



BRIEFING PAPER

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Briefing on the draft Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 (England)

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1. Background

Under the *Childcare Act 2016*, the Government legislated for qualifying parents – in most cases, those households where the parent(s) work (subject to the means-test) – of eligible children – i.e. a child is aged 3 or 4 years old – would be entitled to an additional 570 hours of free childcare a year, on top of the universal 570 hours of free childcare a year of free childcare available for all 3 and 4 year olds.

The childcare offer is expected to be taken as 30 hours over 38 weeks in many cases – this note's references to the "30 hours of free childcare" is shorthand for the free entitlement.

The new policy has been trailed in pilot areas since September 2016 and is due to be rolled-out nationwide in September 2017.

The 30 hours of free childcare policy applies to England only.

2. The *Childcare Act 2016*

The *Childcare Act 2016* provided the statutory basis for the introduction of 30 hours of free childcare (over at least 38 weeks) for qualifying parents of eligible children. However, the Act left much of the detail to secondary legislation.

This led to considerable debate during the passage of the *Childcare Bill* – the House of Lords' Delegated Powers and Regulatory Reform Committee noted, for example, noted that the Bill as introduced to the Lords was "almost entirely enabling" and that it "contains very little substantive provision about either of the topics for which it seeks to provide", calling it a "skeleton" Bill.¹

During Second Reading in the Lords, the Parliamentary Under Secretary of State for the School System, Lord Nash, justified the form of the Bill and its early introduction before much of the detail had been decided, saying that:

The introduction of the Bill, with a strong duty on the Secretary of State, sends a clear message to parents and providers about the Government's commitment. They are expecting us to deliver on our manifesto commitment. They will be able to plan in the knowledge that they can expect this further support for working families, and the market can continue to grow in anticipation.

¹ Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\] etc.](#), 2015–16 HL 12, 26 June 2015, p3, paras 1, 2 and 3

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Although the detail that will go into regulations is important, so are the primary powers that we are taking. We will listen very carefully to the issues that the House has raised tonight and will raise in Committee, and I will write with further details to support scrutiny in Committee.

By considering and challenging us on the legal framework at this stage, the House will contribute significantly to the shaping of this policy, but it is equally important to take time to consult providers, parents and local authorities before operational details are fixed.²

During the passage of the Bill through the Lords, the Government did agree to a number of amendments in this area. Amendments were tabled at Lords Report Stage which required the affirmative procedure to be applied to “the first regulations” relating to the duty to secure 30 hours free childcare available for working parents and the discharge of this duty. As the Delegated Powers and Regulatory Reform Committee noted, the affirmative procedure would not apply if regulations already made were being amended (or withdrawn), leading it to say that it was “not persuaded ... that these scrutiny proposals are adequate in the case of this Bill”.³

These amendments were agreed and are to be found in section 4(4) and 4(5) of the Act.

Only regulations “seeking to update the maximum level of any financial penalty set out in section 2(5)(a) of the Bill”, or any regulations that amended or repealed provision made by an Act would be subject to the affirmative resolution on every occasion.⁴

In addition to discussions of the matters that would be covered in regulations during the passage of the Bill through Parliament, the DfE also published the [Childcare Bill: policy statement](#) which it kept updated during the passage of the Bill; the latest version was published in December 2015.

3. Consultation on the draft, indicative regulations

During the passage of the *Childcare Bill*, the government “committed to consult in the spring [of 2016] on drafts of the regulations and statutory guidance, which will set out further technical detail on how we intend to implement the policy”.⁵

The Department for Education issued a consultation document, [Childcare free entitlement: delivery model](#), on 3 April 2016, together with [draft, indicative regulations](#); the consultation period closed on 8 June 2016.⁶ On 5 November, the [government response](#) to the consultation was published alongside the [draft Childcare \(Early Years Provision Free of Charge\) \(Extended Entitlement\) Regulations 2016](#).

The DfE noted that it had “in total ... received 1314 responses to the consultation, the highest proportion of which were from private and voluntary childcare providers (47%) and local authorities (13%). Responses were also received from childminders, parents and providers from the independent and maintained schools sector. There were also 66

² [HL Deb 16 June 2015 c1104](#)

³ Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\]: Government Amendments](#), 2015–16 HL 37, 13 October 2015, p3, para 4

⁴ [Childcare Act 2016–EN](#), p8, para 31

⁵ Department for Education, [Childcare free entitlement: delivery model – Government consultation](#), April 2016, p7

⁶ The consultation website is available at: <https://consult.education.gov.uk/early-years-funding/childcare-free-entitlement/>

responses from national organisations, a number of whom represent large groups of providers".⁷

