

Disability Assistance for Children and Young People Regulations 2020

Policy Note

Introduction

1. The Social Security (Scotland) Act 2018 (the 2018 Act) sets out the broad framework for the delivery of devolved social security in Scotland. The draft Disability Assistance for Children and Young People Regulations 2020 set out the detailed entitlement and administrative rules for delivery of this form of Disability Assistance.
2. The full new claims service for DACYP will commence in Summer 2020 with the process of transferring existing Disability Living Allowance for Children (DLAC) cases from the Department for Work and Pensions (DWP) to Social Security Scotland (SSS) beginning shortly after.
3. Disability Assistance is set out in section 31 of the 2018 Act:
(1) Disability assistance is assistance (which may or may not take the form of money) given by the Scottish Ministers under section 24 to an individual on account of the individual having—
 - (a) a disability arising from a physical or mental impairment, or*
 - (b) a terminal illness.*

Key Policy Divergence from DLAC

4. As part of the process of devolution, the Scottish Government will deliver DACYP which will replace DLAC in Scotland. There are a number of key areas of policy divergence from the existing DLAC system including:
 - the extension of the entitlement age from 16 to 18, where a young person is in receipt of the benefit prior to their 16th birthday;
 - the introduction of Short-Term Assistance (STA), a new form of assistance that ensures that clients can continue to receive their previous payment amount, where an award is reduced or stopped, until the conclusion of any challenge of the decision to reduce or stop the award;
 - the introduction of Child Winter Heating Assistance (CWhA), a £200 annual payment that constitutes a new form of assistance paid to clients in receipt of the highest rate care component in the qualifying week; and
 - the implementation of a new definition of terminal illness, removing the existing requirement that a person must reasonably be expected to die within 6 months.
5. In addition to these areas of significant policy divergence from the existing DLAC benefit, there are a range of proposed operational and administrative measures that will ensure that DACYP is delivered in a way that is consistent with the values of Social Security in Scotland. These include:

- the provision of a range of application channels which clients can select based on preference including online, by phone, paper applications and face to face;
- the delivery of a local delivery service that will provide support and information to clients and stakeholders at a local level; and
- that the decision making process is holistic and considers each client's individual circumstances.

Current Draft Regulations

6. The draft regulations that this paper accompanies are provided for SCoSS as required by 97(2) of the 2018 Act. The draft is predominantly in an advanced stage with although some amendments are expected to the following sections:

- Short-Term Assistance (Part 7); and
- AVE (Part 12).

7. There are also further provisions for these Regulations that will be provided at a later date as further policy decisions are taken for example regulations that describe the framework of how Scottish Ministers will transfer cases from DWP.

8. We will endeavour to provide SCoSS with detailed policy proposals on both of these aspects of DACYP at the earliest opportunity.

Policy Summary

9. The policy summary for the provisions within the regulations are as follows:

Part 1: Citation, Interpretation

10. Some terms set out in this section include those that are key to this set of regulations but potentially novel in relation to social security in the UK. Other terms relate to phrases used in the existing DLA legislation and we have attempted to reflect relevant judgments and case law in how these terms should be defined in relation to DACYP.

Part 2: Disability assistance for children and young people

11. Part 2 sets out the overarching framework for entitlement to DACYP.

Part 3: Eligibility

12. Regulation 4 describes the residence and presence requirements. These are broadly replicating the existing DLA provisions that relate to residence and presence with the addition of a requirement that clients are 'ordinarily resident' in Scotland.

13. The requirement is that a child or young person must:

- be habitually resident in the UK, Republic of Ireland, the Channel Islands, the Isle of Man, the EEA or Switzerland;
- not be a person ‘subject to immigration control’;
- have been present in Great Britain for at least 104 out of the past 156 weeks; and
- be ordinarily resident in Scotland.

14. This allows individuals moving from another part of the CTA to live in Scotland to qualify for the Scottish form of Disability Assistance, and avoids potential eligibility gaps which could arise if a habitual residence test was applied to Scotland. It also honours existing reciprocal agreements between these jurisdictions.

15. The Regulations make provision for individuals to travel outside of Great Britain for temporary absences without losing entitlement. Individuals will be free to travel temporarily within Great Britain while receiving DACYP. Where an individual moves permanently to another part of the UK they will be under a duty to report that change to Social Security Scotland.

16. EU social security coordination rules mean that some components of the existing DWP disability benefits are paid to individuals living in another European country. Our intention is to continue to pay the equivalent components of DACYP to people who are covered by the coordination rules.

