

Staff Suitability and Disqualification Factsheet - ENGLAND

The aim of this factsheet is to clarify the current legal requirements for ensuring staff suitability to work with children and to support nurseries with procedures for checking staff suitability and disqualification.

Providers have a legal responsibility to ensure that each member of their staff team is suitable to work with children and is not disqualified from working in childcare. Key relevant legislation includes:

- Childcare Act 2006 (sections 75,76)
- Safeguarding Vulnerable Groups Act 2006
- The Childcare (Disqualification) Regulations 2009
- Early Years Foundation Stage (Welfare Requirements) Regulations 2012
- Statutory Framework for the Early Years Foundation Stage 2013

It is an offence, under section 76, Childcare Act 2006, to provide early years provision if disqualified or be involved in the direct management of such provision if disqualified or to knowingly employ a disqualified person to work with children.

Under the Early Years Foundation Stage providers must:

- ✓ Ensure people looking after children are suitable to fulfil the requirements of their role (3.9 Safeguarding & Welfare Requirements)
- ✓ Have effective systems in place to ensure suitability of staff and any other person coming into regular contact with children including obtaining information about whether a person is disqualified (3.9)
- ✓ Ensure staff understand their responsibility for disclosing any convictions, cautions, court orders, reprimands or warnings that may affect their suitability to work with children (whether received before or during their employment at the setting) (3.11)
- ✓ Record information about staff qualifications, identity checks and vetting processes that have been completed (3.12)
- ✓ In the event of a disqualification of a member of staff providers must take appropriate action to ensure the safety of children. In the event of a disqualification providers

must not continue to employ that person (3.14)

- ✓ Where relevant providers must supply Ofsted with the information listed in 3.15 of the EYFS Safeguarding Welfare Requirements 2012
- ✓ Report to Ofsted any changes to staff that may affect their suitability to work with children as soon as reasonably practicable but at the latest within 14 days. Failure to do so would be a breach of Early Years Foundation Stage (Safeguarding and Welfare Requirements) Regulations 2012 (see 3.16)
- ✓ Providers must report any member of staff dismissed or who resigns before/during disciplinary action for inappropriate behaviour/concerns to the Disclosure and Barring Service.

Statutory Framework for the Early Years Foundation Stage, 3.9 states:

Providers must ensure that people looking after children are suitable to fulfil the requirements of their roles. Providers must have effective systems in place to ensure that practitioners and any other person who is likely to have regular contact with children (including those living or working on the premises) are suitable.

Reasons for Disqualification

There are a number of reasons that a person may be disqualified from working with children, under the Childcare Act 2006. These may be grouped under the following general headings:

- Grounds relating to the care of children
- Offences against children
- Offences against adults
- Inclusion on the list held by the Disclosure and Barring Service
- Living on or working on premises where a disqualified person lives or where a disqualified person is employed. **This includes a provider or a nursery worker living in a household with a person that is disqualified**
- Having registration refused or cancelled (this does not apply to a person whose registration as a childminder or childcare provider is cancelled in England for non-payment of fee after 1 September 2008)
- Offences include those committed overseas that, had the offence been committed in the UK, would disqualify that person from registration, regardless of how the offence is described in the law of the other country.

A list of the offences and cautions for which a person may be disqualified can be found in Tables 4 & 5 in Ofsted's Compliance, investigation and enforcement hand-book: childminding and childcare – disqualification.

<http://www.ofsted.gov.uk/resources/compliance-investigation-and-enforcement-handbook-childminding-and-childcare>

The Childcare (Disqualification) Regulations 2009

<http://www.legislation.gov.uk/uksi/2009/1547/body/made>

Checking suitability

It is essential that providers have robust systems in place to check staff members' suitability to work with and to continue working with children. Checking staff suitability should not only be done during the recruitment and selection process but should be an ongoing process that is embedded into your regular practice. You may do this through a specific question during staff supervisions and appraisals or asking each member of staff if anything has changed in their personal circumstances that would affect their suitability to work with children. Or you may prefer to have a 'suitability questionnaire' that all staff and volunteers complete at regular intervals (see Appendix 1).

