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).

<sup>4</sup> Committee on the Rights of the Child, General Comment 7 (20 September 2006) CRC/C/GC/Rev 1, para 4.

traditions and the organisation of primary school systems. Thus, there is flexibility in defining 'early childhood' based on local contexts.<sup>5</sup> What is important however is that in its consideration of rights in early childhood, the Committee included all young children: at birth; throughout infancy; during the preschool years; and during the transition to school.<sup>6</sup> Thus, it can be argued that the definition of early childhood in any context should be expansive, recognizing all the phases of early childhood.

## **THE GENERAL PRINCIPLES OF HUMAN RIGHTS AND EARLY CHILDHOOD**

3. The right to early childhood development has to be located within the structure of the UNCRC and general principles of international human rights law. General Comment 7 of the CRC states that the convention rights shall be applied holistically in early childhood, taking account of the principle of the universality, indivisibility and interdependence of all human rights.<sup>7</sup> Thus, according to General Comment 7 the following are the general principles of human rights relevant to the right to early childhood development. It is important to note here, however, that while General Comments hold great persuasive force as expert pronouncements, they are not legally binding.

### **a) Young children are rights holders: Moving away from traditional belief**

4. Traditionally, it has been believed that early childhood mainly is a period for the socialisation of the immature human being towards mature adults. However, General Comment 7 moves away from this understanding and recognizes that children, including the very youngest children, must be respected as persons in their own right. Young children should be recognized as active members of families, communities and societies, with their own concerns, interests and points of view.<sup>8</sup> As holders of rights, even the youngest children are entitled to express their views and be given due weightage in accordance with their age and maturity.<sup>9</sup> Thus, adults are required to adopt a child-centred attitude, respecting their dignity.<sup>10</sup>

### **b) Interconnectedness and Indivisibility of the Right to Early Childhood Development**

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<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid* para 3.

<sup>8</sup> *ibid* para 5.

<sup>9</sup> *ibid* para 1.

<sup>10</sup> *ibid* para 14.

5. While in this report we are concerned with the right to early learning opportunities, it is important to remember that children's rights, much like all other human rights, are marked by indivisibility and interconnectedness. This is particularly applicable to the right to early childhood development which has been envisioned based on a 'holistic approach' towards development and the child's inherent right to life.<sup>11</sup> General Comment 7 particularly focuses on this holistic approach and recognizes that for the exercise of their rights, young children have 'particular requirements' for physical nurturance, emotional care, and time and space for social play, exploration and learning.<sup>12</sup> Some of the relevant rights which are interconnected with the right to early learning opportunities are:

- a. Right to adequate standard of living for physical, mental, spiritual, moral and social development.<sup>13</sup>
- b. Right to benefit from social security, including social insurance.<sup>14</sup>
- c. Right to access the highest attainable standard of health care and nutrition during early years.<sup>15</sup>
- d. Right to access clean drinking water, adequate sanitation, appropriate immunisation, etc.<sup>16</sup>

Thus, a broad approach to all aspects of development must be kept in mind throughout this report.

### **c) Non-Discrimination and Intersectionality**

6. Non-discrimination and intersectionality are part of fundamental international human rights norms and have been recognised as such in reference to right to early childhood development and right to education. Article 10(a) of the CEDAW expressly mentions equality of education for men and women (which will include education in early childhood).<sup>17</sup> It is the only convention to expressly mention early childhood education. Similarly, the Sustainable Development Goal- Target 4.5 commits states to removing gender disparities and ensuring

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<sup>11</sup> art 6, UNCRC (n 3).

<sup>12</sup> para 5, General Comment 7 (n 4).

<sup>13</sup> art 27, UNCRC (n 3); para 26 General Comment 7 (n 4).

<sup>14</sup> *ibid.* See also art 26, UNCRC (n 3).

<sup>15</sup> art 24, UNCRC (n 3); para 27, General Comment 7 (n 4).

<sup>16</sup> para 27.a, General Comment 7 (n 4).

<sup>17</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979) 13 UNTC 1249.

equal access to education at all levels.<sup>18</sup> In reference to disabled persons General Comment 4 by the Committee on CRPD recognises the right to inclusive education.<sup>19</sup>

7. Non-discrimination has been part of the architecture of UNCRC under Article 2. The thrust of the CRC's recommendations on the right to early childhood has been that *every* child, in *every* circumstance should be ensured this right.<sup>20</sup> Thus, a particular group of children must not be discriminated against which may take the form of restricted opportunities to play, learning and education.<sup>21</sup> Apart from non-discrimination on grounds of sex, gender, race, class, religion, disability or any other similar grounds;<sup>22</sup> General Comment 7 also specifically recognises the following particular vulnerabilities:<sup>23</sup>

- a. Child victims of neglect, maltreatment, abuse, physical and mental violence.<sup>24</sup>
- b. Children without family.<sup>25</sup>
- c. Refugee children.<sup>26</sup>
- d. Children with disabilities.<sup>27</sup>
- e. Children victims of substance abuse, harmful work.<sup>28</sup>
- f. Child victims of sexual abuse, trafficking, abduction.<sup>29</sup>
- g. Children with deviant behaviour and law breaking.<sup>30</sup>
- h. Children affected by HIV.<sup>31</sup>

8. In reference to South Africa, the CRC noted in its concluding observation in 2016 that adoption of a new policy on pregnancy amongst learners must be expedited so that pregnant teenagers and adolescent mothers can continue their education. Again in 2018, the committee recommended South Africa that the state must provide necessary support services to pregnant adolescent girls.

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<sup>18</sup> *ibid.*

<sup>19</sup> Committee on the Rights of Persons with Disabilities, General Comment No 4 on the Right to Inclusive Education (25 November 2016) CRPD/C/GC/4.

<sup>20</sup> para 36, General Comment 7 (n 4).

<sup>21</sup> *ibid* para 11(b).

<sup>22</sup> art 2, UNCRC (n 3).

<sup>23</sup> para 36, General Comment 7 (n 4).

<sup>24</sup> art 19, UNCRC (n 3).

<sup>25</sup> *ibid* arts 20 and 21.

<sup>26</sup> *ibid* art 22.

<sup>27</sup> *ibid* art 23.

<sup>28</sup> *ibid* arts 32 and 33.

<sup>29</sup> *ibid* arts 34 and 35.

<sup>30</sup> *ibid* art 40.

<sup>31</sup> para 27.c, General Comment 7 (n 4).

## **QUESTION 2: WHAT ARE THE STATE'S DUTIES IN RELATION TO PROMOTING AND FULFILLING THE RIGHT TO SUCH EARLY LEARNING OPPORTUNITIES?**

9. Early childhood education refers to the education a child receives before entering primary school and is largely split into two categories: early childhood educational development (aged 0-2) and pre-primary education (aged three until reaching primary school age).<sup>32</sup>
10. The right to education is an established human right and is enshrined in three major international human rights treaties- the International Covenant on Economic, Social and Cultural Rights (Article 13), the UNCRC (Article 28 and 29) and the CRPD (Article 24). All the three treaties have been ratified by almost all states, showing a wider acceptance of the right across the world.
11. Prima facie, it may seem that the right to education is only applicable once the child enters a formal educational institution, since primary and secondary schools are the only stages of education specifically mentioned in the treaties.
12. However, in the light of the purposes and objectives of the right to education in all three conventions, it would be a very limited view to read the right to education as beginning only with primary education.<sup>33</sup> The language of three of the conventions is similar in asserting that the right to education should lead to 'full development' of the personality of the child and prepare them to 'participate in the society. Article 29(1)(a) of the UNCRC obliges the state to ensure 'the development of the child's personality, talents and mental and physical abilities to their fullest potential.' Article 13(2) and Article 24 of the ICESCR provide that education should lead to 'full development of personality and sense of dignity'. General Comment 1 of the CRC on the aims of education under UNCRC provides the goal of education to 'empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.'<sup>34</sup>

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<sup>32</sup> UNESCO, 'Right to Education Handbook' (UNESCO and Right to Education Initiative 2019) 103.

<sup>33</sup> Sandra Fredman, Georgina Donati, Linda Richter, Sara Naiker, Jere R Behrman, Chunling Lu, Caroline Cohrsen, Florencia López Bóo, Chamba Raghavan, Amanda Devercelli, S Jody Heymann and Alan Stein, 'Recognizing Early Childhood Education as a Human Right in International Law' (2022) 22 (4) Human Rights Law Review 1.

<sup>34</sup> Committee on the Rights of the Child, General Comment 1 (17 April 2001) CRC/GC/2001/1, para 2.

13. The aims of ‘full development of personality’ and ‘participation in the society’ cannot be achieved without a right to early learning opportunities.<sup>35</sup> This is because early childhood is a period of ‘special sensitivity’.<sup>36</sup> During this time period, 80-90% of the human brain is developed. Lack of special attention to the rights of children during this period can severely harm cognitive development, schooling, social and emotional health, and overall well-being throughout human life.<sup>37</sup> Whereas if the rights of children are paid adequate attention, then it can lower school dropouts and produce higher learning outcomes.<sup>38</sup> The UNCRC thus recognises early childhood as a ‘critical period’ for recognition of all other rights enshrined in its text.<sup>39</sup> UNICEF recognises this period as a ‘critical window’ for foundational development of life.<sup>40</sup> Further, investment in early childhood is particularly important for promoting equity.<sup>41</sup> Children benefit the most from high-quality early childhood education since it leaves a more significant impact during a child’s development window.<sup>42</sup> Early childhood education is also important for transition to primary education.
14. This reading gets further support from Article 6(2) of UNCRC which obligates states to ‘*ensure, to the maximum extent possible the... development of child.*’ (emphasis supplied). Article 6(2) and Article 29(1) have also been read together by the CRC. Thus, General Comment 7 interprets the right to education as beginning at birth, linking closely with young children’s maximum development.<sup>43</sup>
15. International human rights law thus does not explicitly mention the right to early learning opportunities, but it has implicitly recognised the right of children to early education through reading together two rights – right to education and a child’s right to full development. A notable exception to this is the CEDAW that links the early childhood education to gender equality. For instance, General Recommendation 36 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) categorically mentions the need to monitor the implementation of girls’ right to education, with a specific emphasis on the

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<sup>35</sup> Fredman (n 33).

<sup>36</sup> Paul Leseman, ‘Early Childhood Education and Care for Children from Low-Income or Minority Backgrounds’ (OECD 2002)

<sup>37</sup> Fredman (n 33).

<sup>38</sup> *ibid.*

<sup>39</sup> para 1, General Comment 7 (n 4).

<sup>40</sup> UNICEF Data, ‘A World Ready to Learn: Prioritizing Early Childhood Education’ (April 2019) <<https://data.unicef.org/resources/a-world-ready-to-learn-report/>> accessed 24 May 2022.

<sup>41</sup> Organization for Economic Cooperation and Development, ‘Early Childhood Education: Equity, Quality, and Transitions: Report for the G20 Education Working Group (OECD 2020) 4.