Regulations 5-10 set out the over-arching entitlement rules for assistance including entitlement to components and levels of assistance for children and young people aged between three months and 18 years::

- children who have lived with a disability or long term condition for at least three months and who can expect to continue to have this disability or long term condition for at least six months - unless they are regarded as terminally ill; and
- eligible children aged three months or over will be entitled to the care component of the assistance. The lower rate of the mobility component is available to children who are at least five years old, and children will need to be at least three years old to be eligible for the higher rate of mobility

Components

17. The Regulations broadly replicate the eligibility criteria used to assess entitlement to DLAC so that:

- the lower rate care component will be payable where the child or young person requires assistance for some of the day or night
- the middle care component will be payable where:
 - the child or young person requires frequent help or supervision during the day or at night; or
 - they require prolonged or repeated attention in connection with bodily functions from another person; or

- they require a person to be awake during the night for a prolonged period or at frequent intervals to watch over them in order to avoid substantial danger to themselves or others; or
- they undergo haemodialysis or intermittent peritoneal dialysis treatment at home at least twice a week
- the highest rate care component will be payable where:
 - the child or young person requires help or supervision throughout both the day and night; or
 - they are terminally ill
- the lower rate mobility component will be payable where:
 - the child or young person can walk but needs help or supervision out of doors
- the highest rate mobility component will be payable where:
 - the child or young person is unable to walk, can only walk a short distance without severe discomfort, could become very ill if they try to walk or have severe mental or visual disabilities

Part 4: Entitlement Under Special Rules for terminal illness and when undergoing dialysis

Terminal Illness

18. A terminal illness is regarded as a progressive disease, which can reasonably be expected to cause an individual's death. In Scotland, registered medical practitioners will use their clinical judgment to determine, without reference to any time restriction, whether an individual is terminally ill for the purpose of accessing disability assistance under special rules.

19. Under the draft Regulations, a child or young person with a terminal illness will be entitled to the highest rate of the care component, regardless of the period of time for which that child or young person has had a terminal illness. This will allow rapid access to financial support during a sensitive, and often distressing time for families.

20. We have also made provision to ensure that the higher rate of the mobility component will be awarded to any child or young person with a terminal illness, from the age of 3 and over.

Dialysis

21. Children and young people who are required to undergo haemodialysis or intermittent peritoneal dialysis at least twice a week will be taken to meet the requirements for the middle rate of the care component, in recognition of the extra costs that may be associated with this treatment for families.

Part 5: Effect of time spent in care homes, residential educational establishments, hospitals and in legal detention

22. The draft Regulations make provision for the suspension of payment of the care component of DACYP after a child or young person has spent 28 days in a care home, residential educational establishment or legal custody. The mobility component is unaffected in these circumstances.

23. The 28 day period can be made up on non-consecutive days, so long as there is not more than 28 days between each of these periods.

24. The regulations set out that the care component is payable where a client is resident in a care home that is fully or partly funded from private funds. This is to ensure that where clients meet the costs of their own care, they may use their payment of DACYP to contribute towards these additional costs.

25. Where the cost of care is met solely from public funds, the person will not be entitled to the care component of DACYP. The policy intent for DACYP is to provide financial assistance to mitigate some of the increased care or mobility costs clients incur as a result of a disability or long-term condition and where these care needs are met from another source of public funds, to continue to pay the care component would lead to a duplication of public funding.

26. We intend that the mobility component of DACYP will remain payable despite being detained in legal custody. We recognise that young people and children can spend longer periods than adults outwith detention in legal custody as part of the rehabilitation process.. To support the young person's transition back into a community setting, it is important that their family are able to meet their mobility needs.

27. The draft Regulations have also set out that children and young people will retain entitlement to the care component where they are "looked after and accommodated."

28. Children and young people who are receiving medical or other treatment in hospital, or are in a hospice, will continue to receive both components of DACYP, subject to continuing to meet the overall eligibility criteria.

29. Regulations set out entitlement to the care component for individuals in a care home, residential education or legal custody where they are 'on leave' from these forms of accommodation. The regulations set out that an individual in receipt of DACYP, who enters either a care home, an educational establishment or legal custody but is 'on leave' e.g. staying with their family, is entitled to the care component of DACYP. The regulations set out that the rate will be 1/7th of the weekly amount to which they were previously entitled for each day that they are 'on leave.'