In the event of information that suggests a person is disqualified from working with children the provider **must not** allow that person to work with children and must dismiss them if disqualification is confirmed and not waived (see below on waiving disqualification).

Best Practice Tip

Although there is no duty on the provider to monitor the 'suitability' of persons living in staff households, you do need to check with your staff that they are not living with a person that is disqualified from working with children.

If a member of staff is living in a household with someone who is disqualified then they too are disqualified from working with children by association. This applies to household members including partners, children including foster children, house share colleagues and lodgers.

However there are two points to bear in mind:

First the person is not guilty of an offence if they do not know a person they are living with is disqualified. For example, a member of staff may live in shared housing and may not have any knowledge about the people they live with including whether those people are disqualified. Neither the member of staff nor the provider has any legal requirement to seek this type of information.

Second the law is clear that this is about 'knowingly employing' someone who is disqualified. Providers who regularly ask staff to confirm there are no changes in their circumstances and act on any information received that brings into doubt a staff member's suitability are taking appropriate steps to make sure they do not knowingly employ someone who is disqualified.

If you become aware of information which may lead to the disqualification of a member of staff you **must** report it to Ofsted as soon as reasonably practicable but at the latest within 14 days. Failure to do so would be a breach of Early Years Foundation Stage (Safeguarding and Welfare Requirements) Regulations 2012.

Statutory Framework for the Early Years Foundation Stage, 3.14 states:

In the event of the disqualification (in accordance with regulations made under section 75 of the Childcare Act 2006) of a registered provider, a person living in the same household as the registered provider, or a person employed in that household, the provider must not continue as an early years provider – nor be directly concerned in the management of such provision.

Where an employer becomes aware of relevant information which may lead to disqualification of an employee, the provider must take appropriate action to ensure the safety of children. In the event of disqualification of a person employed in early years provision, the provider must not continue to employ that person.

The terminology used in the Statutory Framework (EYFS 2012) has led to some confusion around disqualification as paragraph 3.14 refers to the registered provider.

The Childcare (Disqualification) Regulations 2009 make no distinction between a registered provider/childminder/employee and volunteer and so it is relevant to **any member of staff or volunteer** working with children in your setting. If you have an employee that is living in the same household as somebody who would be disqualified (for example their partner or lodger) then the employee will also be disqualified from working with children.

This is further documented in Ofsted guidance:

5.1a Disqualification: childminding and childcare in Compliance, investigation and enforcement handbook: disqualification:

*People who apply to provide childminding or childcare are disqualified if they live or work on premises where a disqualified person lives. In these cases, the registered person, applicant for registration **or person wishing to work in childcare** must apply to us to waive their disqualification, rather than the disqualified individual. **This is because the applicant/registered person is disqualified by virtue of living or working with a disqualified person.***

Applying for a waiver

If a member of staff is disqualified from working with children (through an offence committed by themselves or because someone they live with is disqualified) then they would need to obtain a waiver from Ofsted to allow them to continue working with children. Application to have disqualification waived must be made by the disqualified person and not the employer.

Each waiver application will be considered on its own merits and a waiver may be granted with limitations, e.g. a waiver may apply to one particular type of employment or to particular premises. If a waiver is granted then the employer must make a decision as to whether they wish to employ/continue employing this person.

For more details on applying for a waiver see Ofsted's Compliance, Investigation and Enforcement Handbook, Chapter 5 1a on disqualification

<http://www.ofsted.gov.uk/resources/compliance-investigation-and-enforcement-handbook-childminding-and-childcare>

The following example of a waiver with limitations is taken from the Ofsted Compliance and enforcement handbook – 5.1a Disqualification: Childminding and Childcare.

Extent of consent to waive disqualification

We may specify the extent to which we agree to waive a disqualification. For example, we may limit it to a particular setting or job. Limiting the decision to waive disqualification in this way requires the individual to reapply if the circumstances change or the risk to children increases. For example, person A wants to work in childcare on non-domestic premises, but is a disqualified person because she or he lives with person B, who has committed a disqualifiable offence against a child.