4. The provisions in the draft regulations

4.1 Qualifying child of working parents and making a declaration of eligibility

Means-test – upper and lower limits

Regulation 2(d) defines the minimum income for a parent to be eligible for the 30 hours of free childcare to be either:

- a) for a person—
 - (i) not yet aged 25 years; or
 - (ii) to whom the apprenticeship rate applies, as determined in accordance with regulation 5 of the National Minimum Wage Regulations 2015(c),
the amount a person would be paid for 16 hours of work a week at the hourly rate for a person in that person's circumstances as set out in regulation 4A of the National Minimum Wage Regulations 2015;
- b) for a person aged 25 years or older, the amount a person would be paid for 16 hours of work a week at the hourly rate set out in regulation 4 of the National Minimum Wage Regulations 2015.

It should be noted that to be eligible, a parent has to *earn* the equivalent of 16 hours per week at either the National Minimum Wage or National Living Wage (depending on their age), rather than have to work a minimum of 16 hours per week.

In terms of the upper limit, regulation 4(5) states that the parent (and their partner) "does not expect their adjusted net income⁸ to exceed £100,000 in the relevant tax year". This upper limit applies to the income of each parent in the household, rather than the joint income of both parents if applicable.

Definition of an eligible child

Under section 1(2) of the *Childcare Act 2016*, the term "Qualifying child of working parents" is defined as meaning a "young child (a) who is under compulsory school age, (b) who is in England, (c) who is of a description specified in regulations made by the Secretary of State, (d) in respect of whom any conditions relating to a parent of the child, or a partner of a parent of the child, which are specified in such regulations, are met, and (e) in respect of whom a declaration has been made, in accordance with such regulations, to the effect that the requirements of paragraphs (a) to (d) are satisfied".

Under paragraph (c), regulation 3 of the draft, indicative regulations published alongside the consultation in April 2016 stated that:

For the purposes of section 1(2)(c) of the Act, a young child is of a specified description if the young child—

⁷ Department for Education, [30 hour free childcare entitlement: delivery model – Government consultation response](#), November 2016, p7

⁸ HMRC explains that "Adjusted net income is total taxable income before any Personal Allowances and less certain tax reliefs, for example: trading losses; donations made to charities through Gift Aid; pension contributions paid gross (before tax relief); pension contributions where your pension provider has already given you tax relief at the basic rate" (GOV.UK, [Personal Allowances: adjusted net income](#), Guidance, 4 February 2016)

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- a) has attained the age of three years; and
- b) is not a looked after child.

In the draft regulations published in November 2016, this had been amended to:

For the purposes of section 1(2)(c) of the Act, a young child is of a specified description if the young child—

- a) has attained the age of three years or will attain the age of three years within 16 weeks beginning with the day on which the declaration was made in relation to that child; and
- b) is not looked after by a local authority.

In addition, the draft regulations include a definition of a “looked after child” as given in the legislation of each of the four countries of the UK (although the 30 hours of free childcare only applies to England), and also states that a “looked after child” is not, for the purposes of regulation 3 a looked after child (and so is entitled to 30 hours of free childcare) either:

- during any period which is in the nature of a short-term break or is one of a series of such breaks for the purposes of providing respite for the person with whom the child normally lives; or
- in England, during any period when the child is placed with or continues to live with a person who is a parent, or a person with parental responsibility, or who was the holder of a child arrangements order with respect to the child immediately before the care order (to place the child into the care of the local authority) was made. Broadly similar provision applies to Wales, Scotland and Northern Ireland, taking into account the law on children in those countries.

Qualifying paid work

The regulations set out “the requirement to be in qualifying paid work”, the calculation of expected income for self-employed parents, and the rules on start-up periods for self-employed people that allow them to be entitled to the 30 hours of free childcare during a “start-up period” of “12 months following the commencement by the self-employed person of any trade, profession or vocation” (although no second start-up period is allowed “unless at least 48 months have passed since the end of the previous start-up period”).

The draft regulations also set out a number of other categories who are treated as being in “qualifying paid work”, which follow the intentions set out in the December 2015 *Policy Statement*.

Families where one parent does not work (or neither parent works) will usually not be eligible for these additional hours. However, the government intends to make provision to support families where one parent is in receipt of benefits relating to caring responsibilities or a disability and the other parent is working. Full details will be set out in regulations, but the government intends that the additional entitlement should be available in the following circumstances:

- both parents are employed but one or both parents is temporarily away from the workplace on parental, maternity or paternity leave;
- both parents are employed but one or both parents is temporarily away from the workplace on adoption leave;
- both parents are employed but one or both parents is temporarily away from the workplace on statutory sick pay;
- one parent is employed and one parent has substantial caring responsibilities based on specific benefits received for caring; or

- one parent is employed and one parent is disabled or incapacitated based on receipt of specific benefits.⁹

Regulation 10 defines the partner of the parent of a child.