<sup>42</sup> *ibid.*

<sup>43</sup> para 28, General Comment 7 (n 4).

transition between levels of education from early childhood to primary.<sup>44</sup> General Recommendation 36 notes the central obligation to eliminate discrimination in access to educational facilities at all levels and all ages, taking a life-cycle approach.<sup>45</sup> It also emphasises the integration of gender equality content into curricula at all levels of education from early childhood as measures for the prevention of violence against women and girls.<sup>46</sup> The CEDAW Committee recommends states parties to provide universal, free and compulsory education from pre-school up to the secondary level, and progressively up to the tertiary level.<sup>47</sup> Effective and well-integrated ECD policies and programmes that involve parents, free women from being primary caregivers to then participate in community decision making, development activities as well as in gainful employment.<sup>48</sup>

16. Early childhood education is also one of the UN Sustainable Development Goals. Sustainable Development Goal Number 4 provides that by 2030 inclusive and equitable quality education and lifelong learning opportunities should be ensured for all. Within this obligation, Sustainable Development Goal 4.2 provides that by 2030 all children should be ensured access to quality early childhood development, care, and pre-primary education so that they are ready for primary education.<sup>49</sup> Even though Sustainable Development Goals are only in the nature of political commitment, this is a clear and strong articulation of the obligations of the state.
17. Thus, the right to education includes education at *all* levels including early childhood. All three documents can be read to include the state's obligation to provide 'affordable, accessible, quality early childhood education.'<sup>50</sup> The question thus is not whether there is a right to early education but how and in what ways the right can be applied to the context of early education, and what should be the state obligations in this reference.<sup>51</sup> Thus, learning begins at birth.<sup>52</sup>

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<sup>44</sup> Committee on the Elimination of Discrimination against Women, 'General Recommendation No 36 on the Right of Girls and Women to Education' (16 November 2017) CEDAW/C/GC/36 [31]. See also Committee on the Elimination of Discrimination against Women, 'CEDAW Statement: Protection of Girls' Right to Education' (19 October 2012).

<sup>45</sup> Christine Chinkin and Keina Yoshida, '40 Years of the Convention on the Elimination of All Forms of Discrimination against Women' (2020) Centre for Women, Peace and Security 1, 9.

<sup>46</sup> *ibid* 14.

<sup>47</sup> General Recommendation 36 (n 44).

<sup>48</sup> Marito Garcia, Alan Pence, and Judith L Evans (eds), *Africa's Future, Africa's Challenge: Early Childhood Care and Development in Sub-Saharan Africa* (World Bank 2008) 33.

<sup>49</sup> UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1.

<sup>50</sup> Fredman (n 33).

<sup>51</sup> *ibid* 4.

<sup>52</sup> Pia R Britto, Stephen J Lye et al, 'Nurturing Care: Promoting Early Childhood Development' (2017) 389 *The Lancet* 91.

## a) State's Duties and Obligations

18. While the General Comment 7 of the CRC does not comment directly upon the nature of state obligations in relation to early learning opportunities, it recommends that states should follow a (1) comprehensive, (2) strategic, (3) time bound, and (4) a right-based framework for full realisation of children's rights during this phase of their lives.<sup>53</sup> Since the right to early learning opportunities is equally part of the right to early childhood development, this framework is equally applicable to the right to early learning opportunities.

19. General Comment 7 of the CRC elucidates the obligations of states as follows:

- a. Article 17 of the UNCRC recognises the positive role of electronic mass media communication in the realisation of rights under the convention. Thus, the state should encourage dissemination of appropriate material based on the capacity and interest of the children. Such material should be socially and educationally beneficial to their well-being of children.
- b. Increase in human and financial resources for early childhood services and programmes.
- c. Sufficient public investment in services, infrastructure, and overall resources for early childhood development.
- d. Development of a comprehensive and up-to-date system for qualitative and quantitative data with indicators consistent with the convention. The data should be disaggregated by relevant categories.<sup>54</sup>
- e. Systemic and time-to-time training on rights of children for parents and professionals working for and with children.<sup>55</sup>
- f. Foster high-level policy dialogue and research on early childhood, especially from a right-based perspective.<sup>56</sup>
- g. Ensure institutions, services, and facilities responsible for early childhood conform to quality standards, particularly in the areas of health and safety.<sup>57</sup>
- h. Sufficient and age-appropriate training of staff.<sup>58</sup>

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<sup>53</sup> para 38, General Comment 7 (n 4).

<sup>54</sup> *ibid* para 39.

<sup>55</sup> *ibid* para 41.

<sup>56</sup> *ibid* paras 40 and 43.

<sup>57</sup> *ibid* para 23.

<sup>58</sup> *ibid*.

## b) Age to access early learning opportunities

20. While the CRC in its Concluding Observations has interpreted preschool as age beginning from the age of three years, yet it has recommended states to fulfil obligations which hint towards a broader right to early learning and care services in a continuum since birth.<sup>59</sup>

21. Some of the obligations since birth include:

- a. Increasing access to early childhood care for children under age two and preschool education for children under six.<sup>60</sup>
- b. Investment and allocation of sufficient financial resources for the development and expansion of early childhood education.<sup>61</sup>
- c. Developing a comprehensive and holistic policy of early childhood care and development.<sup>62</sup>

### i) *Transition Period*

22. G20 Education Working Group recognises the transition period is a ‘major milestone’ in early childhood as starting school involves formally attending an institution regularly, for the first time. Thus, the Working Group recognises the need for the government’s focus on the transition period otherwise the gains of early childhood learning will fade away, particularly for children from disadvantaged backgrounds.<sup>63</sup> Transition period is also integral to the overall well-being of the child, increasing the potential for success in primary education when high-quality transition programming is available.

23. The working group recommends the following policies for a smooth transition:

- a. *Pedagogical continuity across transition years*: These include- preparing pre-primary and primary teachers with skills and knowledge about transition, developing monitoring tools to respond to individual child’s need.

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<sup>59</sup> Committee on the Rights of the Child, Concluding Observations on Japan (5 March 2019) CRC/C/JPN/CO/4-5, para 40; Committee on the Rights of the Child, Concluding Observations on Hungary (7 February 2020) CRC/C/HUN/CO/6, para 35.

<sup>60</sup> Committee on the Rights of the Child, Concluding Observations on El Salvador (29 November 2018) CRC/C/SLV/CO/5-6.

<sup>61</sup> Committee on the Rights of the Child, Concluding Observations on Gabon (8 July 2016) CRC/C/GAB/CO/2.

<sup>62</sup> Committee on the Rights of the Child, Concluding Observations on Mexico (3 July 2015) CRC/C/MEX/CO/4-5.

<sup>63</sup> Organization for Economic Cooperation and Development (n 41) 32.

- b. *Create Structural Conditions that facilitate coordination and cooperation across pre-primary and primary schools:* These include developing national strategy or guidelines on transition, encouraging interaction between pre-primary and primary schools.
- c. *Developing policies that build wider social support for child's transition:* These include- preparing families and children for transition, better coordination and communication between family, health services, community, and social services.

24. The G20 Education working group's recommendations are suggestive, not compulsory. They are provided by practices established by G20 countries but are not integral to international legal precedents. However, the vast citation of country-based data and practices may be relevant as useful indicators to understand best practices.

### **QUESTION 3: WHAT ARE THE OBLIGATIONS OF THE STATE VIS-À-VIS THE PRIVATE SECTOR IN RELATION TO THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?**

25. While General Comment 7 of the CRC encourages states parties to develop 'strong and equitable' partnerships between government, non-governmental organisation, public services, private sector and families to financially support the rights of children;<sup>64</sup> the Committee notes that privatisation and decentralisation should not be disadvantageous to children. Thus, privatisation or informalization cannot justify reduction of or disadvantage to rights of children.<sup>65</sup>
26. The Committee has also expressed concern about the lack of adequate resources, regulations, and quality assurance.<sup>66</sup> The Committee encourages multi-sectoral strategies but asserts states are still obliged to engage in such strategies through law and policy development.<sup>67</sup> Hence, obligation fulfilment via the private sector still demands infrastructural and legislative development at the state level.
27. The Committee urges states to address the rights-based framework of early childhood with 'comprehensive, strategic and time-bound plans.'<sup>68</sup> Given the human and financial resources

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<sup>64</sup> para 38, General Comment 7 (n 4).

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid* para 22.

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid* para 38.

required to capacity-build for early childhood education provisions, the committee explicitly recognises the infrastructural, training/service capacity, and resource allocation variances between states. The Committee further acknowledges these structural differences may also be compounded by competing priorities (e.g., attempting to fulfil ECE obligations where universal health care or primary education policies/practices are not yet achieved).<sup>69</sup> Given these unequal starting points, the Committee recognizes the integral role of public-private partnerships in capacity and resource building for early childhood education access. As previously mentioned, this should not preclude the state from establishing its own infrastructural and political capacity to provide early childhood education access, and states cannot fulfil their obligations through full reliance on the private sector. This is further outlined in General Comment 7, where the Committee states the importance ‘that there be sufficient public investment in services, infrastructure and overall resources specifically allocated to early childhood’.<sup>70</sup>

*ii) Role of Civil Society*

28. The role of civil society is further clarified in General Comment 7 of the CRC. The Committee recommends the states parties to support the activities of the non-governmental sector as ‘a channel for programme implementation’, yet it reminds the states parties that it is *their* primary obligation to ensure implementation of rights. The role of civil society is only ‘complementary’ to the state and not that of a ‘substitute’ of the state. States parties are responsible for service provisions for right to early childhood development.

*iii) Community based programmes*

29. General Comment 7 recommends that states parties should support home and community-based programmes that ‘complement the parents’ role and are developed as far as possible in partnership with parents, including through active cooperation between parents, professionals, and others. The CRC recognises the bolstering of such community-driven parental/public obligations to support early childhood education as a facet of the state’s responsibilities of early childhood education provision. The CRC acknowledges children as both active members of the community and being powerfully shaped by community aspects such as culture, beliefs, and family membership.<sup>71</sup> Further, General Comment 7 emphasises the state obligations in establishing/bolstering the capacity of such programmes through legislative frameworks. The

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<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid* para 6.

CRC notes the integral role of state legislative frameworks in supporting the quality and resourcing of community-based engagement. It also acknowledges differing needs and engagement amongst various communities, asserting the importance that such frameworks also ensure that ‘standards are tailored to the circumstances of particular groups.’<sup>72</sup>

*iv) Role of Parents*

30. General Comment 7 notes that parents and primary caregivers are children’s first educators.<sup>73</sup>

It elucidates the integral nature of parental engagement and assert that states should use this consideration as a point of departure in planning childhood education. This upholds the obligations of the state in fulfilling early childhood education access, engaging with parents’ roles as necessarily benefitting from state-driven infrastructure and programming. General Comment 7 outlines obligations of the state in supporting parental engagement which are ‘child-centred, encourage respect for the child’s dignity and provide opportunities for developing understanding, self-esteem and self-confidence.’<sup>74</sup> In recognising the role of parents in early childhood education/development, General Comment 7 asserts states’ obligations toward infrastructure and programming to ensure parental roles can be complemented and fulfilled.<sup>75</sup>

31. Further, the Committee also recognises state obligations of education vis-a-vis the parental role of care. It acknowledges divisions between roles of ‘care’ versus roles of ‘education’ services, asserting the concept of ‘educare’ in preventing such divisions from impacting the best interests of early childhood educational access.<sup>76</sup> Conceptually, the model of ‘educare’ is stated to recognize the interdependence of holistic, multifaceted modes of care with educational infrastructure provisions.

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<sup>72</sup> *ibid* para 31.

<sup>73</sup> *ibid* para 29.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid* 29.1(a).

<sup>76</sup> *ibid* para 30.

32. General comment 7 recognises the following state obligations.<sup>77</sup> This is based on the recognition that early childhood is ‘most extensive’ and ‘intensive’ period of parental responsibilities:<sup>78</sup>

- a. Rendering assistance in performance of child-rearing responsibilities including quality childcare services;<sup>79</sup>
- b. Assisting parents in providing necessary conditions for child’s development.<sup>80</sup>

33. Under Article 18 of the UNCRC states parties are obligated to respect the primacy of parents particularly in reference to the obligation not to separate children from their parents.<sup>81</sup> Thus the states parties are under obligation to avoid institutionalisation or long-term care for children until it is in their best interest (say in case of neglected children).<sup>82</sup> General Comment 7 also outlines situations most likely to be detrimental to the development and well-being of children (e.g., parenting in isolation, parenting under acute material/psychological stress, conflictual parenting, or child-parent separations).<sup>83</sup> In so doing, the Committee urges states to prioritise steps that enable parents to fulfil caretaker duties without such developmentally harmful introduction. This also prioritising steps to reduce the number of abandoned, orphaned, and/or institutionalised children. The Committee further recognises the prevalence of informal networks in supporting parental responsibility, while also acknowledging such networks are subject to great differentiation amongst families and regions.<sup>84</sup> The Committee recognises the distinctive advantages of such informal networks/arrangements, and their role in fulfilling the UNCRC.<sup>85</sup> The Committee’s comments lend to the framing of parental assistance obligations and the role of the state in supporting parental well-being and responsibility as interdependent to early childhood education.

