

EXPLANATORY MEMORANDUM TO
THE CHILDCARE (DISQUALIFICATION) AND CHILDCARE (EARLY YEARS
PROVISION FREE OF CHARGE) (EXTENDED ENTITLEMENT) (AMENDMENT)
REGULATIONS 2018

2018 No. 794

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 Firstly, this instrument replaces and updates, with modifications, the Childcare (Disqualification) Regulations 2009¹ (“the 2009 Regulations”). These Regulations remove the disqualification by association element of the arrangements in non-domestic settings, and makes some minor technical changes. These Regulations also bring up to date references to legislation in England and Wales, Northern Ireland, Scotland and the Crown Dependencies of Isle of Man, Jersey and Guernsey.

2.2 Secondly, this instrument amends the Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 (the “2016 Regulations”) to extend eligibility for 30 hours to three and four year old children in foster care providing that the foster parents meet the eligibility criteria. The Regulations are intended to give foster families the same support as other families where it is consistent with the child’s care plan.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

Disqualification component

4.1 Section 75 of the Childcare Act 2006 (“the Act”) makes provision about disqualification from registration to provide childcare under Chapters 2, 3 and 4 of the Act. The 2009 Regulations made under section 75 set out the orders, determinations, offences and other grounds which result in disqualification from registration. The 2009 Regulations also provided for the Chief Inspector to waive disqualification from registration in certain circumstances, and contained a requirement to provide information to the Chief Inspector of Schools (Ofsted) about the details of any such

¹ S.I. 2009/1547.

order, determinations, convictions or other grounds for disqualification from registration. Section 76 of the Act describes the consequences of disqualification from registration.

- 4.2 When the 2009 Regulations were first laid on 29 June 2009 the same arrangements applied to childcare providers in both domestic and non-domestic settings, including schools and nurseries. These arrangements included the provision for disqualification by association (regulation 9 – Persons living or working on premises where a disqualified person lives). This provision is now considered to be unnecessary in relation to non-domestic settings, as it did not take into account the established and well observed safer recruitment and safeguarding policies in place in schools and other registered, non-domestic settings.
- 4.3 As a result of the removal of disqualification by association in non-domestic settings and because other amendments are required to the 2009 Regulations, the Department is revoking those Regulations and replacing them with a new, consolidated set using these Regulations.
- 4.4 The other changes being made relate firstly to technical changes to regulation 4 of the arrangements to increase the fairness of the legislation which currently disqualifies foster carers and those who have adopted children, as well as childcare workers who themselves were once subject to a care order.
- 4.5 Furthermore, the schedules of relevant offences and orders are updated to reflect current legislation, including references to legislation in England and Wales, Northern Ireland, Scotland and the Crown Dependencies of Isle of Man, Jersey and Guernsey.

Extension of 30 hours to children in foster care component

- 4.6 The Childcare Act 2016 places a duty on the Secretary of State to make 30 hours free childcare available for working parents of three and four year olds. The 2016 Regulations, (“the 2016 Regulations”) made under the 2016 Act, set out the eligibility criteria for 30 hours free childcare and the eligibility checking process by Her Majesty’s Revenue and Customs (HMRC). The 2016 Regulations also set out how local authorities should discharge their duty to secure 30 hours free childcare for eligible children.
- 4.7 These Regulations amend the 2016 Regulations to provide that foster children are eligible for the 30 hours free child care and set out the conditions that the foster parents must meet in order to receive 30 hours free child care for their foster child.

