

LANCASHIRE COUNTY COUNCIL

DISQUALIFICATION UNDER THE CHILDCARE ACT 2006

GUIDANCE FOR SETTINGS AND FAQs (OCTOBER 2018)

In August 2018, the DfE updated its statutory guidance, detailing the obligations on early years settings, schools and local authorities under the Childcare Act 2006 and the application of the Childcare (Disqualification) and Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2018. The guidance sets out the responsibilities of local authorities and settings, what they need to do to comply with the legislation, who is covered and the circumstances where staff should be directed to apply to Ofsted to waive disqualification. The guidance is available on the Gov.uk website [here](#).

The Regulations prohibit anyone who is disqualified under the Regulations, from working in a relevant setting, including in early years settings, unless the individual in question has been granted a waiver by Ofsted for the role they wish to undertake.

An employer commits an offence where it allows a disqualified individual to be employed in connection with a relevant childcare setting, unless the employer did not know or had no reasonable grounds for believing the person was disqualified.

1. What are relevant staff and relevant settings?

The following categories of staff in nursery, primary or secondary school settings are covered by the Childcare (Disqualification) and Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2018 :

- a) Staff/volunteers who work in early years' provision, providing care for a child up to and including reception age ie from birth until 1 September following a child's fifth birthday. This includes education in playgroups, nurseries and reception classes and/or any supervised activity (e.g. breakfast clubs, lunchtime supervision and after school care provided by the setting) both during and outside of usual hours;
- b) Staff/volunteers working in later years' provision provided by the School for children who are above reception age but who have not attained the age of 8. This includes before school settings, such as breakfast clubs, and after school provision but not education or supervised activities during school hours (including extended school hours for co-curricular learning activities such as the school's choir or sports teams).
- c) Staff/volunteers who are directly concerned with the management of such early or later years provision, whether supervised or not. This includes the Headteacher, and may also include other members of the School's Leadership Team, and any manager, supervisor, leader or volunteer (including Governors) responsible for the day-to-day management of the provision.

The Local Authority's advice is that settings should:

1. Identify staff/volunteers employed in connection with those settings.
2. Identify staff/volunteers involved in day to day management of those settings.
3. Carry out the required checks in relation to those identified.

It is important that settings are able to demonstrate that they have clearly considered who is in scope and their reasons for the conclusions reached. Settings should take advice from their HR Manager, Local Authority Designated Officer (LADO) or Safeguarding Officer.

For example:

Early Years settings (except for childminders) – All staff involved in the provision of care or management are covered (as described in 1a above).

Infant and Nursery Schools - All staff involved in the provision of care or management are covered (as described in 1a above).

Primary/Junior Schools - All staff employed within or involved in the management of reception classes (including mixed classes) are covered as well as those involved in before and after school childcare for children up to the age of 8 years.

Consideration should also be given to those not employed specifically in such settings but who may be required to substitute for someone who is. However, the guidance specifically states that the check should not be undertaken 'just in case.' There must, therefore be a real chance of an employee who is not specifically employed in the relevant setting being deployed to such a setting for the check to be undertaken.

Secondary Schools - will only need to undertake checks on relevant staff (including managers) where any services are provided by the school where under 8s may be in attendance e.g. childcare facilities, before or after school clubs

Other childcare providers using setting premises

In relation to staff employed by childcare providers (not employed by the setting or local authority) who hire or rent setting facilities or premises (for example a private, voluntary or independent childcare provider), settings should ensure that such providers have appropriate policies and procedures in place in regard to safeguarding children, including under the 2018 regulations.

Agency/third-party employees

Where settings use staff from any agency, or third-party organisation (for example a supply nursery nurse, music teacher or sports coach) to work in relevant childcare provision, or contract out such childcare, they must obtain confirmation that the agency or organisation providing the staff has informed them that they will be committing an offence if they are deployed to work in relevant childcare, or are directly concerned in the management of such provision, if they are disqualified under the 2018 regulations.

This should include the provider requesting that their staff inform them if they consider that they could be disqualified under the legislation.

Self-employed staff

Where the setting engages a person who is self-employed (for example a music teacher or sports coach) to work in relevant childcare provision, the setting must ensure that they are compliant with the requirements of the legislation explained in this guidance.

Caretakers, cleaners, drivers, transport escorts, catering and office staff, who are not employed to directly provide childcare, are generally not covered by the legislation.