#### **aa) What kind of assistance to parents?**

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<sup>77</sup> *ibid* para 20.

<sup>78</sup> *ibid*.

<sup>79</sup> arts 18.2 and 18.3, UNCRC (n 3).

<sup>80</sup> art 27.2, UNCRC (n 3).

<sup>81</sup> para 18, General Comment 7 (n 4).

<sup>82</sup> *ibid*.

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid* para 19.

<sup>85</sup> *ibid*.

34. Interdependency of Children’s Rights on Parental Resources: Recognising that realisation of children’s rights is in large measure dependent on the well-being and resources available with those responsible for their care, is the ‘starting point’ for planning assistance and services to primary caregivers.<sup>86</sup> General Comment 7 denotes the interdependency of children’s well-being in relation to the resources available with their caretakers. It utilises the concept of interdependence as a starting point in providing examples of state-promoted parental assistance solutions. General Comment 7 provides examples such as:<sup>87</sup>

- a. State-driven interventions such as tax and benefits, housing stability, and hourly work considerations to increase the capacity of parenting. This example holds that such interventions can also contribute to the immediate consequences of parent provision (e.g., maternal health and parental education).
- b. Emphasis on parental well-being and support through parenting education opportunities and parental counselling.

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<sup>86</sup> *ibid* para 20.

<sup>87</sup> *ibid*.

# INDIA

## QUESTION 1: HOW HAS INDIA DEFINED ENTITLEMENTS TO EARLY LEARNING OPPORTUNITIES AS A PART OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?

35. India ratified the UNCRC in 1992. Constitutional obligations pertaining to the right to early learning opportunities have been detailed in 2(A) below.
36. When the Right to Education was made a part of **Article 21A of the Constitution of India, 1950** because of the 86<sup>th</sup> amendment [discussed in more detail under 2(A) below], Article 51A (k) was also introduced, casting an obligation on parents/guardians to provide opportunities for education to children between the ages of 6-14 years. The 259th Report of the Law Commission of India submitted in 2015 titled, ‘Early Childhood Development and Legal Entitlements’ recommended the removal of this age qualification to make Article 51 A(k) read as: it shall be the duty of every citizen of India ‘who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward under his care.’<sup>88</sup> However, this recommendation has not been accepted.
37. In India, the term early childhood care and education refers to all care and education services provided for children below the age of six years.<sup>89</sup>
38. Apart from constitutional and statutory obligations, the **National Early Childhood Education and Care Policy, 2013** (NECE) drafted by the Ministry for Women and Child Development, aims to ensure that children have access to preschool education and care by laying down standards for the running of preschools and day-care centres. The vision of the policy is to, ‘achieve holistic development and active learning capacity of all children below six years of age by promoting free, universal, inclusive, equitable, joyful and contextualised opportunities for laying foundation and attaining full potential.’ The NECE defines early childhood as ‘the formative stage of the first six years of life’.

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<sup>88</sup> Law Commission of India, ‘Report No 259: Early Childhood Development and Legal Entitlements’ (Government of India 2015) 54.

<sup>89</sup> Nirmala Rao, Namita Ranganathan, Ravneet Kaur and Rashi Mukhopadhyay, ‘Fostering Equitable Access to Quality Preschool Education in India: Challenges and Opportunities’ (2021) 15(9) International Journal of Child Care and Education Policy 1.

39. However, this policy is only an executive policy that requires legislative sanction for its continued implementation, without which it is not legally binding. The government body in charge of early childhood education is different from state to state. It is also ineffective because it envisages several duty-bearers including the private, community and civil society, thereby diluting the responsibility on the state as a primary provider of ECD. As a result, the provision of free and compulsory early learning opportunities of a minimum standard and quality are not legal entitlements for children under the age of six years in India.
40. The government of India also released the **National Early Childhood Care and Education Curriculum Framework 2013** (NECCE). State governments have designed their own curricula in light of this national framework. However, the framework does not fully acknowledge the large variations in outcomes across and within states.
41. Women in the unorganized sector cannot be beneficiaries of statutory crèche facilities and hence, the **Rajiv Gandhi National Crèche Scheme for the Children of Working Mothers** is crucial for them. Under this scheme, the state aids NGOs for running crèches for infants (0-6 years) and provides facilities for sleeping and pre-school education.<sup>90</sup> This program also receives limited government assistance and relies on voluntary institutions for its implementation. A study reported that the infrastructural, cooking and sleeping facilities as part of the scheme were poor on account of lack of funding from the government.<sup>91</sup>
42. The **National Plan of Action for Children, 2016** aims to ensure all children their right to survival, dignity, health, nutrition, education, development, protection, and participation. It also provides a framework for the states and Union Territories to develop their own state plans to protect children's rights and promote their development. It highlights the importance of strengthening the communities and families to support children and their overall development.<sup>92</sup>

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<sup>90</sup> Ministry of Women and Child Development, 'Rajiv Gandhi National Crèche Scheme for Children of Working Mothers' (Government of India) <[https://wcd.nic.in/sites/default/files/Revised%20RGNCSScheme\\_210515.pdf](https://wcd.nic.in/sites/default/files/Revised%20RGNCSScheme_210515.pdf)> accessed 15 June 2022.

<sup>91</sup> Planning Commission, 'Performance of Rajiv Gandhi National Crèche Scheme for Children of Working Mothers' (Government of India 2013).

<sup>92</sup> Ministry of Women and Child Development, 'National Plan of Action for Children, 2016: Safe Children, Happy Childhood' (Government of India 2016) <<https://wcd.nic.in/sites/default/files/National%20Plan%20of%20Action%202016.pdf>> accessed 15 June 2022.

43. The **National Educational Policy 2020** uses the term inclusion to allude to policy goals associated with access to education of groups that are underrepresented on the grounds of gender, caste, religion, migration, minority status, special needs, or socio-economic status. The education division of the National Commission for Protection of Child Rights (NCPCR) created a set of guidelines (2011 and 2015) for play schools and preschools based on the NECCE Policy 2013. Again, these guidelines are not legally binding.
44. These policy documents reiterate that all children have the right to access early childhood care and education (ECCE) but whether that right on paper translates into an effective entitlement on ground is dubious, given the non-binding nature of these policy documents and lack of monitoring to enforce the standards that they lay down. In the context of ECCE, a minimalist approach to public sector programmes as well as an attitude promoting laissez-faire when it comes to private sector programmes has been criticized.<sup>93</sup>

**a) Private programmes**

45. As per a study collecting data from a nationally representative sample in 2013–2014 around 31% of 3 to 6-year-old children receive pre-school education from private, for-profit entities.<sup>94</sup> Private preschools are unregulated by the government. However, the government laid down norms and expectations for ECCE as part of its National Quality standards in ECCE in 2013.<sup>95</sup> However, while public sector programs are monitored, as yet there has been no systematic inspection of private sector programs to assess whether these standards have been complied with.<sup>96</sup> Thus, the realisation of early learning opportunities as part of the right to ECD would require a robust regulatory mechanism, which India currently lacks, to ensure that quality ECCE programs are implemented nationwide.<sup>97</sup>
46. The present legal framework for ECD in India is weak and wanting. As a result, the conceptualisation of early learning opportunities has not translated into a legally enforceable entitlement. The 259<sup>th</sup> Report of the Law Commission of India lamented that overall, two problems can be noticed in the context of ECD in India. Firstly, there is a lack of

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<sup>93</sup> Rao (n 89) 6.

<sup>94</sup> Renu Singh and Protap Mukherjee, 'Comparison of the Effects of Government and Private Preschool Education on the Developmental Outcomes of Children: Evidence from Young Lives India' (Young Lives 2017). See also Rao (n 89) 8.

<sup>95</sup> Ministry of Women and Child Development, 'National Early Childhood Care and Education (ECCE) Curriculum Framework (Government of India 2013).

<sup>96</sup> G Krishnakumar, 'Fine-tuning Education for Society's Youngest' (*The Hindu*, 16 December 2016) <<https://www.thehindu.com/news/national//article60638010.ece>> accessed 15 June 2022.

<sup>97</sup> *ibid.*

harmonisation of service and delivery standards on account of fragmented policies and schemes instead of a holistic framework that frames this right as a legally enforceable entitlement. This has led to a lack of coordination among different ministries involved in providing ECCE, including the Ministry for Women and Child Development, Ministry of Human Resource Development, Finance Ministry, Health Ministry. Thus, as recommended by the Law Commission, there is a need for convergence to consolidate different ECD areas into a single institutional framework. Secondly, and relatedly, it is also important to make these schemes and policies actionable without which they will remain mere promises lacking legal enforceability.<sup>98</sup>

## **QUESTION 2: WHAT ARE THE STATE'S DUTIES IN RELATION TO PROMOTING AND FULFILLING THE RIGHT TO SUCH EARLY LEARNING OPPORTUNITIES?**

### **A. MUST THE STATE BE THE PROVIDER OF EARLY LEARNING OPPORTUNITIES? IF SO, TO WHAT EXTENT AND CONSIDERING WHAT PARAMETERS?**

47. The part below analyses the constitutional obligations, interpreted by case law and translated into statutes to assess the government's role as a provider of early learning opportunities and nutrition inasmuch as the latter is inextricably tied to the former. India has a particularly nutrition-based approach to early childhood development given the widespread prevalence of malnutrition in children and the general lack of food security. Subsequently, government run schemes such as the ICDS, the Anganwadi system and National Education Policy are discussed to analyse the extent of functions and responsibilities taken up by the state under these programs as well as the parameters upon which these different functions are based.

#### **a) Constitutional Law Obligations**

48. Fundamental Rights and Directive Principles of State Policy provided for in the Indian Constitution give guidance on legislations concerning child welfare, education, and development. Article 15(3) of the Constitution provides for affirmative action for women and children. Under this Article, several beneficial laws and programmes have been passed. The

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<sup>98</sup> Law Commission of India (n 88) 30-32.

Court has repeatedly read into Article 21 (right to life and personal liberty), a variety of other rights. Right to food, nutrition and health have been judicially crafted as being part and parcel of the Right to Life under Article 21, to which every citizen, including a child is entitled to. Similarly, the right to free education up to the age of 14 years was read into Article 21 by the Supreme Court in *Unni Krishnan JP v State of Andhra Pradesh*.<sup>99</sup> While creating these rights, the Supreme Court has emphasized the importance of reading the right to life under Article 21 in light of Directive Principles of State Policies, i.e., Articles 41, 45 and 46.<sup>100</sup> Eventually, the value of having a positive entitlement ensuring to the child the right to full development led to the insertion of Article 21-A in the Constitution via the 86<sup>th</sup> Amendment Act, 2002, recognising the fundamentality of the right to education for children between the age group of six to fourteen. Although the 86<sup>th</sup> Amendment brought a Directive Principle of State Policy, ignored until now, within the folds of Part III of the Constitution, it excluded children below the age of six, thus not extending to them the rights conferred by the 86<sup>th</sup> Amendment.