In this case, we may decide to waive disqualification for A to work in childcare on non-domestic premises, but specify the extent to which we have waived the disqualification so that A can only work at that particular premises. This type of specification allows A to work with children, but does not extend to allow them to become a childminder or to work in another nursery. In this case, A will need to submit a new request to waive disqualification before making any decision about registration as a childminder or working in any other childcare setting.

In some cases, the law does not allow Ofsted to consider granting consent to waive the disqualification. It does not have any power to waive disqualification in relation to childminding or childcare if a person:

- is included on the list held by the Disclosure and Barring Service (the barred list) <http://www.homeoffice.gov.uk/agencies-public-bodies/dbs/>
- has been found to have committed an offence against a child within the meaning of section 26(1) of the Criminal Justice and Courts Services Act 2000 (<http://www.legislation.gov.uk/ukpga/2000/43/contents#pt2-pb1-l1g26>) and the court has ordered that she or he is disqualified from working with children – under section 28(4), 29A (2), or 29(4) of the same Act.

For further guidance on applying for a waiver see the Compliance, investigation and enforcement handbook, Ofsted, May 2013.

<http://www.ofsted.gov.uk/resources/compliance-investigation-and-enforcement-handbook-childminding-and-childcare>

Employment Law

It is important to ensure you comply with employment law in your recruitment and management of staff and when addressing any issues around staff suitability.

Employers will need to ensure they introduce clear concise documentation consisting of a sufficiently robust and well drafted application form, offer letter and Statements of Main Terms and Conditions. You also need to have well-constructed disciplinary procedures which allow you properly to investigate a given issue. If, as a result of an investigation, there is deemed to be a case to answer, your procedures should allow you to call disciplinary proceedings. These proceedings could lead to a sanction up to and including dismissal, depending on the facts of the given situation.

Disciplinary procedures also need to provide for allowing suspension prior to investigation to allow you to remove the individual from the workplace pending the outcome of a full investigation.

If you receive a disclosure via a third party relating to concerns about a member of staff's suitability to work with children you should treat this as an allegation and follow your policies and procedures for reporting allegations against a member of staff. Your policies and procedures should be in line with the guidance and procedures of the relevant Local Safeguarding Children Board (LSCB) and the lead practitioner is responsible for liaison with the LSCB as set out in 3.4/5 EYFS Safeguarding and Welfare Requirements and liaison with the Local Authority Designated Officer (LADO).

We advise that you check your current documents and procedures. Further support is available in NDNA's publications 'Your essential guide to policies and procedures' (available free online to NDNA members) and 'Your essential guide to recruitment and selection'. Visit: www.ndna.org.uk/publications

The scenario below is given as an illustration and every case will be different, therefore you should always seek expert legal advice on the circumstances of your own particular situation. NDNA members can contact our free members' legal helpline on 0845 900 3583.

Scenarios and guidance

A member of staff discloses that a partner who is disqualified has moved back into their household. This means the staff member is also disqualified. What course of action should the employer take?

- Report to Ofsted as soon as reasonably practicable – in any event within 14 days
- Suspend the employee on full pay pending a full investigation
- The member of staff would need to apply for a waiver from Ofsted to allow them to continue to work with children
- **If a waiver is granted** the employer must make a decision as to whether they wish to continue to employ the person. If they do, invite the employee back to work on full pay with preserved continuous service
- **If a waiver is not granted** the employer should invite the individual to a disciplinary meeting in accordance with the company disciplinary policy, specifying:
 - the date, time and place of the meeting
 - the allegation in advance, i.e. that they live with a disqualified person and a waiver has been declined by Ofsted, and proving evidence of this fact
 - informing the staff member of their right to be accompanied by a union official/work colleague at the meeting, and that if the allegation is proven it could lead to a sanction up to and including dismissal.
- Following the disciplinary hearing and the outcome, the employee would have a right of appeal against any disciplinary sanction.
- The potentially fair reason for any dismissal would be illegality – i.e. it is illegal to continue to employ, as it contravenes a statutory provision.