30. Under the administration of DLA, individuals who enter these forms of accommodation have the care component of their benefit 'suspended.' The 2018 Act describes a different framework for entitlement and, as such, the provisions set out in the Disability Assistance for Children and Young People Regulations 2020 have been drafted differently to equivalent UK legislation. The end effect ensures that where clients are 'on leave' from a care home, residential education or legal

custody, they can access disability assistance to meet their needs. This is set out in regulations 17 and 18.

Part 6: Payment towards winter heating costs

31. Regulation 19 sets out the entitlement rules for Child Winter Heating Assistance (CWAHA) that will be introduced by this regulation. The entitlement rule sets out that children or young people in receipt of the highest rate care component on one day of the week that starts from the third Monday in September each year, will be entitled to a payment of £200.

Part 7: Short-Term Assistance (STA)

32. The Scottish Government has committed to and set out powers to provide STA where Social Security Scotland has made a decision to reduce or stop a continuing payment (such as disability, carer's and employment injury assistance), and that decision is subject to a request for re-determination or an appeal.

33. The policy intention is to ensure an individual is not discouraged from challenging that decision or from accessing administrative justice by having to manage, for a period, with a reduced income. STA is not available in the reserved system and providing support in this way is another example of where Scottish Ministers are removing barriers to challenging decisions in the Scottish social security system.

34. The draft Regulations provide that:

- STA will be available if a client's DACYP has been reduced or stopped and that is subject to a challenge;
- STA will be available until the First-tier Tribunal (FtT) has made a determination;
- the value of STA will be the difference between the amount prior to the reduction and what it was reduced to.

35. In line with a rights based approach, the Scottish Government believes that a person should have a right to choose whether they want STA, but that its availability will be as seamless as possible without the need to complete complicated forms.

36. Furthermore the availability of STA will not be dependent on meeting conditions of hardship as it would be inconsistent with the policy approach to on-going types of devolved assistance, which will themselves not be subject to means-testing. The Scottish Government envisages that a request for STA will be processed when an individual requests a re-determination or an appeal.

37. Regulations 20, 21 and 22 set out the entitlement criteria for STA. 20(2) sets out exceptions to this including where Scottish Ministers consider that the individual's prior assistance was claimed fraudulently, where the individual has transferred from another part of the UK to Scotland and the determination of assistance was made to replicate their existing award, or where the individual has had their entitlement ended

or reduced as a result of being accommodated in a care home, residential educational establishment or legal custody.

Part 8: Making of Applications and payments and duration of eligibility

38. Regulation 23 sets out in further detail the entitlement criteria in relation to the upper age limit of DACYP. This regulation gives Scottish Ministers discretion to continue to pay DACYP to people who have reached their 18th birthday. This is intended to ensure that at 18, clients continue to receive the benefit where either they are an inpatient in a hospital or where they have yet to have an assessment completed for PIP or for the devolved replacement.

39. Regulation 25 describes the date on which an application is treated as having been made. In effect, this allows for a client to register an application date at the earliest opportunity, provide a full application within 6 weeks and then, once a determination is made, receive the benefit backdated to the initial date of contact. It also allows Scottish Ministers to make a determination, where an individual has not had a condition for the 3 month qualifying period, to treat the application as having been made on the date that this qualifying period would be fulfilled.

40. The regulations set out that payment of disability assistance will be made 4-weekly in arrears or for terminal illness cases, weekly in advance.

Part 9: Reconsideration of entitlement to DACYP: determinations without applications

41. Regulation 30 sets out the requirement for Scottish Ministers to make a new determination of an individual's entitlement after the date specified on the client's initial notice of determination. This describes the review process for DACYP and Regulation 29 sets out the ability to request further information to make a new determination.

42. Determinations without applications are used to make any change to the level of assistance that an individual receives not as a result of a new application. The broad range of circumstances are set out below:

- *where Scottish Ministers become aware of a change of circumstances likely to result in an alteration to the level of Disability Assistance for Children and Young People payable in respect of the person – this enables a new determination to be made to take account of the change of circumstances;*
- *that a person has been admitted to a care home or residential educational establishment or legal custody for a period of 28 days or more – this enables a new determination to be made to reflect the change in entitlement to DACYP;*
- *that a determination of the person's entitlement was wrongly made, due to an official error – this provides for a new determination to be made to correct an official error;*