49. Articles 39(e) and (f) of the Constitution provide for health care and protection of its citizens, including children. While Article 39(e) stipulates that the state shall direct its policy towards securing ‘that the health and strength of workers, men and women and the tender age of children are not abused’ and ‘that the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength’. At the same time, Article 39(f) requires the state to ensure that ‘children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that their childhood and youth are protected against exploitation and against moral and material abandonment.’ Importantly, Article 39 provides directive principles, and not fundamental rights. Similarly, Article 45 provides that ‘the state shall endeavour to provide early childhood care and education for all children until they complete the age of six years.’ This provision makes the right to early childhood care and education an express constitutional objective, which was further bolstered by the subsequent enactment of the **Right of Children to Free and Compulsory Education Act, 2009** (RTE), which came into being ‘with a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free pre-school education for such children’.

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<sup>99</sup> *Unni Krishnan JP v State of Andhra Pradesh* (1993) 4 SCC 111.

<sup>100</sup> *Maniben Maganbhai Bhariya v District Development Officer* [2022] SCC OnLine SC 507 [25].

50. Article 47 (also a directive principle) provides that the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. Apart from Article 47, India is a signatory to the Universal Declaration of Human Rights (UDHR) and the ICESCR. Article 25 of the UDHR provides that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food' and the ICESCR casts responsibilities on all states to recognize the right of citizens to adequate food. These are significant recommendations and suggestions that should guide governments and courts but do not provide for any enforceable legal entitlement to children below the age of 6 years.

## b) Case Law

51. The Supreme Court noted in *Maniben Maganbhai Bhariya v District Development Officer, Dabod (Maniben)* that the absence of legally enforceable entitlements makes children especially under-six more vulnerable to neglect and discrimination.<sup>101</sup> Similarly, the reproductive health of the mother and the health of the infant child are closely related. Recognizing this close relationship, the Supreme Court in a petition (popularly known as petition for right to food) filed by the PUCL held the Central and State Government responsible for providing ICDS services including supplementary nutrition, nutrition and health, education, etc. not only to every child under the age of six but to pregnant women and lactating mothers as well - a clear endorsement of the binding relation of mother and child's health.<sup>102</sup>

## c) Statutes

52. **National Food Security Act 2013:** One of the objectives included in the statement of objects and reasons of the National Food Security Act 2013 (NFSA) is to improve the nutritional status of women and children. The aim of the NFSA was to bring about a shift in addressing the issue of food security from a welfare-based to a rights-based approach. The role of Anganwadi centres finds a place in paragraph 7 of the statement of objects and reasons of the NFSA.

53. **Right to Education:** Section 11 of the RTE Act is relevant.

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<sup>101</sup> *ibid* [28].

<sup>102</sup> *PUCL v Union of India* AIR 1982 SC 1473.

54. Section 11 reads thus:

“11. Appropriate Government to provide for pre-school education: With a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free pre-school education for such children.”

55. The appropriate government for the purposes of section 11 is the state government concerned. Notably, this does not impose a mandatory obligation on the government, without which accountability regarding the obligations of the government, and their content, is left to the whims and fancies of political will.<sup>103</sup> To give effect to section 11 of the RTE Act, provisions have been made by some state governments to conduct pre-primary schools for children above the age of three years in the Anganwadi centres. As mentioned earlier, it is the duty of the Anganwadi workers to provide a pleasant educational environment, assess the growth of children and the duty of the state government to run pre-primary schools for children in the age group of 3 to 6 years. The educational activity of running pre-school is an integral part of Anganwadi centres. The workers who are managing the Anganwadi centres have a duty to look after pre-primary schools as well.

#### d) Government Schemes and Policies

##### i) *Integrated Child Development Services Scheme*

56. The network and vision built by India's Integrated Child Development Services (ICDS) scheme are commendable in terms of scope. Since its inception in 1974, ICDS has grown from a network of 33 UNICEF-funded programmes to nearly 1.4 million Anganwadi centres that provide a package of health and pre-school services to ten million beneficiaries. This is by far the largest network in the world. However, it lacks service quality, particularly in the area of ECCE.<sup>104</sup> India's ECCE quality trails behind the rest of the world, placing last out of 45 nations in the Economist Intelligence Unit's 2012 ECCE quality survey.<sup>105</sup> India, unlike Brazil and

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<sup>103</sup> Law Commission of India (n 88) 55.

<sup>104</sup> Kyle Bardman and Rohan Sandhu, 'Making Early Childhood Education a Priority' (*Livemint*, 04 November 2018) <<https://www.livemint.com/Opinion/iY8Xbc1fz9RX0BmoUCTszI/Opinion--Making-early-childhood-education-a-priority.html>> accessed 15 June 2022.

<sup>105</sup> *ibid.*

South Africa, does not provide free early childhood care and education to children under the age of six.<sup>106</sup>

57. ICDS is the world's largest early childhood care and development programme, with over 158 million children and pregnant and lactating mothers covered according to the 2011 census. According to statistics from June 2018, there were 1.36 million active Anganwadi centres dispersed across the country's districts. Frontline health workers staff these districts: one Anganwadi worker and one Anganwadi helper. The majority of these centres are in rough terrain, and these workers must journey for miles every day to fulfil their responsibilities.<sup>107</sup> Until the Supreme Court's judgment in *Maniben*, Anganwadi workers were considered 'volunteers.' The Court in this case recognised the large range of functions that Anganwadi workers perform and formalised their economic status as employees entitled to certain benefits of government employment.<sup>108</sup> However, further questions of efficacy remain despite this move to formalise Anganwadi workers. Given the diverse range of tasks expected to be carried out, often by one or two Anganwadi workers, there is a need for training, protection against exploitation and overwork.

58. The objectives of the ICDS Scheme are:

- a. to improve the nutritional and health status of children in the age-group 0-6 years.
- b. to lay the foundation for proper psychological, physical and social development of the child.
- c. to reduce the incidence of mortality, morbidity, malnutrition and school dropout.
- d. to achieve effective co-ordination of policy and implementation amongst the various departments to promote child development; and
- e. to enhance the capability of the mother to look after the normal health and nutritional needs of the child through proper nutrition and health education.

59. Notably, the Court in *Maniben* held that the ICDS programme is more than just a welfare programme; it also protects the rights of children under the age of six, such as their right to nutrition, health, and joyful learning, as well as the rights of pregnant and nursing mothers. Children's survival, well-being, and rights become social issues that affect the entire community, not just the mothers of the affected families. It also noted that 'socialised

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<sup>106</sup> *ibid.*

<sup>107</sup> *Maniben* (n 100).

<sup>108</sup> *ibid* [19].

childcare' contributes to women's liberation by easing the burden of childcare, providing a potential source of remunerated employment for women, and allowing them to form women's organisations. In view of these significant contributions of childcare to social progress, the Court emphasised that ICDS, as an institutional tool for realising these goals, deserves significantly more attention in public policy. The Court lamented that despite the ICDS institutionalising the realisation of children's and women's rights, these services are considered to be state largesse as opposed to enforceable entitlements.<sup>109</sup> It held that extending social security to the early childcare and development of millions of children in this country, as well as health and nutrition assistance to children, is a beneficial investment if we take a holistic view of the situation. Thus, the Court held that ICDS is an arm of the Ministry of Women and Child Development, and the nature of services it provides to the general public must be recognised by legislation.<sup>110</sup>

60. The importance of the early years of life for a child's optimal development was underscored by the court. Early childhood development provides the foundation for later learning, and any harm or deprivation sustained during this time is likely irreversible. These are years of acute vulnerability and enormous potential, and it is critical to offer sufficient protection, care, and stimulation to ensure the child's well-being and development. The repercussions of inadequate nourishment and care are irreversible. School enrolment and preparation are negatively impacted by poor nutrition. Undernourished children are less likely to enrol in school and, if they do, are more likely to drop out. Language, motor, and socioemotional development are all affected by a severe or chronic lack of vital nutrients in children's diets. In addition to this, the Court also held that access to safe drinking water and proper sanitation would reduce infant and child mortality drastically.<sup>111</sup> Thus, most of the Court's focus was on a nutrition-based approach to early childhood development given the prevalence of child malnutrition and the general lack of food security in India.

61. Broadly, it was held that the ICDS provides six services:

- a. supplementary nutrition
- b. pre-school non-formal education
- c. nutrition and health education
- d. immunization

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<sup>109</sup> *ibid* [20].

<sup>110</sup> *ibid* [21].

<sup>111</sup> *ibid* [22].

- e. health check-up and
- f. referral services.

62. The cost of running ICDS and Anganwadi centres is being shared by the central government and the state governments.<sup>112</sup>

ii) *The Anganwadi System*

63. Anganwadi centres were statutorily recognised and functionally defined under the NFSA 2013. Sub-section (1) of section 2 of 2013 Act reads thus: (1) ‘anganwadi’ means a childcare and development centre set up under the ICDS Scheme of the central government to render services covered under section 4, clause (a) of sub-section (1) of section 5 and section 6. Section 4 of the NFSA 2013 entitles women to ‘meal, free of charge during pregnancy and six months after the childbirth, through local Anganwadi, so as to meet the nutritional standards specified in schedule II of the Act.’

64. The ICDS scheme implemented through Anganwadis must ensure development, care and protection of children through cross-cutting policies and programmes, spreading awareness about their rights and facilitating access to learning, nutrition, institutional and legislative support for enabling them to grow and develop to their full potential.

65. Thus, Anganwadi centres have the responsibility of implementing some of the most important and innovative provisions of the NFSA 2013 Act. They perform a salient role in discharging the statutory obligation of the state to provide nutritional support to pregnant women, lactating mothers and children in the age group of 6 months to 6 years.<sup>113</sup> A free meal is provided to pregnant mothers during pregnancy and 6 months after childbirth through the Anganwadi centres. In case of children in the age group of 6 months to 6 years, an age-appropriate free meal is to be provided in Anganwadi centres. In addition, the important duty of providing free meals to children who suffer from malnutrition has been entrusted to Anganwadi centres. The free meals to be provided through Anganwadi centres must satisfy the nutritional requirements and standards specified in schedule II of the 2013 Act. Therefore, under sub-section (2) of section 5, there is a provision that every Anganwadi centre shall have a proper facility for

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<sup>112</sup> *ibid* [59].

<sup>113</sup> *ibid* [65].

cooking meals, drinking water and sanitation. Another important statutory responsibility assigned to local Anganwadi centres is to identify children who are malnourished so that free meals can be delivered to them. Because AWWs and AWHs are the backbone of Anganwadi centres, they bear the burden of extending benefits to beneficiaries under the NFSA 2013 Act. Anganwadi centres are responsible for ensuring the healthy development of children aged 6 months to 6 years, as well as those who are malnourished.

66. The Supreme Court in *Maniben* introduced the onerous duties and functions assigned to Anganwadi workers (AWWs) as follows:

- a. The AWWs shall carry out the survey within their area of duty and shall update the record regularly by taking note of the occurrence of new events.
- b. Apart from providing health and nutrition services to the children within their jurisdiction, AWWs are under a duty to monitor the growth-development of all children. They are also under an obligation to identify severely malnourished children and children in need of medical attendance.
- c. AWWs have a duty of monitoring the growth of the children in the age group of 0 to 3 years, including monitoring their weight. They are responsible for maintaining a growth chart for measuring the child's individual growth. They must identify children who are significantly underweight and take special care of such children.
- d. To make four follow-up visits every fortnight to the children rehabilitated at Children Malnutrition Treatment Centres/Nutrition Rehabilitation Centres and ensure that the said children get supplementary food at Anganwadi centres.
- e. AWWs are also required to cater to vaccination services with the help of Asha workers. They are also duty-bound to undertake activities relating to health, nutrition, and hygiene education.
- f. They are responsible for following safety and hygiene norms in respect of food materials in Anganwadi centres.
- g. AWWs must make home visits at least three times a week and meet children below the age of 3 years, pregnant women, and lactating mothers.
- h. With a view to ensuring public participation in the activities of Anganwadis, they are required to celebrate various special days on all four Tuesdays.
- i. It is the duty of the AWWs to identify disabled children or children with slow growth and provide referral services to them by referring them for health screening.