5. Extent and territorial application

- 5.1 The instrument extends to England and Wales.
- 5.2 The territorial application of this instrument is England only.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

Disqualification component

- 7.1 The 2009 Regulations specifically define the categories of people who are disqualified from registration as childcare providers. They also provide for the Chief Inspector to waive disqualification in certain circumstances.
- 7.2 The disqualification by association provision means that an individual can be disqualified from working in childcare because of an offence committed by someone who lives or works in their household. This means that a member of staff is unable to work in childcare even though they themselves have not committed a relevant offence. The rationale for this component of the legislation is that someone caring for young children could be under the dangerous influence of someone who lives with them.
- 7.3 Historically there have been an extremely small number of serious incidents involving the abuse of young children in early years settings, where individuals working in those settings were found to have associated with others engaged in child abuse. The Department's considered view is that the disqualification by association arrangements do not achieve their objective of protecting children in these circumstances.
- 7.4 The disqualification by association arrangements only capture those with a criminal record (or where certain child protection orders/ Ofsted decisions have been made in respect of the individual) and rely on the person in the household agreeing to share this information with the person working in childcare (and subsequently agreeing to share it with the employer). Employers cannot access the criminal record history of household members without the individual's consent. As Ofsted's data confirms, there is a significant variation in the application of the arrangements, which further suggests that they are not effective in safeguarding children.
- 7.5 Over the last three years, Ofsted data shows that in only four cases out of more than 2,000 where waiver applications have been submitted in cases of disqualification by association from individuals working in schools and other non-domestic settings, was a waiver application declined. This represents a refusal rate of less than 0.002% in cases of disqualification by association. In none of these cases was there evidence to suggest harm to children, although there was proof that individuals' understanding of, and attitude towards safeguarding was poor. In the Department's view, these are issues that employers are able to address without the need for legislation.
- 7.6 A wide range of employers and other stakeholders have questioned whether the disqualification by association arrangements are proportionate. They have also challenged their contribution to child protection, given the difficulties associated with their application and the negative impact the disqualification by association provision has in the workplace. The assessment of the majority of stakeholders, including safeguarding bodies, local authorities and trade unions, is that the disqualification by association requirements of the legislation are disproportionate to the benefits, and are unnecessary. Furthermore, the general consensus is that the wider safeguarding measures in place in these settings are well observed and understood, and that these adequately protect all children.

- 7.7 On the basis of the evidence provided, the Department is removing automatic disqualification for childcare workers in non-domestic provision (including schools, nurseries and other registered non-domestic settings) currently disqualified by association. These changes do not extend to domestic settings, where the disqualification by association arrangements will continue to remain in place.

Extension of 30 hours to children in foster care component

- 7.8 Since September 2010, all three and four year olds (including those in foster care) have been entitled to 570 hours of free early education over no fewer than 38 weeks of the year (which equates to 15 hours a week for 38 weeks of the year).
- 7.9 In September 2017, the government fulfilled its 2015 manifesto commitment to double the amount of free childcare from 15 hours a week for 38 weeks of the year to 30 hours a week for 38 weeks of the year (or 1140 hours a year) for three and four year olds of working parents. The additional free childcare is intended to enable parents to work or work more hours if they wish to and will help families by reducing the costs of childcare.
- 7.10 The Childcare Payments Act 2014 (“the 2014 Act”) enacted a new scheme known as “Tax Free Childcare” (TFC) designed to provide financial support to help working families with the costs of childcare. The eligibility criteria for the additional 15 hours broadly align with those for the Tax-Free Childcare scheme. Foster children are currently not eligible for either 30 hours free childcare or TFC as foster parents are paid to care for their foster children.
- 7.11 Parents can apply for either 30 hours free childcare or Tax-Free Childcare or both through a joint on-line application – the HMRC Childcare Service. HMRC determine whether parents meet the eligibility criteria for either or both schemes.
- 7.12 In December 2017 the then Minister for Children announced that the Department would extend eligibility for 30 hours childcare to foster parents, in certain circumstances. Children in foster care will only be eligible for the extended entitlement if the following criteria are met: That accessing the extended hours is consistent with the child’s care plan and that the foster parent and their partner (if any) are engaging in paid work outside their role as a foster parent. This ensures that the policy remains aligned to the work incentive objectives of the policy; however, the Department has not set any requirements on the number of additional hours the carer should work, only that they must be in paid work.
- 7.13 The HMRC Childcare Service (the on-line system for checking eligibility for 30 hours) cannot be adapted in the short term to include the additional eligibility checks. The Department has therefore developed parallel local delivery arrangements, based on the key principles that they must be practical and proportionate for all (social workers, local authorities, childcare providers and parents). These use existing processes wherever possible, but stand separate from the HMRC Childcare Service (at this stage) and include additional safeguards to ensure the best interests of the child are met.