Grace period (not part of the regulations)

In the consultation document, the DfE stated that:

During the passage of the Childcare Bill, Ministers made clear that the extended entitlement is a work incentive but committed to putting in a place a 'grace period' for families whose circumstances change. The 'grace period' is intended to enable parents to retain their childcare place for a short period if they have become ineligible for the extended entitlement.

[...]

Local authorities should be guided by the point at which the child is no longer eligible. Put simply, a child who falls out of eligibility in the first half of the term / quarter will retain their childcare until the end of term / quarter. A child who falls out of eligibility in the latter half of the term / quarter will retain their childcare until mid-way through the following term / quarter.

[...]

For those local authorities operating on a termly basis, we would expect the arrangements to be slightly different for the summer term. Where a child is shown as ineligible half-way through the term, the child should retain their place until the end of the term. Where they are shown as ineligible in the latter half of the term, we would expect the child to retain their place until the start of the following term in September.¹⁰

In the consultation response, the DfE noted that while "most respondents were positive about plans to offer parents a 'grace period' so they can retain their childcare place if they become ineligible for the extended entitlement ... there was little agreement on the length of the grace period". It concluded that:

Having considered these consultation responses, the government is satisfied that overall, the principle of a grace period has been welcomed. However, we recognise that there are a number of practical delivery concerns to address. We are committed to a grace period that strikes a balance between being affordable for the taxpayer and practical to administer whilst not diluting the work incentive objective of the entitlement.

[...]

Given the lack of agreement in the consultation responses over how long the grace period should be, and the concerns about how this will work for term-time only settings, the government will undertake further informal consultation with the sector on the length of the national grace period. We will use existing expert working groups composed of a wide variety of representatives from the childcare market and local authorities to consider the detail of the grace period policy further. We will publish details of how the grace period will operate in revised statutory guidance and departmental advice in early 2017.¹¹

Making a declaration for 30 hours of free childcare

Regulation 11 sets out the conditions for making a declaration of eligibility to claim 30 hours of free childcare, including that they "must ... be in the United Kingdom (within the meaning provided in regulation 12) on the date of the declaration" and the rules on how

⁹ Department for Education, [Childcare Bill: policy statement](#), December 2015, pp8–9

¹⁰ Department for Education, [Childcare free entitlement: delivery model – Government consultation](#), April 2016, pp17 and 18

¹¹ Department for Education, [30 hour free childcare entitlement: delivery model – Government consultation response](#), November 2016, pp6 and 16–17

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often a declaration must be reconfirmed. The declaration “must be made by electronic communications” unless:

the Commissioners are satisfied that the person making the declaration—

- a) is prevented, by a court order, from sending information by electronic communications;
- b) holds beliefs which are incompatible with the use of electronic communications;
- c) is unable to send information by electronic communications by reason of—
 - (i) age;
 - (ii) disability;
 - (iii) inability to operate a computer effectively in a manner that cannot be remedied by the use of assisted digital support; or
 - (iv) living in a remote location so that it is not reasonably practicable to use electronic communications; or
- d) is prevented, for a continuous period of at least 7 days, by a technical failure affecting the Commissioners, from making a declaration.

4.2 Information, reviews, appeals and penalties

Part 3 of the regulations concern information, reviews, appeals and penalties; as the explanatory notes explain:

- Regulations 18 and 19 make provision regarding the sharing of information with the Commissioners for Her Majesty’s Revenue and Customs to assist it in making determinations under regulation 17.
- Regulations 20 to 24 make provision regarding applications for review and appeals of determinations made under regulation 17.
- Regulations 25 to 32 make provision regarding penalties for inaccurate, false, misleading information or actions in connection with a determination made under regulation 17.¹²

The clauses in the draft regulations are largely unchanged from those in the draft, indicative regulations, although the term “inaccurate information or documents” was changed to “false or misleading information or statements”.

In terms of providing “inaccurate declarations”, under the draft, indicative regulations a person is liable to a penalty if the person “the person makes a declaration that contains an inaccuracy; and the inaccuracy is due to a failure by the person to take reasonable care”. However, for the draft regulations currently before the House, the first part of this was amended so as to read: “the person makes a declaration that contains a *material* inaccuracy” (emphasis added).

The range of penalties vary:

- for “inaccurate declarations” – up to £300;
- for “providing false or misleading information or statements” – up to £500;
- for “dishonesty” – up to £3,000.