- j. AWWs are required to conduct pre-primary education activities for the children of the age group of 3 to 6 years following pre-school timetable and using preschool kit.
- k. Appendix-1 provides for AWWs attending meetings of various committees.
- l. The AWWs are required to look after the implementation and coordination of various other services under various government schemes.
- m. Their duties are to carry out Aadhar registration of the children attached to Anganwadis.<sup>114</sup>

iii) *The Prime Minister's Overarching Scheme for Holistic Nourishment (POSHAN) 2.0*

67. The Ministry for Women and Child Development inaugurated POSHAN 2.0, urging all Aspirational Districts to establish a Poshan Vatika (nutrition garden) during the Nutrition Month (Poshan Mah) from 1 September 2021. The POSHAN mission places special attention on Severe Acute Malnourished (SAM) children. This is an umbrella scheme covering the ICDS, Anganwadi Services, POSHAN mission, the Scheme for Adolescent Girls and the National Creche Scheme.
68. It was announced in the Central Budget 2021-22 by merging supplementary nutrition programmes and the POSHAN mission (National Nutrition Mission 2018). The scheme was launched in the Central Budget 2021-22 to strengthen nutritional content, delivery, outreach and outcome, with a renewed emphasis on establishing practices that nurture health, wellness and immunity to disease and malnutrition in the country.
69. As per a Report by the Associated Chambers of Commerce and Industry (ASSOCHAM) in India, children suffering from malnutrition earn 20% less after growing up than those who have had healthy childhoods and India is home to the largest number of malnourished children globally.<sup>115</sup> The study also noted that approximately 39% of India's children are stunted, 37% are underweight, 21% are wasted, and 8% are severely acutely malnourished.<sup>116</sup> Thus, notwithstanding these government schemes, the health and nutrition needs of the most marginalised children in the country continue to remain unmet.

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<sup>114</sup> *ibid* [69].

<sup>115</sup> Cheryl Tay, 'Half of the World's Undernourished Kids Live in India as Debate About RUTFs Rumbles On' (*Nutraingredients-Asia*, 09 November 2017) <<https://www.nutraingredients-asia.com/Article/2017/11/09/Half-of-world-s-under-nourished-kids-live-in-India-as-debate-around-benefits-of-RUTFs-rumbles-on>> accessed 15 June 2022.

<sup>116</sup> *ibid*.

70. *Saksham Anganwadi* — The Indian Finance Minister Nirmala Sitharaman, in her 2022 Budget speech noted that ‘Saksham Anganwadis are new generation Anganwadis that have better infrastructure and audio-visual aids powered by clean energy and providing an improved environment for early childhood development.’<sup>117</sup>
71. *National Education Policy 2020* (NEP) – Under the NEP, there was a proposal to make ECCE available to children hailing from socio-economically disadvantaged backgrounds. It was also provided that ECCE will be extended through Anganwadi centres.<sup>118</sup>

**B. AT WHAT AGE OR STAGE IN A YOUNG CHILD’S DEVELOPMENT SHOULD A CHILD HAVE A RIGHT OF ACCESS TO EARLY LEARNING OPPORTUNITIES? IS IT LIMITED TO TWO YEARS OF PRE-SCHOOL? IF SO, WHY? IF NOT, WHY NOT?**

72. While Article 45 of the Constitution required that the state offer free education to all children under the age of 14, the 86<sup>th</sup> Constitutional Amendment Act 2002—and, later, the Right to Education Act—created a shift by defining education as a right for children aged six to fourteen. This effectively relieved the state of its responsibility to offer high-quality early childhood education to children aged 0 to 6 years.<sup>119</sup> ‘The first six years of a child’s life are globally acknowledged to be the most critical years for lifelong development...this logic underpins the necessity of pre-school education,’ notes Rajasthan’s vision on the ECCE.<sup>120</sup> India is attempting to maximise the potential of its Anganwadi network in order to increase the quality of ECCE.
73. The Anganwadi system described above covers the nutritional, educational and development needs of children aged 3-6 years.

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<sup>117</sup> Edex Live, ‘Saksham Anganwadis The Way To Go For Better Women and Child Development: Finance Minister at Budget’ (*The New Indian Express*, 01 February 2022) <<https://www.edexlive.com/news/2022/feb/01/saksham-anganwadis-the-way-to-go-for-better-women-and-child-development-finance-minister-at-budget-2-27184.html>> accessed 15 June 2022.

<sup>118</sup> Ministry of Human Resource Development, ‘National Education Policy 2020’ (Government of India 2020) <[https://www.education.gov.in/sites/upload\\_files/mhrd/files/NEP\\_Final\\_English\\_0.pdf](https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf)> accessed 15 June 2022.

<sup>119</sup> Bardman and Sandhu (n 104).

<sup>120</sup> *ibid.*

**C. IS THE ACCESS TO THE SERVICES WITHIN THE RIGHT (OR COMPONENTS OF THAT ACCESS) COMPULSORY AND/OR FREE?**

74. The access to services within the right in Anganwadi centres is free but not compulsory insofar as it is entirely possible to attend a private playschool and there are no sanctions against parents who choose not to send their child to playschool. The cost of provision of services under the ICDS are shared by the central and the state government while section 11 of the RTE imposes an obligation on the state government to run pre-schools. The section on budgetary allocation and the funding of the Anganwadi system by the state below provide a more detailed account as to who bears the monetary cost for making these services available to the beneficiaries for free.

**a) Budgetary Allocation**

75. The 2022-23 budget fails to proactively address the challenges that arose during the pandemic and exacerbated inequalities particularly in the field of children's health and nutrition.<sup>121</sup> There has been a reduction in the budget for children from 2.46 percent in 2021-22 to 2.35 percent in 2022-23, which falls far below the 5 percent recommended by the Ministry of Women and Child Development's National Plan of Action for Children in 2016.<sup>122</sup> Given that 38% of India's children aged 3-6 years are not provided any early childhood education and the existing services require qualitative upgrades, the government needs to prioritise ECE in its budget. Similarly, it is lamentable that there is no specific budget allocation for ECE in India.

76. Child development programmes, including supplementary nutrition and Anganwadi (day care) services, have witnessed a drop of 10.97% in allocation for the next fiscal 2022-23.<sup>123</sup> The share of child education in the overall Central Budget 2022-23 has witnessed only a marginal increase of 0.3 percentage points from 1.74% in the current fiscal to 1.73% for the next fiscal. Schemes for the protection and welfare of children clubbed under the Mission Vatsalaya of the Ministry

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<sup>121</sup> Save the Children, 'Save the Children Reacts to Union Budget 2022: Official Statement' (02 February 2022) <<https://www.savethechildren.in/news/save-the-childrens-reacts-to-union-budget-2022-official-statement/>> accessed 15 June 2022.

<sup>122</sup> Ministry of Women and Child Development (n 95).

<sup>123</sup> The Hindu Bureau, 'Children's Share in Budget is Lowest in 11 years' (*The Hindu*, 2 February 2022) <<https://www.thehindu.com/business/budget/childrens-share-in-budget-is-lowest-in-11-years/article38365640.ece>> accessed 15 June 2022.

of Women and Children received ₹1,472.17 crore, which is 65% more than this fiscal, but below the allocation of ₹15,000 crore in 2019-2020, prior to the restructuring of the scheme.<sup>124</sup>

#### **b) ICDS Scheme and Anganwadi System**

77. The network and vision built by India's ICDS scheme are commendable in terms of scope. Since its inception in 1974, ICDS has grown from a network of 33 UNICEF-funded programmes to nearly 1.4 million Anganwadi centres that provide a package of health and pre-school services to ten million beneficiaries. This is by far the largest network in the world. However, it lacks service quality, particularly in the area of ECCE.<sup>125</sup> India's ECCE quality trails behind the rest of the world, placing last out of 45 nations in the Economist Intelligence Unit's 2012 ECCE quality survey.<sup>126</sup> India, unlike Brazil and South Africa, does not provide free early childhood care and education to children under the age of six.<sup>127</sup>

78. As mentioned above India's ECCE programme is not compulsory. Neither are parents who choose not to enlist their children in early childhood education penalised, nor is the provision of ECCE a binding obligation on the state as is the case with the constitutionally enshrined Right to Education, which envisions compulsory education beginning at primary school. This dilutes the nature of obligation under ECCE and thus the extent to which caregivers and the state can be held accountable as duty-bearers within the question of access and quality of ECCE.

#### **QUESTION 3: WHAT ARE THE OBLIGATIONS OF THE STATE VIS-À-VIS THE PRIVATE SECTOR IN RELATION TO THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?**

79. ECCE is a priority for the National Education Policy 2020, with a 2030 target of ensuring that all children entering Grade 1 are school ready. To reflect the importance, the pedagogical and curricular framework of school instruction has been altered. Preschools will provide foundational education to children aged 3 to 6 years, preparing them for formal education beginning in Grade 1. Play-based, activity-based, and inquiry-based education are all

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<sup>124</sup> *ibid.*

<sup>125</sup> Bardman and Sandhu (n 104).

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*

encouraged in the policy document. The emphasis on developmentally suitable requirements of this age group builds on the ECCE policy 2013.

80. Preparatory Classes have been considered as a way to connect Anganwadis with primary schools. The initiative envisions training and certificate programmes for all Anganwadi and primary school personnel, mostly through digital methods, beginning with ECCE. All these initiatives are geared toward ensuring universal access to early childhood education.
81. Although the National Education Policy 2020 recognises the necessity for significant expenditures in ECCE, it makes no mention of the role that the private sector can play in achieving the 2030 target. The policy also makes no mention of private pre-school regulation. There is no timeline for implementation, and no discussion of budget allocations or inclusion in the Right to Education.

# FINLAND

## QUESTION 1: HOW DOES FINLAND DEFINE ENTITLEMENTS TO EARLY LEARNING OPPORTUNITIES AS PART OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?

### Governing Principles and Statutory Framework of Finnish Early Learning System

82. Finland conceptualises the right to early learning opportunities as a fundamental entitlement available to all children from birth until commencing primary schooling at the age of seven. Provision of early learning, qualifications required of early learning staff, and funding aspects of early learning delivery are all centrally mandated by the state, though individual municipalities differ in the additional degree of funding they provide for early learning centres. Central to the Finnish understanding of early learning is the integration of care with education. Finland refers to early learning as Early Childhood Education and Care (ECEC). As such, ECEC encompasses not only ‘goal-oriented early childhood education’<sup>128</sup> to ease the transition to primary education, but also day care and even parental care in cases where a parent chooses to stay home and receive a government payment in lieu of returning to the workforce. Though patterns of ECEC uptake in Finland indicate the increasing prominence of formalised day-care and early learning facilities - and accordingly the decreasing trend of parents choosing to receive ‘cash for care’<sup>129</sup> - this broad spectrum of options available to parents demonstrates the fundamental ‘educare’ principle of Finnish ECEC. Educare focuses on ‘the simultaneous consideration for children’s education, teaching, and care as the foundation for pedagogical activity’, rooted in a holistic conception of learning and development.<sup>130</sup> This principle recognises that children and families each have unique needs and will be suited to different types of ECEC.

83. The Finnish ECEC framework has its roots in the **Day Care Decree 1973**, which continues to mandate adult-child classroom ratios and certain governing principles. However, the **Early Childhood Education Act 2015** is now the principal statutory instrument through which

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<sup>128</sup> Jenni Salminen, ‘Early Childhood Education and Care System in Finland’ (2017) 2(5) *Nauki o Wychowaniu. Studia Interdyscyplinarne* 135.