- *that a determination of the person's entitlement was made in ignorance of a material fact which existed at the time of the determination* – this provides the ability to supersede a determination to reflect any facts which were not considered in making a determination and which may impact on the entitlement to, or level of, DACYP;
- *that a deduction is to be made to recover assistance given in error* – this enables a new determination to be made where part of the assistance is a deduction to repay a liability to Scottish Ministers;
- *of an alteration of the level of award of Disability Living Allowance of which a person was in receipt immediately before transferring to Scotland*; this is to enable a new determination where, after an individual has moved to Scotland from the rest of the UK and received a determination to DACYP at equivalent rates to an existing DLAC award, a challenge to their previous DLA award has been upheld;
- *they are informed that a person in respect of whom Disability Assistance for Children and Young People is or will be payable, has or intends to transfer to Scotland from another part of the United Kingdom*; this enables an entitlement decision to be made for clients moving from the rest of the UK to Scotland who are currently in receipt of DLAC;
- *they form the view, on the balance of probability, that the person's existing award of entitlement was made, or has continued, as a result of the commission of an offence under section 71, 72 or 73 of the 2018 Act* – this enables a new determination to be made where, on the balance of probabilities, Scottish Ministers conclude that existing entitlement to DACYP was obtained fraudulently;
- *they are informed that, in the case of a person who has transferred to Scotland from another part of the United Kingdom in accordance with regulation 45, the relevant authority has formed the view, on balance of probability, that an offence under section 111A (Dishonest representations for obtaining benefit etc.) or 112 (False representations for obtaining benefit etc.) of the Social Security Administration Act 1992 has been committed* – this has similar effect to the previous provision relating to fraud but relates to cases that transfer from the rest of the UK to Scotland where the client's previous DLAC award was deemed to have been obtained fraudulently;
- *entitlement is altered as a result of a change of eligibility criteria for the Disability Assistance for Children and Young People* – this enables a new determination to be made where any future amendment to regulations changes entitlement rules;
- *a request is made that Disability Assistance for Children and Young People no longer be paid* – this allows payment of DACYP to cease where a client, or a person acting on their behalf, requests that payment of assistance is stopped.

43. Regulations 32 and 33 set out when changes of entitlement take effect, dependent on the circumstances of the change and when it was notified.

Part 10: Procedural Matters

44. In response to feedback received during the Consultation on Disability Assistance, the draft Regulations set out that a client has 42 calendar days to request a redetermination from the date of determination. Similarly, we have sought to establish that Social Security Scotland will have 56 calendar days to make a redetermination, beginning on the day that Social Security Scotland receives a valid request.

45. We have sought to set out in the draft Regulations that Social Security Scotland staff involved in making decisions regarding entitlement to Disability Assistance must undertake such training as required by the Scottish Ministers, and in the case of Specialist Advisers, must have prior experience of providing health or social care whether through paid employment or voluntary work, for at least 12 months.

Part 11: Assistance to be given

46. It is our intention that the rate of all forms of Disability Assistance will remain the same as the current rate of benefit being replaced. Disability Assistance will be annually increased in line with inflation.

47. Based on 2019/2020 rates the weekly amounts of DACYP are:

Care component

Highest £87.65
Middle £58.70
Lowest £23.20

Mobility component

Higher £61.20
Lower £23.20

Part 12: Accessible Vehicles and Equipment Scheme

48. Disabled children who get the highest rate of the mobility component of DLA are able to transfer either the whole or part of the money they get for the mobility component to lease a new car, scooter or powered wheelchair through the Motability Scheme.

49. The Scottish Government has developed the Accessible Vehicles and Equipment scheme to ensure that there is equivalent provision to the Motability scheme in Scotland. The AVE Scheme allows interested suppliers to apply for accreditation under a scheme administered by the Scottish Government – this affords clients in receipt of the highest rate mobility component of DACYP access to a range of cars, wheelchair accessible vehicles, powered wheelchairs and scooters on affordable leasing terms. Clients can expect to receive the same standard of service that they would under the Motability scheme.

50. The Regulations make provision for the transfer of the client's mobility component to an accredited provider.

Part 13: Transfers within the United Kingdom

51. The draft Regulations set out the process for the transfer of cases to and from Scotland, and the remainder of the United Kingdom, including a period of up to three months to allow a transfer to Disability Living Allowance elsewhere in the United Kingdom. This relates to the long term process for individuals who move from Scotland to the rest of the UK, and vice versa, rather than the process of transferring cases which will be set out in separate provisions.

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