Further Information:

Childcare Act 2006, Section 75

<http://www.legislation.gov.uk/ukpga/2006/21/section/75>

Childcare Act 2006, Section 76

<http://www.legislation.gov.uk/ukpga/2006/21/section/76>

Compliance, investigation and enforcement handbook: childminding and childcare

<http://www.ofsted.gov.uk/resources/compliance-investigation-and-enforcement-handbook-childminding-and-childcare>

Early Years Foundation Stage (Safeguarding & Welfare Requirements) Regulation 2012

<http://www.legislation.gov.uk/uksi/2012/938/schedule/paragraph/2/made>

Statutory Framework for the Early Years Foundation Stage

<http://www.education.gov.uk/aboutdfe/statutory/g00213120/eyfs-statutory-framework>

Safeguarding Vulnerable Groups Act 2006

<http://www.legislation.gov.uk/ukpga/2006/47/contents>

NDNA Disclosure and Barring Service Factsheet

<http://www.ndna.org.uk/advice-information/factsheets/member-factsheets>

Staff Suitability Declaration

This form is to be completed by all new staff when they commence employment (including regular volunteers and students) AND completed by all staff on an annual basis

Name of staff:.....

Name of Manager:.....

Please answer the questions and sign the declaration below to demonstrate that you are safe to work with children. If there are any aspects of the declaration that you are not able to meet, you should disclose this immediately to the manager/senior responsible for your recruitment.

Please circle yes or no against each bullet point:

Have you been cautioned, subject to a court order, bound over, received a reprimand or warning or found guilty of committing any offence since the date of your most recent enhanced DBS disclosure?	Yes/ No
Have you been cautioned, subject to a court order, bound over, received a reprimand or warning or found guilty of committing any offence either before or during your employment at this setting?	Yes/ No
Are you 'Disqualified for Caring for Children': (to include)	Yes/ No
<ul style="list-style-type: none"> • Have you committed any offences against a child? 	Yes/ No
<ul style="list-style-type: none"> • Have you committed any offences against an adult (e.g. rape, murder, indecent assault, actual bodily harm etc)? 	Yes/ No
<ul style="list-style-type: none"> • Have you been barred from working with children (DBS)? 	Yes/ No
<ul style="list-style-type: none"> • Are you living with someone who has been barred from working with children (DBS)? 	Yes/ No
<ul style="list-style-type: none"> • Are you living in the same household as someone who has been disqualified from working with children under the Childcare Act 2006? 	Yes/No
<ul style="list-style-type: none"> • Have your own children been taken into care? 	Yes/ No

• Have/are your own children the subject of a child protection order?	Yes/ No
Has your name been placed on the DBS barring list?	Yes/ No
Do you have any medical conditions that could affect your ability to care for children?	Yes/ No
Are you taking any medication on a regular basis or any other substances?	Yes/ No

If you have answered **YES** to any of the questions, please provide further information below:

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I understand my responsibility to safeguard children and am aware that I must notify my manager of anything that may affect my suitability.

I will ensure I notify my employer of any convictions, cautions, court orders, reprimands or warnings I may receive

I am aware that if I am taking medication on a regular basis I must notify my employer, and must keep the medication in a safe place, out of reach of children

I will ensure I notify my manager if I experience any health concerns which could impact upon my ability to work with children

I give permission for you to contact any previous settings, local authority staff, the police, the DBS, or any medical professionals to share information about my suitability to care for children

Signed:.....Date:.....

Manager/senior
signature:.....Date:.....

Manager/Owner

Please record follow-on action taken, where relevant

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Sign:..... Date action taken:.....

Disclaimer

NDNA would like to point out that although the information in this document has been completed and checked by experts, it only provides a practical guide to the required policies and procedures. As legislation and inspection criteria change on a regular basis to reflect new practices it is essential that you confirm legal matters with a solicitor and keep your policies up to date.

NDNA cannot accept any responsibility if you implement the guidance without first confirming your legal position with a suitably qualified person.

We hope that you will continue to use this factsheet as a useful tool for guidance and would welcome any feedback. If you have any queries or concerns about the publication please do not hesitate to contact us.

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