<sup>129</sup> *ibid* 143.

<sup>130</sup> *ibid* 135.

ECEC is delivered, alongside the Core Curriculum for Pre-Primary Education 2014. Additionally, the compulsory pre-primary year of schooling (which is distinct from ECEC) is mandated by the **Basic Education Act 1998** and **Basic Education Decree 1998**, including the amendments made in 2010. Each of these instruments is explicitly premised on the values of the UNCRC, and in particular its emphasis on the child's best interest as the primary consideration, and on giving due respect to children's opinions about their education, as well as securing children's rights to equality and non-discrimination.<sup>131</sup> The ten overarching goals of the 2015 Act are directly derived from the UNCRC, on the understanding that early childhood is valuable in itself and not merely as a means to later education.<sup>132</sup> Moreover, the policy goals of the Finnish ECEC system are clearly linked not only to equal opportunities for all children, but to gender equity also. It aims to make women's equal participation in the labour force a viable option, by facilitating skilled and affordable ECEC that enables more women to return to the workforce before children reach school age; as a result, three quarters of married women with children under seven work full-time, in comparison to ninety percent of married men with children.<sup>133</sup> However, as discussed below, gender equity is less apparent within single-parent families.

84. Within this ECEC framework, pedagogical goals are delineated by the **Core Curriculum for Early Childhood Education and Care 2016**, which scales activities according to children's level of development and broadly defined age-related expectations. Due to the rigour of the Finnish ECEC framework, the qualifications required of early learning staff are substantial and demand a high level of competence. Under the **Qualification Requirements for Social Welfare Professionals Act 2005**, at least one of every three educators must have a university bachelor's degree in education or social sciences, while the remaining staff must have vocational post-secondary qualifications in social work or early learning.<sup>134</sup> This is a consistent requirement regardless of the age group of children in ECEC. For the year of mandated pre-primary education (that is, all children who have turned six or are turning six by the end of the calendar year – equivalent to preschool in other jurisdictions), teachers must hold a university bachelor or master's degree in education.<sup>135</sup> Studies of Finnish ECEC provision have found that, consistent with evidence from elsewhere, teachers with advanced qualifications are

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<sup>131</sup> *ibid* 136.

<sup>132</sup> Tarja Kahiluoto, 'Integration of Education and Care in ECEC: Integration at the System Level: Finland as Example, Presentation for the OECD Early Childhood Education and Care (ECEC) Network' (*OECD Briefing*, 7 Dec 2009).

<sup>133</sup> Salminen (n 128) 138.

<sup>134</sup> *ibid* 141.

<sup>135</sup> *ibid* 143.

perceived as delivering higher-quality pedagogical leadership, enacted through targeted assessment and detailed planning for teaching and learning.<sup>136</sup>

**QUESTION 2: WHAT ARE THE STATE'S DUTIES IN RELATION TO PROMOTING AND FULFILLING THE RIGHT TO SUCH EARLY LEARNING OPPORTUNITIES?**

**A. MUST THE STATE BE THE PROVIDER OF EARLY LEARNING OPPORTUNITIES? IF SO, TO WHAT EXTENT AND CONSIDERING WHAT PARAMETERS?**

**A. State provision of early learning opportunities**

85. The contemporary Finnish ECEC system is decentralised, incorporating both public day-care centres along with private providers, as well as parental 'cash for care'. The principle behind ECEC in Finland is that all children should be able to access publicly funded early learning, though families are also afforded the choice to arrange private ECEC. Since the first public kindergarten was opened in Finland in 1888, the ethos behind ECEC provision has been one of social pedagogy, foregrounding the need to support each unique child's growth and development.<sup>137</sup> Early learning opportunities were initially targeted in particular at socially disadvantaged families, enabling children from poor homes to be cared for while their parents worked.<sup>138</sup> This social welfare-informed perspective continues to play an important role in the Finnish attitude towards ECEC today. Both public ECEC centres and private home care are managed and funded by the central government, though local municipalities play a role in determining the extent to which additional subsidies are offered beyond the minimum ECEC hours available to all children.<sup>139</sup> Additionally, since 2015, a year of pre-primary education has become mandatory for all six-year-old children in Finland, consisting of at least four hours a day or 700 hours annually.<sup>140</sup>

86. The preamble to the ECEC Act 2015 provides that early learning opportunities are to ensure equal opportunities for all children to be cared for in a safe and healthy environment. However,

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<sup>136</sup> Johanna Heikka, Leena Halttunen, and Manjula Waniganayake, 'Perceptions of Early Childhood Education Professionals on Teacher Leadership in Finland' (2018) 188 *Early Child Development and Care* 143.

<sup>137</sup> Sisko-Liisa Hänninen and Siiri Valli. *Suomen lastentarhatyön ja varhaiskasvatuksen historia [History of Finnish Kindergartens and Early Childhood Education and Care]* (Otava 1986).

<sup>138</sup> Salminen (n 128) 137.

<sup>139</sup> *ibid* 138.

<sup>140</sup> *ibid* 143.

as Salminen asserts, ‘the variation in circumstances under which ECEC is being delivered in municipalities is large.’<sup>141</sup> As well as regional variation, this divergence is particularly marked in the case of single parent families. Ronka finds that the provision of ECEC in nonstandard hours, for example to accommodate a single-parent’s work arrangements, is marked by stereotyping from ECEC providers.<sup>142</sup> Such ‘flexibly scheduled’ ECEC - in which single-parent families and lower-educated parents are overrepresented - is characterised by greater challenges in administration and delivering pedagogy suited to children’s needs, according to ECEC providers.<sup>143</sup> Thus, although ECEC is publicly funded and available to all children in Finland, it may yet contend with obstacles in delivering early learning on grounds of substantive equality.

87. Similar issues are liable to arise in the case of immigrant families in Finland. As Lastikka remarks, there is an acute need for ‘the development of more inclusive and supportive ECEC practices.’<sup>144</sup> Specifically, she demands greater attention to promoting dialogue, nurturing cultural and linguistic diversity, and encouraging cooperative partnerships between families and ECEC providers, in order to provide children from immigrant and minority ethnicity families with the individualised learning support to which they are equally entitled.<sup>145</sup> Likewise, children with Special Educational Needs are not as well-supported in ECEC as their neurotypical peers. As Heiskanen comments, ‘even when the focus of [ECEC] documentation should be pedagogical, the descriptions of children’s SEN commonly describe a child’s individual deficits as a source of educational problems.’<sup>146</sup> She focuses critically on the need for ECEC records to position children in a more pedagogically focused way, in order to promote discourses of inclusivity and respect towards children with SEN. Thus, despite the universal availability of publicly funded ECEC to children in Finland, real equality of opportunity continues to pose challenges.

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<sup>141</sup> *ibid* 151.

<sup>142</sup> Anna Rönkä, Leena Turja, Kaisa Malinen, Mia Tammelin, and Marjatta Kekkonen, ‘Flexibly Scheduled Early Childhood Education and Care: Experiences of Finnish Parents and Educators’ (2019) 39 *Early Years* 376.

<sup>143</sup> *ibid* 390.

<sup>144</sup> Anna-Leena Lastikka and Lasse Lipponen, ‘Immigrant Parents’ Perspectives on Early Childhood Education and Care Practices in the Finnish Multicultural Context’ (2016) 18(3) *International Journal of Multicultural Education* 75.

<sup>145</sup> *ibid*.

<sup>146</sup> Noora Heiskanen, Maarit Alasuutari, and Tanja Vehkakoski, ‘Positioning Children with Special Educational Needs in Early Childhood Education and Care Documents’ (2018) 39(6) *British Journal of Sociology of Education* 827.

**B. AT WHAT AGE OR STAGE IN A YOUNG CHILD'S DEVELOPMENT SHOULD A CHILD HAVE A RIGHT OF ACCESS TO EARLY LEARNING OPPORTUNITIES? IS IT LIMITED TO TWO YEARS OF PRE-SCHOOL? IF SO, WHY? IF NOT, WHY NOT?**

**a) Parameters of Early Learning Provision in Finland**

*i) Length of ECEC attendance*

88. Within Finland, the provision of ECEC is defined by two overarching policy goals: the first is premised on employment, as children's ECEC attendance facilitates parents returning to work; the second is education-focused, asserting that it is in children's best interest to receive early learning opportunities. Salminen remarks that the younger children are, the more emphasis is placed on employment policy, while older children's ECEC attendance is typically seen through the perspective of educational goals.<sup>147</sup> Since the introduction of a mandatory year of pre-primary education in 2015 for six year-old children, a greater number of children have been attending complementary ECEC before and after the obligatory four-hour educational programme.<sup>148</sup> Shah finds that among low-income children, attending publicly-funded preschool for two years rather than one year has a statistically significant effect on executive function and academic outcomes in the first two years of school.<sup>149</sup> In the Finnish context, the publicly-funded provision of ECEC means that children may take advantage of up to five years of care and learning, though this decision rests with the family: the holistic conception of child development adopted in Finnish early learning places emphasis on collaboration between parents and ECEC providers, so that each child's development remains paramount.<sup>150</sup> This 'child-centred' ethos reflects the belief that the child themselves has the qualified right to self-determination, and that their own voice should be listened to in making determinations about ECEC, such that they may develop the skills to become an ethically responsive future citizen.<sup>151</sup>

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<sup>147</sup> Salminen (n 128) 138.

<sup>148</sup> *ibid.*

<sup>149</sup> Harshini K Shah, Celene E Domitrovich, Nicole R Morgan, Julia E Moore, Brittany R Cooper, Linda Jacobson, and Mark T Greenberg, 'One or Two Years of Participation: Is Dosage of an Enhanced Publicly Funded Preschool Program Associated with the Academic and Executive Function Skills of Low-Income Children in Early Elementary School?' (2017) 40(3) *Early Childhood Research Quarterly* 123.

<sup>150</sup> Salminen (n 128) 136.

<sup>151</sup> *ibid.* See also Jyrki Reunamo and Liisa Suomela, 'Education for Sustainable Development in Early Childhood Education in Finland' (2013) 15(2) *Journal of Teacher Education for Sustainability* 91.

### QUESTION 3: WHAT ARE THE OBLIGATIONS OF THE STATE VIS-À-VIS THE PRIVATE SECTOR IN RELATION TO THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?

#### A. Funding ECEC: Public and Private

89. The robust welfare provision common to all Nordic states, premised on ‘the state’s responsibility for its citizens,’<sup>152</sup> governs the funding of early learning in Finland. The central government now has primary responsibility for this delivery, though local government also plays a significant role. In 1990, all children up to three years old became entitled to free day-care for forty hours per week provided by their local municipality, or to ‘cash-for-care’ subsidies for parents who chose to care for their children at home.<sup>153</sup> In 1996, these entitlements extended to children up to the beginning school age of seven.<sup>154</sup> This universal, unconditional right to early learning remained in force until 2015, at which time national budget cuts halved the entitlement to only twenty hours per week.<sup>155</sup> Yet, across Finland, local governments have differentially decided whether or not to contribute their own funding to subsidise this reduction in ECEC hours, resulting in a patchwork of different approaches towards this right to early learning across Finland’s cities and municipalities.<sup>156</sup> Moreover, since 2015, ECEC has been differentiated on the basis of family income, with households above a certain threshold being required to contribute to the costs of ECEC, though these provisions also vary between local governments.<sup>157</sup> Since these changes were introduced, the proportion of children attending private ECEC has increased (though now still comprising only 16 percent of children), while those in home-based care has decreased.<sup>158</sup> Thus, while the national framework and curricula for early learning opportunities have been standardised across Finland by the new regulatory architecture, a growing divide between public and private ECEC is emerging.<sup>159</sup>

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<sup>152</sup> Salminen (n 128) 138.