¹² [Childcare \(Early Years Provision Free of Charge\) \(Extended Entitlement\) Regulations 2016–EN](#)

In terms of determining the penalty, the draft regulations state that “where a person becomes liable to a penalty under these Regulations the Commissioners [for Her Majesty’s Revenue and Customs] may assess the amount of the penalty” (regulation 28(1)).

Under regulation 31, a “person may appeal against the imposition of the penalty or the assessment of the amount of the penalty or both” to the First-Tier Tribunal.

4.3 Local authority duties

Section 1(1) of the *Childcare Act 2016* states that:

The Secretary of State must secure that childcare is available free of charge for qualifying children of working parents for, or for a period equivalent to, 30 hours in each of 38 weeks in any year.

During consideration of the *Childcare Bill* in the House of Lords, Lord Nash explained: “We know that childcare is the issue for parents, and that it inhibits many from going back to work, or from working more, when they would otherwise choose to do so. For that reason, the Government believe that it is right for the Secretary of State to be named in the Bill because parents will, ultimately, hold her to account for delivery of the entitlement”.¹³

However, section 2(2) states that “Extended entitlement regulations may (amongst other things) ... require an English local authority to secure that childcare of such a description as may be specified is made available free of charge for children in their area who are qualifying children of working parents”.

Part 4 of the draft regulations set out the duties on English local authorities (under regulation 33):

- “an England local authority must secure early years provision ... that is provided by an early years provider, other than an excluded provider, to whom section 40 of the Childcare Act 2006 (duty to implement Early Years Foundation Stage) applies” (regulation 33);
- “the provision must be available for a period of 570 hours in any year and during no fewer than 38 weeks in any year” (with regulation 35 setting out when the first year of 30 hours of free childcare commences after a child’s third birthday);
- that “a local authority must discharge its duty under regulation 33 by making arrangements which secure that an early years provider chosen by a parent of the child provides the early years provision” in such cases as set out in regulation 36.

Again, the draft regulations are largely unchanged from the draft, indicative regulations.

5. Matters not included in the regulations

There are some matters which are not included in the regulations:

- grace period – as noted above in section 4.1, “the government will undertake further informal consultation with the sector on the length of the national grace period ... We will publish details of how the grace period will operate in revised statutory guidance and departmental advice in early 2017”;¹⁴

¹³ [HL Deb 14 October 2015 c258](#)

¹⁴ Department for Education, [30 hour free childcare entitlement: delivery model – Government consultation response](#), November 2016, pp6 and 16–17

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- flexibility – the Government response to the consultation noted that “the majority of respondents agreed that flexibility to stretch the 30 hours offer over more than the 38 weeks of the school year would be the most valuable type of flexibility for parents”.

It said that “the government will therefore clarify in statutory guidance that, while the free early years entitlements must be provided over no fewer than 38 weeks, local authorities should work with childcare providers to enable, as far as possible, parents to ‘stretch’ their free childcare over the full year where that is what they wish”, stating that it would:

- “extend the hours over which the funded hours can delivered, to between 6am and 8pm (increased from between 7am and 7pm)”;
- “remove the minimum session length ... [although] the maximum session length of 10 hours will remain unchanged”;¹⁵
- supporting children with Special Educational Needs and Disabilities in the early years – in response to the consultation, the Government said that it would, among other things:
 - “introduce, subject to the early years funding consultation, a targeted Disability Access Fund and an SEN Inclusion Fund model”;
 - “revise statutory guidance to make clear, and bring together, the responsibilities of local authorities under both the Children and Families Act 2014 Part 3 and Equalities Act 2010”;¹⁶
- reformed local authority delivery model – the Government noted that “overall, respondents were positive about encouraging monthly payment to childcare providers, and about introducing a model agreement to standardise agreements between local authorities and providers”. It therefore said that it would “amend statutory guidance to set a clear expectation that by September 2018 childminders should be paid monthly; and all other providers should also be paid monthly unless they request an alternative payment model”.¹⁷
- childcare Information for parents – the Government said that it would “strengthen the regulations and guidance to make clear that local authorities will be required to update and publish their childcare information on a termly basis”, and “require local authorities to publish the information by electronic means via their websites, and also to continue to provide the information in other formats”.¹⁸

The Government added that “any changes in the statutory guidance will come into force in September 2017”, and that “changes to the regulations and the statutory guidance will apply to both the universal and extended entitlement”.¹⁹

¹⁵ As above, pp7–8 and p20

¹⁶ As above, p8

¹⁷ As above, p9

¹⁸ As above, p10

¹⁹ As above, p10

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