

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (FINANCIAL RESOURCES AND PAYMENT FOR SERVICES) (AMENDMENT) REGULATIONS 2023

2023 No. 45

1. Introduction

1.1 This explanatory memorandum has been prepared by Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The instrument makes changes to the civil legal aid means test schemes to ensure legal services are available to those most in need of support.

2.2 These Regulations amend the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (“the means regulations”, to remove the means test for approved prospective adoptive parents (APAP) and foster parents in civil representation and controlled work for cases where a looked after child (LAC) or a young person who continues to reside with their former foster parent in a ‘staying put’ arrangement cannot make an appeal to the First-Tier Tribunal (Special Educational Needs and Disability) (“FTT (SEND)”) in their own right, and an adult must apply on their behalf.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Extent and Territorial Application

4.1 The extent of this instrument is England and Wales

4.2 The territorial application of this instrument is England and Wales

5. European Convention on Human Rights

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

6. Legislative Context

6.1 Section 21(1) of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) requires that for an individual to qualify for legal aid, they must meet certain financial eligibility criteria. This criteria is also referred to as ‘means testing’. Section 21(2)(a) of Part 1 of LASPO gives the Lord Chancellor the power to make secondary legislation in relation to means testing.

Civil legal aid financial eligibility

6.2 Paragraph 2 of Part 1, Schedule 1 of LASPO covers civil legal services for special educational needs and provides that these types of proceedings are covered for legal help, on a means and merits tested basis. This provision does not cover legal

representation so an application for exceptional case funding (ECF) would be required to cover this.

- 6.3 Regulation 5(1) of the means regulations provides a list of ‘exceptions from requirement to make a determination in respect of an individual’s financial resources’. Appeals to the FTT (SEND) brought on behalf of a looked after child or young person by a foster parent or APAP do not currently fall under this exception.

SEND tribunals

- 6.4 Section 51 of the Children and Families Act 2014 restricts who can bring an appeal to the FTT (SEND) to a child’s responsible adult (either where the adult has parental responsibility or is a foster parent), or, if the appellant is a ‘young person’ (under 25 years old) the appeal may be brought either by the responsible adult on behalf of the young person, or by the young person themselves. Where a child (whether they are a looked after child or not) wishes to bring an appeal to the FTT (SEND) and they are not a “young person”, section 51 requires that their responsible adult *must* bring the appeal. This means the parent needs to make the application for legal aid, which means they have to go through the legal aid means test. Where the adult has parental responsibility for the child the exclusion from aggregation of means in the Lord Chancellor’s Guidance cannot apply, because it only applies where the child makes the application for legal aid themselves.
- 6.5 A young person may elect to represent themselves, in which case they would fall under the under 18 (U18) non-means testing rules. Where the young person chooses to be represented by their responsible adult, the means of that adult would be assessed if the adult has parental responsibility, equally, if the young person is over 18 and lacks capacity, currently the adult applying on their behalf would also be means tested.
- 6.6 Regulation 25A of the Care Planning regulations allows for the temporary change in status of a foster parent to an approved prospective adopter. There is a period of time where the approved prospective adoptive parent is responsible for a LAC, before the adoption order is made. When the adoption order is made, parental responsibility is transferred from the Local Authority to the adoptive parents.
- 6.7 Section 98 of the Children and Families Act 2014 introduces a staying put duty which is a duty on the local authority to support young people to continue to live with their former foster carers once they turn 18. Support for the staying put arrangement includes financial support to the carer.

7. Policy background

What is being done and why?

- 7.1 The legal aid means testing regulations are designed to provide legal aid to those who need it most and target support at the most vulnerable individuals. Currently, under s. 51(1) of the Children and Families Act 2014, the right of appeal to the FTT (SEND) lies with either the child’s parents (in this context, including a foster parent or APAP) or with the “young person”. This means that a child under 16 is unable to appeal in their own right, and a young person may choose whether to represent themselves or have the case brought by an adult on their behalf.
- 7.2 For legal aid purposes, this results in a situation where children under 16 have their parents’ income taken into account in the means assessment (because the application for legal aid is made in the parents’ name), and children over 16 bringing an appeal in

their own name do not. This is because the Lord Chancellor’s Guidance on determining financial eligibility for controlled work and family mediation indicates that where the application is made by the child themselves (as opposed to by the “parent”, as specifically required under s.51), the income of their foster carers or social worker should not be aggregated for these types of cases