<sup>153</sup> Miho Taguma, Ineke Litjens, and Kelly Makowiecki, ‘Quality Matters in Early Childhood Education and Care: Finland’ (OECD Publishing 2012).

<sup>154</sup> *ibid.*

<sup>155</sup> Salminen (n 128) 137.

<sup>156</sup> *ibid.*

<sup>157</sup> *ibid.* 139.

<sup>158</sup> *ibid.*

<sup>159</sup> *ibid.* 143.

90. Yet despite these obstacles, Salminen contends, “[T]he main strength of the Finnish ECEC system lies in providing integrated education, teaching, and care for all children under school age in varying, accessible forms, from which parents guardians can choose the best alternative for their family. Furthermore, qualified staff and a normative curriculum ... lead to purposeful delivery of pedagogically oriented ECEC ... [with] a holistic approach toward learning and development.”<sup>160</sup>

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<sup>160</sup> *ibid* 150.

# BRAZIL

## QUESTION 1: HOW DOES BRAZIL DEFINE THE ENTITLEMENTS TO EARLY LEARNING OPPORTUNITIES AS PART OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?

### a) Basic Structure of Early Learning Opportunities

91. Within the Federal Constitution of 1988, under the Chapter ‘Education, Culture and Sports’,<sup>161</sup> early learning opportunities are detailed in Article 208, subsection IV, stating that the State must ensure, ‘infant education to children of up to 5 (five) years of age in day-care centres and pre-schools’.<sup>162</sup> Since 1996, these day-care centres have been integrated into the educational system,<sup>163</sup> as the first part of ‘basic education’. Since 2007 state funding is provided for all young children who attend public crèches or preschools.<sup>164</sup> Private sector prices are particularly dependent on geographical location.
92. Municipal education departments are mainly responsible for early childhood education, and there are 5,570 municipalities, which vary hugely in population numbers. Therefore, despite the national legislation in place, which does define the basic conditions that must be in place (including for the private sector – see below), there is not an efficient monitoring and enforcement system in place and so the municipal services can be incredibly unequal in the provisions they provide.
93. The services for ELO can be public or private and a large proportion of creche services are offered by private non-profit institutions (community, religious, and philanthropic)<sup>165</sup> that themselves are financed by public resources. The organisation, and factors such as the level of qualifications of teachers, vary widely between different municipalities and between public and private providers.

### b) Legal Developments

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<sup>161</sup> Brazilian Constitution Chapter III.

<sup>162</sup> *ibid* art 208, ss IV.

<sup>163</sup> Maria Malta Campos, ‘Curriculum and Assessment in Brazilian Early Childhood Education’ in Marilyn Fleer and Bert van Oers (eds) *International Handbook of Early Childhood Education* (Springer 2018).

<sup>164</sup> Federal Law No 11,494 (20 June 2007).

<sup>165</sup> Campos (n 163) 1149 – 1150.

94. Brazil also ratified the UNCRC in 1990. In the decades that followed, several pieces of legislation were enacted that further developed children's rights. Most notable of these were the **Statute on the Child and the Adolescent (ECA)**<sup>166</sup>, and the first federal state level law on ECD<sup>167</sup> which created the Better Early Childhood (Primeira Infância Melhor, PIM) programme.

95. In 2016 **Law No 13,257** (the Legal Framework for ECD) was approved and became law.<sup>168</sup>

Rather than defining new entitlements,<sup>169</sup> this modifies the existing legislation that protects children. Key modifications include:

- a. Putting in place public policies such as conditions to guarantee children's rights in early childhood.
- b. Introducing new areas where public policies can be developed such as health, food and nutrition, children's education, family and community coexistence, social assistance to the child's family, culture, play and leisure, and space and environment.
- c. Extending the action of the state beyond public childcare institutions to include services delivered in the family home and community settings.<sup>170</sup>

## **QUESTION 2: WHAT ARE THE STATE'S DUTIES IN RELATION TO PROMOTING AND FULFILLING THE RIGHT TO SUCH EARLY LEARNING OPPORTUNITIES?**

### **A. MUST THE STATE BE THE PROVIDER OF EARLY LEARNING OPPORTUNITIES? IF SO, TO WHAT EXTENT AND CONSIDERING WHAT PARAMETERS?**

96. Education in Brazil is a right for all under the Federal Constitution and there it is a government's duty to provide. This duty is shared between the different branches that comprise the federacy: Union (federal government), states, federal district and municipalities.<sup>171</sup>

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<sup>166</sup> Statute of the Child and Adolescent, Law No 8.069 (13 July 1990) <<https://www.refworld.org/docid/4c481bcf2.html>> accessed 16 May 2022.

<sup>167</sup> State Law No 12,544 (3 July 2006) which institutes the Better Early Childhood Program and other measures, updated by State Law No. 14,594 (28 August 2014).

<sup>168</sup> Law No 13,257 (8 March 2016).

<sup>169</sup> Pedro Sanjurjo, Miriam Broeks, Mafalda Pardal, Emma Leenders and Emma Disley, 'Advocacy Efforts in Brazil to Extend the Recognition of Children's Rights in Early Childhood: A Case Study' (RAND Corporation and Bernard van Leer Foundation 2021).

<sup>170</sup> *ibid* 1-2.

<sup>171</sup> Yoshie Kaga, John Bennett, and Peter Moss, 'Caring and Learning Together: A Cross-national Study of Integration of Early Childhood Care and Education within Education' (UNESCO 2010).

The municipality's educational support is mostly aimed at early childhood and elementary education; therefore, the responsibility is at municipal level to make and implement policies of early childhood education services and management of them. On the contrary, for older children in secondary education and beyond, the primary responsibility lies with the state or federal government.

97. The **Fund for the Development of Basic Education and Appreciation of the Teaching Profession** (Fundo de Manutenção e Desenvolvimento da Educação Básica e de Valorização de Profissionais de Educação (FUNDEB)) was created in 2006 and is the national body which finances all elementary education. The main objective of FUNDEB is to redistribute resources related to education (including early learning) across the country, considering the economic and social needs of the different regions. This is designed to act as an equalizer to ensure equal quality (through funding) to different regions of the country. FUNDEB specifically pays municipalities for enrolling children in Early Childhood Education.
98. However, despite these efforts, the quality of ECD centres still varies dramatically across different regions in terms of infrastructure, teacher quality, activities, and spending per pupil.<sup>172</sup> While more than half (51%) of 0–3-year-olds from the most affluent quintile of the population were enrolled in some form of early childhood education, the comparable figure for the poorest quintile was only 26%.<sup>173</sup>
99. Similarly, 38% of 0–3-year-olds in urban areas were enrolled, compared with only 21% of their rural counterparts.

**B. AT WHAT AGE OR STAGE IN A YOUNG CHILD'S DEVELOPMENT SHOULD A CHILD HAVE RIGHT OF ACCESS TO EARLY LEARNING OPPORTUNITIES? IS IT LIMITED TO TWO YEARS OF PRE-SCHOOL? IF SO, WHY? IF NOT, WHY NOT?**

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<sup>172</sup> David Evans and Katrina Kosec, 'Early Child Education: Making Programs Work for Brazil's Most Important Generation' (World Bank Group 2012).

<sup>173</sup> Organisation for Economic Cooperation and Development, *Education in Brazil: An International Perspective* (OECD Publishing 2021). See also Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira (INEP), 'Published Statistical Synopsis of ENCCEJA in Infographics' (2020) <<https://www.gov.br/inep/pt-br>> accessed 15 June 2022.

100. The Legal Framework for ECD notes that ‘Article 2 For the purposes of this Law, early childhood is considered to be the period that covers the first 6 (six) complete years or 72 (seventy-two) months of the child’s life.’<sup>174</sup>

101. Brazil divides its education system into basic and higher levels. Early childhood education is part of the basic level. The right to of access includes the year 0-4, early childhood education development (i.e., creches and daycentres) and pre-school between the ages of 4-6. The starting age in Brazil for formal education has been decreasing over time, from seven prior to 1996 to six in 2007, and finally—by constitutional amendment—to four in 2009.<sup>175</sup> Brazil’s school starting age is now among the youngest in the world.

### **C. IS THE ACCESS TO THE SERVICES WITHIN THE RIGHT (OR COMPONENTS OF THAT ACCESS) COMPULSORY AND/OR FREE?**

102. Access to 0-4 early childhood education development services is not compulsory. Compulsory schooling begins at 4 years old with pre-school.<sup>176</sup> All education at any stage, including 0-6 years old is free. Transportation, food, and educational materials will also be provided for children at all stages of basic education.<sup>177</sup>

### **QUESTION 3: WHAT ARE THE OBLIGATIONS OF THE STATE VIS-À-VIS THE PRIVATE SECTOR IN RELATION TO THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?**

103. The Constitution of the Federal Republic of Brazil establishes the possibility for private actors to be part of Brazil’s educational system. This is regulated by the 1996 Law on National Education Guidelines and Framework<sup>178</sup> and applies to all education from Early Childhood to tertiary education. Educational institutions under this framework are divided into public,

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<sup>174</sup> Law No 13,257 (n 168).

<sup>175</sup> Evans and Kosec (n 172).

<sup>176</sup> Law No 12,796 (4 April 2013).

<sup>177</sup> O Globo, ‘País terá que matricular filhos de 4 anos na pré-escola’ (*O Globo*, 5 April 2013) <<https://oglobo.globo.com/brasil/educacao/pais-terao-que-matricular-filhos-de-4-anos-na-pre-escola-8036261>> accessed 15 June 2022.

<sup>178</sup> Law No 9,394 (20 December 1996) as amended last in 2019.

private and community.<sup>179</sup> Private can include both for profit and not for profit institutions, the definition of private schools is those ‘owned, managed, and financed by private actors, including individuals or legal entities’.<sup>180</sup> Additionally, under the Constitution (Article 213) public resources can be allocated to denominational or philanthropic schools, as defined by law, which demonstrates non-profit purpose and invests their financial surpluses. A non-state educational institution wishing to receive state funds must apply in its corresponding jurisdiction.

### **a) Home-schooling**

104. There is no specific legislation relating to home-schooling at any age. A decision by the Federal Supreme Court in 2018 ruled that because of this lack of regulation, home-schooling cannot be considered a lawful means for parents to provide education to their children<sup>181</sup> (this applies from age four onwards, as this is the age compulsory schooling begins).

### **b) Regulation of private sector providers**

105. The Municipalities are responsible for recognising and authorising all non-state early childhood education providers. Every provider must comply with the 1988 Federal Ordinance No 321 and the guiding principles of the 2006 MEC (Ministry of Education) ‘Basic Infrastructure Parameters for Early Childhood Education’.<sup>182</sup> This establishes the norms and minimum standards for the construction, installation, and operation of day-care centres throughout the country. Requirements included in the guiding principles are demonstrating legal registration, financial capabilities, pedagogical requirements, and compliance with infrastructure requirements.

106. Non-state early childhood education centres have the flexibility to accommodate their curricular plans and learning standards but must comply with the National Curriculum

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<sup>179</sup> *ibid* art 19.

<sup>180</sup> *ibid* art 19II.

<sup>181</sup> RE 888815 (Supremo Tribunal Federal). Documents are available at: <<https://portal.stf.jus.br/processos/detalhe.asp?incidente=4774632>> accessed 15 June 2022.

<sup>182</sup> Secretaria de Educação Básica, ‘Parâmetros Básicos de Infra-estrutura para Instituições de Educação Infantil’ (Ministério da Educação 2006).

Guidelines for Early Childhood Education (DCNEI) from the National Common Curriculum Base (BNCC).