Consolidation

- 7.14 The proposed changes are limited to consolidation of the 2009 Disqualification Regulations and do not amend any other instrument.

8. Consultation outcome

Disqualification component

- 8.1 The policy underpinning the 2009 Regulations was not consulted on because it replicated arrangements for disqualification, including waivers and the requirement to disclose information to the Chief Inspector which applied to childcare providers under the previous legislation (Part 3 of the Act²). In so far as the proposed changes do not reflect a change in policy, the Department has not consulted on them further.
- 8.2 The public consultation³ on three options for reforming disqualification by association, undertaken in summer 2016, received around 450 responses, almost 60% of whom favoured its removal in non-domestic settings. Responses favouring the other two options, which focussed on reforming disqualification by association rather than its removal, were more-or-less evenly split. Therefore, no compelling case was made for either of these alternatives. Our extensive pre and post consultation stakeholder engagement has confirmed the widespread support for the removal of the disqualification by association provision. Universally the message that we have received is that the disqualification by association provision is unfair and unjust to staff in non-domestic settings, where there are other well observed safeguards.
- 8.3 The consultation confirmed that the current arrangements present significant difficulties and challenges for employers in their identification of cases of disqualification by association, and when considering whether to redeploy or suspend staff during the Ofsted waiver process. This is causing significant disruption to both employers and employees, and in some cases this is resulting in disruption to family life, including, on occasion, the breakup of families. Accordingly, the disqualification by association provision is largely considered unfair, and unjust, as it is stigmatising a number of individuals who have committed no crime, and it is having a negative impact in the workplace with very little or no benefit in child protection.
- 8.4 The disqualification by association arrangements present particular complexities when recruiting staff, and are considered extremely unfair on prospective staff who are disqualified by association, when applying for work. In some cases, the implementation of the policy is also causing retention difficulties, resulting in some cases teachers, nursery workers and support staff leaving the profession.
- 8.5 The consultation confirmed that there is support for the proposed technical changes set out in the consultation. Responses were clear, that these would improve the fairness of the regime. Accordingly, regulation 4 is amended to clarify that childcare workers who are foster carers or adoptive parents who wish to work in childcare are not excluded from doing so. The amended regulation 4 also clarifies that where the person was once the subject of a care order they will not be disqualified.
- 8.6 There is a requirement in sections 59(2) and 67(2) of the Act on the Secretary of State to consult the Chief Inspector, and such other persons as he considers appropriate before making or amending regulations made under those sections. In accordance with this requirement, the Secretary of State has consulted the Chief Inspector on the proposed changes as detailed above.

² The Childcare Act 2006

³ Childcare workers: changes to disqualification arrangements consultation response

<https://www.gov.uk/government/consultations/childcare-workers-changes-to-disqualification-arrangements>

- 8.7 The Department has consulted the Devolved Administrations and the Crown Dependencies as well as other government departments to ensure that the amendments to policy provision are both rational and robust whilst improving its overall fairness. Equally, the impact on childcare providers has been considered to be more balanced, fairer and less burdensome whilst maintaining the safeguarding of the children in their care.

Extension of 30 hours to children in foster care component

- 8.8 Although the Department has not undertaken a formal consultation on extending eligibility for 30 hours free childcare to foster children, between January 2018 and May 2018, the Department informally consulted with local authorities, the Local Government Association, third sector organisations and independent fostering service providers about how best to deliver this commitment, with particular focus on eligibility criteria and delivery options. The Department has also consulted with foster parents.
- 8.9 The consultation indicated that local authorities and the sector are broadly supportive of the eligibility criteria. On the delivery options, there has been general support for placing foster parents at the centre of the process, minimising the burden on social workers and mirroring the standard 30 hours processes. Whilst there was some support for incorporating applications for children in foster care into the HMRC childcare service, stakeholders supported developing a separate system to allow the Department to implement this change in September 2018 rather than waiting for a longer-term change to the IT system.