- 7.3 We note that as these proceedings are specific to the FTT(SEND) there might be situations where a ‘young person’ may not apply for an appeal themselves and a foster parent or APAP applies on their behalf. We consider that where a foster parent or APAP applies on their behalf or where the young person continues to reside with the person who was their foster carer under a ‘staying put’ arrangement, and that former foster parent applies on their behalf as a person described in paragraphs (a), (b) or (c) of s.80(6) of the Children and Families Act 2014, then the foster parent or APAP applying on behalf here should have their means exempted from the means test. The ‘staying put’ arrangement covers situations where the local authority provides support (must include financial support) to young people to continue to live with their former foster carers once they turn 18. This instrument will amend the regulations to provide these exemptions.
- 7.4 The amendment made by this instrument would align policy in this area with the approach to legal aid eligibility for LAC and under 18s generally, which recognises the vulnerability of under 18s and aims to ensure that all children are treated equitably. This will also align with our overarching approach with other controlled work where the LAC is able to make the application for legal aid themselves and the foster parents means are excluded from being aggregated with the means of the child and it is considered inequitable.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.5 Assessment of financial eligibility of legal aid requires a calculations of individuals’ means. If these are above a given threshold, the applicant may not be eligible for legal aid or they may be asked to pay a financial contribution towards their legal support. When calculating an individuals’ means, there are specific proceedings where an exception from requirement to make a determination in respect of an individual’s financial resources is applied.
- 7.6 Currently foster parents’ means are taken into consideration for FTT (SEND) appeals on behalf of a LAC for controlled work. There are also circumstances where an adoption has been approved, where the adults are neither foster parents nor adoptive parents, but are approved prospective adoptive parents (APAP). APAPs are currently treated as if they have parental responsibility, and as such, their means are also taken into account for the purposes of a legal aid application, despite the fact that the local authority in fact holds parental responsibility. Additionally, there are circumstances where a young person may continue to reside with their former foster parents after they turn 18 under a “staying put” arrangement, for which the foster parent continues to receive financial support from the Local Authority. This instrument aims to make individuals falling into the descriptions above exempt from the means test where they are required to make an appeal on behalf of the child or young person in accordance with Section 51 of the Children and Families Act 2014, or where they are a person described in paragraphs (a), (b) or (c) of s.80(6) of the Children and Families Act

2014 and make an appeal on behalf of a young person residing with them in a staying put arrangement.

Why is it being changed?

- 7.7 We believe that APAPs and foster parents should be exempt from means testing for FTT (SEND) appeals. To ensure this, we are removing the means test for civil representation and controlled work for APAPs and foster parents in relation to cases where a LAC cannot make an appeal to the FTT (SEND) in their own right. We will also remove the means test where a ‘young person’ who lacks capacity and who is in a “staying put” arrangement decides not to apply for an appeal themselves and would therefore have their former foster parent apply their behalf.
- 7.8 Without this amendment, the means of the foster parents or approved prospective adopters or former foster parents as described above will be included in the assessment of their financial resources and might either render individuals ineligible for legal aid or mean that they will need to pay contributions for legal services. The Lord Chancellor’s guidance on determining financial eligibility for controlled work and family mediation says at section 9.1, “Where a child is a “looked after child” i.e. the responsibility of the local authority, it would usually be inequitable for his or her foster carer’s/social worker’s income and capital to be aggregate with that of the child”. Currently, where a LAC is able to make an application for legal aid themselves, their foster carer’s income is not taken into account. However, for cases relating to s.51 of the Children and Families Act 2014, that cannot apply because the parent is required to make the application to the FTT (SEND) on the child’s behalf, and as such must also be the applicant for legal aid purposes. Therefore, it is necessary to amend the means testing regulations and remove the means test where a LAC cannot make an appeal to the FTT (SEND) in their own right and their foster parent or approved prospective adopter must apply on their behalf. We also consider it is necessary to extend the exemption to former foster parents of young persons lacking in capacity with whom they continue to reside under staying put arrangements.

What will it now do?

- 7.9 This instrument amends regulation 5 of the means regulations to exempt foster parents and APAPs of LAC from the means test in relation to appeals to the FTT (SEND) . In relation to young persons, the exemption from the means test also applies if the applicant is a person described in paragraphs (a), (b) or (c) of s.80(6) of the Children and Families Act 2014 and was a foster parent of a young person with whom the young person continues to reside in a staying put arrangement. This approach will allow foster parents and approved prospective adopters (where relevant) to make the application to the FTT (SEND) as required by the Children and Families Act 2014, but without their means being taken into account for legal aid purposes. It will also allow for former foster parents of young persons who lack capacity but remain residing with them under staying put arrangements to be exempt from the means test. However, it maintains the position that where parental responsibility sits not with the Local Authority, but with the adults caring for the child (either by adoption order or as natural parents) the means of these adults would be assessed.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 There are no plans for consolidation at this time.

10. Consultation outcome

10.1 There has been no formal policy consultation on this statutory instrument.

11. Guidance

11.1 The Ministry of Justice will issue amendments to the Lord Chancellor's Guidance regarding the changes.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 This instrument will impact a small area of spend for the Legal aid Fund. There are fewer than 100 applications per year on behalf of a LAC to the FTT(SEND) and only a small percentage successful apply for ECF. Therefore, this instrument will impact a small number of FTT(SEND) cases per year.

12.4 A full Impact Assessment has not been prepared for this instrument because there is no, or no significant impact on business, charities or voluntary bodies.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is undertaken by the Ministry of Justice and the Legal Aid Agency, who together monitor the operation and expenditure of legal aid scheme.

15. Contact

15.1 Deborah Adedeji at the Ministry of Justice Telephone: +44 07967792137 or email: deborah.adedeji@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Claire Cooper, Deputy Director for Legal Aid Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Bellamy KC, Parliamentary Under Secretary at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.