107. Teachers must meet the minimum educational requirements established to work as early childhood teachers in public or private schools. Currently, the minimum requirement for early childhood teachers is limited to secondary education.<sup>183</sup> But around 66% of pre-school teachers already meet the requirement, and the percentage of teachers with tertiary education is increasing.<sup>184</sup> Additionally, the National Early Childhood Plan (2010-2030) and the Legal Framework for ECD establish that all early childhood teachers must have a professional degree and knowledge of the most appropriate assistance practices.<sup>185</sup>
108. The 1988 Federal Ordinance No 321 establishes that authorities may inspect private childcare centres to ensure their compliance with sanitary regulations and authorization requirements.
109. Additionally, 2013 Law No 12.796, specifies that all early childhood education providers must provide a document certifying each child development and learning processes.

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<sup>183</sup> United Nations Educational, Scientific and Cultural Organization, 'Policy Review Report: Early Childhood Care and Education in Brazil' (UNESCO 2006) [3.2.20].

<sup>184</sup> *ibid.*

<sup>185</sup> Federal Law No 11,494 (n 164).

## UNITED KINGDOM

110. The differences between England, Scotland, Wales and Northern Ireland where relevant will be noted. Most of the information provided here will be on England, which has the highest population of young children, and the most data available in order to discern state obligations and provision of early learning opportunities.

### QUESTION 1: HOW DOES THE UNITED KINGDOM DEFINE THE ENTITLEMENTS TO EARLY LEARNING OPPORTUNITIES AS PART OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?

111. The UK has a statutory framework for the **Early Years Foundation Stage (EYFS)**, which sets the standards for learning, development, and care for children up to the age of five. This framework is mandatory for all Early Years providers in England (since 1 September 2021). Learning and development requirements for Early Years providers are given legal force by an Order made under section 39(1)(a) **Childcare Act 2006**. Safeguarding and welfare requirements are given legal force by Regulations made under section 39(1)(b) Childcare Act 2006. The EYFS framework stipulates seven prioritised areas of learning which children are expected to have developed by age five. These are split into prime areas, which includes: communication and language; physical development; and personal, social and emotional development. Specific focus areas are literacy; mathematics; understanding the world; and expressive arts and design. Overall, there are seventeen ‘Early Learning Goals’, feeding into each of these prioritised areas, which includes listening and attention, making relationships, health and self-care, reading and writing, numbers, people and communities, and being imaginative.

112. Both Scotland and Wales are governed by different Early Years Frameworks. In Scotland, the early years framework includes a ‘Curriculum for Excellence’, with areas including expressive arts, health and wellbeing, mathematics, literacy, and moral education. In Wales, there is a statutory curriculum for all 3–7-year-olds called the ‘Foundation Phase’, focusing on seven areas of learning: personal and social development; well-being and cultural diversity;

language, literacy and communication skills; mathematical development; Welsh language.<sup>186</sup>  
This curriculum was updated in March 2022.

113. There is no specific pedagogical approach which the UK follows in terms of early learning opportunities. It focuses on ‘best practices’, and the EYFS framework in England recognises the importance of play-based activities and a balance of adult-led and child-initiated activities. In the UK generally, there is a focus on ‘school readiness’ and giving children the ‘best start in life’ when designing early learning opportunities.

**QUESTION 2: WHAT ARE THE STATE’S DUTIES IN RELATION TO PROMOTING AND FULFILLING THE RIGHT TO SUCH EARLY LEARNING OPPORTUNITIES?**

**A. MUST THE STATE BE THE PROVIDER OF EARLY LEARNING OPPORTUNITIES? IF SO, TO WHAT EXTENT AND CONSIDERING WHAT PARAMETERS?**

114. Early learning opportunities in the UK are a ‘mixed economy’ comprising private, voluntary and independent sectors, which mostly provide government and parent-funded early childhood education. There are also state-funded nurseries and early years provision within state-funded schools.<sup>187</sup> In England, the majority of two to- three-year-olds attend a setting run by private and voluntary providers, which are state-funded. From age three onwards, children move to maintained nurseries, as these settings provide children with an easier transition to compulsory schooling.<sup>188</sup> Funding for early learning opportunities will be discussed further in question 3. On special educational needs (SEN): in England, the EYFS requires that non-maintained providers have arrangements in place for meeting children’s SEN. Equal opportunities are to be promoted, and arrangements must be in place for identifying children’s additional needs. This is similar within Scotland, Wales and Northern Ireland.

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<sup>186</sup> Early Years Wales, ‘Foundation Phase’ <<https://www.earlyyears.wales/en/foundation-phase>> accessed 16 May 2022.

<sup>187</sup> Anita Patel, ‘Childcare Providers and Inspections (Ofsted 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/788928/Childcare\\_providers\\_and\\_inspections\\_main\\_findings\\_as\\_at\\_31\\_December\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788928/Childcare_providers_and_inspections_main_findings_as_at_31_December_2018.pdf)> accessed 16 May 2022.

<sup>188</sup> These stats are not as readily available for Scotland, Wales and Northern Ireland.

**B. AT WHAT AGE OR STAGE IN A YOUNG CHILD'S DEVELOPMENT SHOULD A CHILD HAVE A RIGHT OF ACCESS TO EARLY LEARNING OPPORTUNITIES?**

115. Within England, Scotland, Wales and Northern Ireland, general access to early learning opportunities begins at age three, though in special circumstances, children aged two may also access early childhood education. There is no entitlement for free provision of early learning opportunities below the age of two; but in England, parents may choose to use Tax-Free Childcare or the childcare element of Universal Credit to fund early learning opportunities. This is discussed in more detail under Question 2(c).

116. Participation in early learning opportunities below the age of five remains entirely voluntary in the UK, but most children attend some form of full or part-time early childhood education. According to the Department for Education, 90% of three and four-year-old children were registered to receive funded early education in the UK in 2021 (the next update is due in June 2022).<sup>189</sup> This fell from 93% in 2020. 62% of eligible two-year-old children were registered to receive funded early learning opportunities, which fell from 69% in 2020. As a result, in contrast to states such as Finland, participation in early childhood education is decreasing overall in the UK.

**C. IS THE ACCESS TO THE SERVICES WITHIN THE RIGHT (OR COMPONENTS OF THAT ACCESS) COMPULSORY AND/OR FREE?**

117. Unfortunately, there is a great inequality of access to early learning opportunities for children in the UK. As reported by the Organisation for Economic Cooperation and Development (OECD) in 2018, children reported as White represented over 80% of all children under the age of five in State-funded ECEC in England. Children reported as Asian made up around 11%, and children reported as Black made up around 7%.<sup>190</sup> The vast majority of these children live in urban areas. In the UK, these children are more likely than the overall

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<sup>189</sup> United Kingdom Department for Education, 'Education Provision: Children Under 5 Years of Age' <<https://explore-education-statistics.service.gov.uk/find-statistics/education-provision-children-under-5/2021>> accessed 16 May 2022.

<sup>190</sup> Organisation for Economic Cooperation and Development, 'Early Learning and Child Wellbeing in England' (OECD iLibrary) <<https://www.oecd-ilibrary.org/sites/bb65d5dc-en/index.html?itemId=/content/component/bb65d5dc-en>> accessed 16 May 2022.

population to be in a low-income household (defined as a household income below GBP 15,400 or less (Universal Credit) or GBP 16,190 or less (Working Tax Credit). This figure sits around 4.5 million children.<sup>191</sup>

118. Within England, the Childcare Act 2016 regulates access to early learning opportunities. All 3-4-year-olds are entitled up to 570 hours of free early education per year, which is often split into 15 hours per week over 38 weeks. Children whose parents or carers are working, or children who are placed in foster care, are entitled to 30 hours of free early education a week over 38 weeks. 3-4-year-olds have a 'universal entitlement' to free early education. For 2-year-olds, children and parents/carers must meet specific eligibility criteria in order to qualify for a free early education place, and it is up to the local authorities to ensure that eligible children are allocated a free place. This specific eligibility criteria includes whether the child comes from a low-income family, or whether they have special educational needs. At age 5, children reach compulsory school age. Before this point, it is voluntary whether children receive early education.

119. Within Wales, access is slightly different. The Welsh Government has a 'childcare offer' which means that eligible parents and carers of 3-4-year-old children can access 30 hours of free early education/childcare, which is split into a minimum of 10 hours of early education per week and a maximum of 20 hours a week of childcare, over 48 weeks of the year. Under 3-year-olds do not have a universal publicly funded provision for early education and childcare/ development, but the 'Flying Start' programme includes family support (alongside childcare) for the most disadvantaged 2-year-olds. (This is governed by the Education (Nursery Education and Early Years Development and Childcare Plans) (Wales) (Amendment) Regulations 2005)).

120. In Scotland, access also differs slightly. Governed by the **Children and Young People (Scotland) Act 2014**, children aged 3-5 are eligible for 1140 free hours of early education per year (38 weeks). Eligible 2-year-olds are also eligible for the same number of hours. Age 5 in Scotland is also the compulsory school age. It is up to local education authorities to choose the method by which it makes early learning and childcare available.

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<sup>191</sup> *ibid.*

121. The offer of early learning opportunities is much more rigid in Northern Ireland. Parents of 3-4-year-olds can apply to receive 12.5 hours free early education per week, and the entitlement must be taken over 2.5 hours a day, five days a week during term time. In Northern Ireland, the compulsory schooling age is 4, making them slightly different to England, Scotland and Wales.

122. Within England, Scotland, Wales and Northern Ireland, local authorities are delegated with the task of providing early learning services free of charge (dependent upon the differences in eligible hours). The UK's Department for Education has overall responsibility and articulates to local authorities the aims of early learning, as discussed previously.

### **QUESTION 3: WHAT ARE THE OBLIGATIONS OF THE STATE VIS-À-VIS THE PRIVATE SECTOR IN RELATION TO THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT?**

123. The EYFS framework sets the requirements for early childhood education in terms of learning and development areas, early learning goals and assessment arrangements, as well as the statutory safeguarding and welfare requires. This applies to all maintained school, non-maintained schools, independent schools, providers on the Early Years Register, and providers registered with an early years childminder agency.

124. In England, there is a legal requirement to monitor the quality of early learning opportunities. This is undertaken by the Office for Standards in Education, Children's Services and Skills (Ofsted) and independent inspectors. All childcare settings must register with Ofsted.

125. In terms of financing early learning opportunities, this is done through a variety of means in the UK. The Department for Education allocates entitlement funding to local authorities so that every three- and four-year-old, as well as eligible two-year-olds, can access their entitled place in early learning. The local authorities then allocate this funding to providers. According to the OECD, the UK spends around 0.7% of its national income on early childhood and care (equivalent to around GBP 14.7 billion, or GBP 1,900 per child in the UK).<sup>192</sup> It is important to bear in mind, however, that this statistic included money spent on 5-year-olds, and other

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<sup>192</sup> Christine Farquharson, 'Institute for Fiscal Studies: Early Education and Childcare Spending' (Institute for Fiscal Studies 2020).

childcare.<sup>193</sup> In England, the Department for Education also funds other early years programmes, including ‘Sure Start’ which offers families with children under the age of 5 a ‘one-stop-shop’ for childcare and early education, health services, parenting support, and employment advice. Funding for Sure Start has fallen in recent years, from GBP 1.6 billion in 2010, to GBP 600 million in 2018.

126. On childcare and early learning opportunities at home: in the UK, there is also public support for childcare through the tax system. This can be in the form of employer-sponsored childcare vouchers, where an employee reduces their annual salary and receives the same amount in vouchers to spend on childcare, paying for childcare out of pre-tax income. Since 2018, the UK Government has introduced the tax-free childcare programme, where parents open an account on behalf of their child. Through the benefit system, the government offers support to low-income families for childcare.

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<sup>193</sup> Local Government Association, ‘Early Years Education Funding: House of Commons’ (21 July 2021) <<https://www.local.gov.uk/parliament/briefings-and-responses/early-years-education-funding-house-commons-21-july-2021>> accessed 17 May 2022.