9. Guidance

Disqualification component

- 9.1 The Department will be updating its Disqualification under the Childcare Act 2006: Statutory guidance for local authorities, maintained schools, academies and free schools⁴. The Department will also continue to provide a dedicated mailbox and helpline.⁵
- 9.2 The Chief Inspector will communicate the changes to the arrangements for waiver applications to provider organisations.

Extension of 30 hours to children in foster care component

- 9.3 There is already statutory and operational guidance⁶ for local authorities on early education and childcare. This came into effect on 1 September 2017 and sets out how local authorities should discharge their duty to secure free early education for eligible two year olds and three and four year olds and 30 hours free childcare. The statutory guidance and operational guidance have been revised to provide comprehensive

⁴ The Disqualification under the Childcare Act 2006: Statutory guidance for local authorities, maintained schools, academies and free schools is published at:

<https://www.gov.uk/government/publications/disqualification-under-the-childcare-act-2006>

⁵ Email: mailbox.disqualification@education.gov.uk or telephone: 01325 340409

⁶ The statutory guidance is published at: <https://www.gov.uk/government/publications/early-education-and-childcare--2> and the operational guidance at: <https://www.gov.uk/government/publications/30-hours-free-childcare-la-and-early-years-provider-guide>

information and advice to support local authorities on delivery of 30 hours free childcare for foster children.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument.

Disqualification component

10.2 The impact on business, charities or voluntary bodies is anticipated to provide small but significant savings to non-domestic childcare providers. There is no impact on domestic childcare providers.

10.3 No Impact Assessment has been prepared in relation to the impact on the public sector as the costs to the public sector fall below £5 million. These Regulations simplify the arrangements and update legislative references to ensure continuity.

10.4 A Regulatory Triage Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

Extension of 30 hours to children in foster care component

10.5 The instrument itself does not have a direct impact on business, charities or voluntary bodies as it places a duty on local authorities to secure 30 hours free childcare for foster children. The Family's Test has shown the impact on foster families will be positive, enabling more foster parents to work outside of the role of as a foster parent. The Public Sector and Equalities Duty has shown no disadvantage to foster parents with protected characteristics.

10.6 The impact on the public sector is minimal. The Department has completed and agreed a new burdens assessment with the Department of Housing, Communities and Local Government. This has shown minimal burdens on local government.

11. Regulating small business

11.1 The disqualification component applies to activities that are undertaken by small businesses. The proposed changes would remove some of the administrative burdens imposed on potential childcare providers by removing the need to apply for waivers from disqualification due to the disqualification by association arrangements in non-domestic settings.

11.2 The extension of 30 hours to children in foster care component does not place requirements directly on small business, as childcare providers are free to choose whether to offer any or all of the free childcare entitlements. The regulations only extend access to 30 hours free childcare to a small number of additional children (estimated to around 300 across England).

11.3 No specific action is proposed to minimise regulatory burdens on small businesses.

12. Monitoring and review

12.1 The Department for Education will continue to monitor and review the scope of the disqualification component of these Regulations. The Department will also continue to monitor and make the necessary amendments to references to legislation from other jurisdictions where they apply to the Schedules of these Regulations.

12.2 For the extension of 30 hours to children in foster care component, the Department for Education will review the implementation over the first year of delivery. Take-up of free places for two, three and four year olds is monitored through the annual early Years Census and the School Level Annual School census and is published annually in the Statistical First Release (SFR). The SFR also contains data on the providers who deliver free places and the quality of providers delivering free places. Internally, the Department will use school census and early years census data to monitor the take-up of 30 hours free childcare by children in foster care.

13. Contact

13.1 Mark Sawyer at the Department for Education, Telephone: 01325 340741 or email: mark.sawyer@education.gov.uk can answer any queries regarding the childcare disqualification component of the instrument.

13.2 Julie Laughton or Christina Bankes at the Department for Education. Telephone: 0207 783 8335 or 0207 783 8583 or email: Jobshare.bankes-laughton@education.gov.uk can answer any queries regarding early years provision free of charge extended entitlement component of the instrument.