Governors are not covered by statute, unless they volunteer to work in relevant childcare on a regular basis, or they are directly concerned with the day-to-day management of such provision. Settings may wish to consider whether undertaking such a check is appropriate depending upon the role of these individuals in the setting.

Anybody involved in any form of **health care provision for a child**, including health visitors, and local authority staff, such as speech and language therapists and education psychologists, are specifically excluded from the statutory definition of childcare, and are therefore not covered by the legislation.

2. Who is disqualified?

The criteria for disqualification under the 2006 Act and the 2018 Regulations include those set out below:

- a. inclusion on the Disclosure and Barring Service (DBS) Children's Barred List,
- b. being found to have committed certain violent and sexual criminal offences against children and adults (e.g. murder/manslaughter, kidnap, rape, cruelty to persons under 16, indecent photographs of children, indecent assault or assault causing actual bodily harm), which are listed in Table A of the 2018 statutory guidance document

Settings may find it useful to keep an up to date copy of Table A for use by staff when they are asked to make any declaration.

- c. certain orders made in relation to the care of children, including orders made in respect of their own children, listed in Table B of the 2018 statutory guidance document
Settings may find it useful to keep an up to date copy of Table B for use by staff when they are asked to make any declaration.
- d. refusal or cancellation of registration relating to childcare or children's homes, or being prohibited from private fostering;
- e. being found to have committed an offence overseas which would constitute an offence regarding disqualification under the 2018 Regulations if it had been done in any part of the United Kingdom.

The above list is only a summary of the criteria that lead to disqualification. Further details about the specific orders and offences which will lead to disqualification are set out in the 2018 Regulations.

NB The disqualification criteria relating to living in the same household where another person who is disqualified lives or is employed (disqualification 'by association') only applies where childcare is provided in domestic settings, defined as 'premises which are used wholly or mainly as a private dwelling.' It does not apply to early years settings but DOES apply to childminders.

3. What should Early Years settings do now?

Settings must ensure that they are not knowingly employing a person who is disqualified under the 2018 Regulations. They must also ensure that they do not apply these arrangements to individuals who do not fall in scope or are specifically excluded. In gathering information to make these decisions settings must ensure that they act proportionately and minimise wherever possible the intrusion into the private lives of their staff.

Settings are responsible for ensuring that anyone who falls within the relevant categories of staff described above is made aware of the legislation.

Settings must make these staff aware of what information will be required of them and how it will be used to make decisions about disqualification. Settings are free to decide how to bring these requirements to the attention of their staff.

The following actions are required:

- I. Settings need to put in place some system to seek the required disclosure from new employees prior to the commencement of employment. Whilst it is not a requirement to use a self-declaration form, the Authority has drafted a suitable form which settings may wish to use, which can be found on the Early Years document bank at www.lancashire.gov.uk/education/childcare under the heading Safeguarding.
- II. Should a declaration be made and it is not clear whether the individual should be removed from the relevant care setting, advice should be sought on whether a 'relevant' offence has been committed from Ofsted at: disqualification@ofsted.gov.uk.
- III. Anyone who is disqualified will need to be immediately removed from the relevant setting (possibly through suspension in the case of employees) and Ofsted must be notified within 14 days. The employee should be advised that Ofsted has been informed, told what information they will need to share with Ofsted and why and provided with an explanation as to the implications of disqualification.
- IV. Should the setting need to consider suspending an employee from work, the matter should be discussed with a member of the settings HR Team before any action is taken.
- V. Settings may wish to use the Annual Confirmation Form [here](#) to seek confirmation that there has been no change to employee's circumstances, in addition to seeking confirmation with regard to other safeguarding/conduct matters.
- VI. Settings must keep a record of the date on which disqualification checks were last completed. Settings may choose to keep this information as part of the single central record, or maintain a record separately. Ofsted and the independent inspectorates will check this as part of the normal setting inspection process.
- VII. Settings must be certain that the information provided is adequate, accurate and relevant to their enquiries and where information is provided in error, or is not relevant e.g. unspent caution/conviction which is not listed as a relevant offence, it should be destroyed.

Settings must ensure that any external agency providing relevant staff carry out these checks prior to placing them in the setting.

4. Disqualified Workers

A disqualified person can apply to OFSTED for a waiver. Guidance on the procedure to be followed to apply for a waiver is located on the DfE website [here](#). Any enquiries regarding the waiver application process should be made to Ofsted at disqualification@ofsted.gov.uk.

Whilst a waiver application is under consideration settings will need to decide whether it is appropriate to redeploy staff elsewhere in the setting, or make adjustments to their role to avoid them working in relevant childcare. Advice can be sought from the LADO or Early Education Safeguarding Officer. Where alternative arrangements cannot be made or it is not appropriate to do so, the setting will need to consider whether to suspend the member of staff while the waiver application is under consideration.

Where an individual decides not to apply for a waiver, or a waiver is declined, settings will have to consider and make decisions about whether the individual could be permanently redeployed, the appropriateness of redeployment (taking into consideration the risk of harm to children), or whether steps should be taken to legitimately terminate their employment. In these circumstances advice should be sought from the LADO.

Frequently Asked Questions

- 1. Is the advice that a self-declaration is sufficient or is any declaration expected to be verified wherever possible, for example by viewing a current DBS check or obtaining a new one, and are employers expected to verify the absence of any Orders or restrictions**

It is not a requirement to use a self-declaration form. Settings need to ensure that they put in place a system to seek to get the required disclosure.

It is not appropriate to re-check a DBS certificate or seek a new one, without justification for doing so.

There is no evident process for verifying if someone has a childcare order or other restriction against them.

New staff should follow the setting's agreed system of disclosure, and the DBS certificate should be checked against the list of offences in the Schedules. Of course, other offences may also lead to non-employment under normal DBS assessment processes.

- 2. How do these Regulations sit with the Data Protection Act (DPA) and the General Data Protection Regulation (GDPR), particularly in respect of sensitive personal data and the school passing information to OFSTED?**

When processing personal information it should be used fairly, lawfully and kept secure. It should be kept to a minimum, be accurate and kept up-to-date and stored for the minimum period necessary, restricted only to those who need it and for the purpose it was gathered (in this case safeguarding and child protection).

Additionally settings will need to review any historic data collected and destroy any information which is no longer required. This does not extend to records which contain information about allegations of sexual abuse or other such safeguarding concerns which settings have an obligation to preserve in line with the requirements of the inquiry into child sexual exploitation, and other child protection requirements.

It is recommended that settings ask existing staff who are working in relevant settings to complete the revised template declaration, which complies with the latest guidance and also seeks permission for the information to be retained on their personal file.

Settings should also review any declarations/information previously provided regarding individuals living in the same household, and decide whether it is still relevant e.g. If there is concern regarding the influence they might have on an employee in the setting, you may decide to retain the information on the grounds that it is in the public interest to keep records of people who may be a risk to children. If it is decided that the information provided previously is no longer relevant, the information should be confidentially destroyed.

Personal data, including any details of an individual's criminal record, and historic information collected on those living in the same household as an employee, should not be held without consent from the individual. In instances where an individual does not consent to their personal data being held, settings should only record the date the declaration was made, details of any additional safeguarding restrictions, and whether or not an Ofsted waiver has been granted. For this reason, the template declaration form provides employees with the opportunity to confirm that they give permission for the declaration to be retained.

The Childcare (Disqualification) Regulations require employers to pass relevant information to Ofsted and such statutory duties are allowed under the DPA/GDPR. It is therefore acceptable for such information to be forwarded to Ofsted, providing that the employee is informed of the reason for doing so.

3. What about contractors and agency staff?

Employers are responsible for ensuring that persons caring for children are suitable to work with children. In the case of workers that are supplied by an agency or third party organisation, settings should ensure that the agency or organisation has carried out the relevant checks.

Settings may wish to use Appendix Q to the Recruitment and Selection Guidance which can be found [here](#) to assess whether the contractor/agency's systems and procedures for the recruitment and selection of supply staff are in line with the established safer recruitment and selection best practice that is employed within a setting and what checks have been undertaken by that contractor/agency

4. How long will it take to process an application for a disqualification waiver?

The DfE have stated that it is a matter for Ofsted who have the responsibility for granting a waiver or not. The time it will take to process a waiver application will undoubtedly vary from case-to-case; whilst many should be straightforward, others will be more complex and take more time to resolve.

5. Does this check need to be recorded on the Single Central Record (SCR)?

There is no statutory requirement that the check should be recorded on the Single Central Record. However, it is advisable that the setting keep a record that all the checks have

been completed as Ofsted will check this as part of the normal setting inspection process. Therefore our best practice advice is that settings should record that a check has been satisfactorily completed, and the date when the check was made, on their single central record. Satisfactorily completed means no relevant information is declared or that a waiver has been obtained where relevant.

Further advice can be sought from the LADO - Tim Booth 01772 536694 or the Early Education Safeguarding Officer - Catherine Isherwood 07909 001 430.