

Explanatory Memorandum to The Education (Admission Appeals Arrangements) (Wales) (Coronavirus) (Amendment) Regulations 2020

This Explanatory Memorandum has been prepared by the Education and Public Services Department of the Welsh Government and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Education (Admission Appeals Arrangements) (Wales) (Coronavirus) (Amendment) Regulations 2020.

Kirsty Williams
Minister for Education
18 May 2020

1. Description

- 1.1 The Education (Admission Appeals Arrangements) (Wales) (Coronavirus) (Amendment) Regulations 2020 (“the Appeal Amendment Regulations 2020”) amend certain procedural and constitutional requirements that are set out in the Education (Admission Appeals Arrangements) (Wales) Regulations 2005 relating to school admission appeals panels until 31 January 2021.
- 1.2 This change is being made to allow these appeals to continue to be conducted despite significant practical difficulties caused by measures needed to limit the spread of coronavirus (COVID-19). Those measures include the social distancing guidance introduced by the Welsh Government and Public Health Wales, which restrict the ability for parties to meet in person, and the guidance on self-isolation, which cause difficulties in securing sufficient panel members for appeal hearings.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1 It is considered that in the current public health crisis, the measure given effect by these Regulations, should be put in place as a matter of urgency. Consequently, they come into force on the day after the day on which they are made, and do not follow the convention that not less than 21 days should elapse between the laying of the Regulations and their coming into force.
- 2.2 This is necessary due to the urgent need to amend constitutional and procedural requirements for admissions appeal panels in response to the significant practical impacts of coronavirus (COVID-19). The months of April to June represent the busiest months for appeal panels as significant numbers of appeals arising from school offers being made to children due to start a new school in September 2020 are lodged during these months. Offer letters for secondary school applications were required to be made on 1 March (or next working day) and there is already a backlog of secondary appeals.
- 2.3 Primary Offer Day on 16 April has added to the number of appeals that need to be carried out before September (or as soon as possible at the start of the academic year). This is why it is of particular importance to re-align the deadlines and amend requirements without delay to help appeal panels conduct this peak volume of business. The impact of coronavirus (COVID-19) and the associated social distancing requirements are significantly compromising the immediate availability of appeal panel members and other people involved in administering appeals and have rendered in-person appeal hearings prohibited.
- 2.4 If the Appeal Amendment Regulations 2020 were to comply with the 21-day rule it is likely that the appeal system would be paralysed for that

period as a number of the current requirements cannot be complied with as a result of coronavirus (COVID-19), which will result in undesirable additional delays for appellants who are likely to be seeking to resolve appeals in time for children starting a new school in September 2020 (or with minimal delays).

- 2.5 It was not possible to make these regulations sooner. On 18 March, the Welsh Government announced that schools should remain open for vulnerable children and the children of critical workers only at the end of the school day on Friday 20 March. The Welsh Government announced social distancing guidance on 16 March, then introduced 'stay at home' rules on 23 March. Officials were not in a position to assess the extent and impact of the lockdown on admissions appeals immediately and needed to consult with the sector to understand the impact and practical difficulties Admission Authorities would have in administering their appeals.
- 2.6 We know from stakeholder feedback that having these amended rules come in to force quickly will be welcomed by those working to provide these appeals. The new arrangements will also be welcomed by parents who will continue to have the right of appeal should they not be happy with the school they have been offered. Safeguards have been built into the Appeal Amendment Regulations 2020 to ensure that appellants still have adequate time and notice to lodge appeals, and that their appeals will continue to be heard fairly, as quickly as possible in the circumstances, and in line with the requirements of natural justice.
- 2.7 To ensure both the sector and parents had notice of these changes, the Welsh Government published guidance on 16 April on Primary Offer Day, which explained what changes the Welsh Government was planning to address and advised these regulations would be laid and come in to force as soon as possible. The Welsh Government also continues to provide coronavirus (COVID-19) updates to the sector.

3. Legislative background

- 3.1 These Regulations are made under powers in sections 94(5), (5A), 95(3), (3A) and 138(7) of the School Standards and Framework Act 1998 ("the 1998 Act") and make amendments to The Education (Admission Appeals Arrangements) (Wales) Regulations 2005 (S.I. 2005/1398 (W. 112)) ("the 2005 Regulations"). They are subject to negative resolution procedure.
- 3.2 The Appeal Amendment Regulations 2020 amend the 2005 Regulations to change procedural and constitutional requirements in relation to school admission appeals in response to the impact of coronavirus (COVID-19) on school admissions appeal arrangements.
- 3.3 Requirements relating to school admissions appeals have been and will continue to be set out in both the 2005 Regulations (as amended by the Appeal Amendment Regulations 2020) and the School Admissions

Appeals Code. The School Admissions Appeals Code is made under section 84 of the School Standards and Framework Act 1998.

- 3.4 The amendments to the procedural and constitutional rules relating to school admissions appeal panels have been implemented by virtue of the Appeal Amendment Regulations 2020 under sections 94(5) and (5A), 95(3) and (3A) and 138(7) of the School Standards and Framework Act 1998 in preference to any amendment to the School Admissions Appeals Code . This is because the procedure for amending the School Admissions Appeals Code set out in section 85 of the School Standards and Framework Act 1998 would necessitate a longer delay to the new procedural and constitutional rules coming into force, which is undesirable due to their urgency. The School Admission Appeals Code and the 2005 Regulations will continue to be read alongside each other. Where the Appeal Amendment Regulations 2020 amend procedure that is set out in the School Admissions Appeals Code, the Appeal Amendment Regulations 2020 will take precedence.
- 3.5 Guidance will be published alongside the Appeal Amendment Regulations 2020 to ensure that those involved in school admission appeals will be able to clearly understand which rules apply in the relevant circumstances. Given the temporary nature of the amended procedural and constitutional rules, it is also considered suitable that the School Admission Appeals Code remains intact and un-amended enabling those involved in school admissions appeals to easily revert to a clear and known set of rules once the coronavirus (COVID-19) outbreak has passed.
- 3.6 The Appeal Amendment Regulations 2020 come in to force on 4 May 2020. They will apply to the procedure for appeals lodged between this date, but before 31 January 2021, as well as appeals that are already underway but which have not yet concluded at the time the regulations come into force.
- 3.7 An Equality Impact Assessment and Children's Rights Impact Assessment have been carried out in the making of the Appeal Amendment Regulations 2020. The Impact Assessments and the Regulations will be kept under review during the period they are in force.

4. Purpose & intended effect of the legislation

- 4.1 Local authorities are the admissions authority for community schools and the governing body is the admission authority for voluntary aided and foundation schools. Admission authorities are responsible for setting and applying a school's admission arrangements. They are concerned that the coronavirus (COVID-19) outbreak will make it impossible to meet the procedural and constitutional admission appeal requirements set out in the School Admissions Appeals Code and the Education (Admission Appeals Arrangements) (Wales) Regulations 2005.

- 4.2 Although there appears to be nothing to preclude admission appeals to take place virtually, the School Admission Appeals Code is drafted on the expectation that appeals will be held in person, with all the parties and panel members physically present. Welsh Government and Public Health Wales restrictions relating to social distancing and self-isolation will limit panel members' physical availability. Each panel currently requires three appeal panel members and the appeal cannot continue without a panel of three. A number of local authorities run several panels concurrently over the summer months to manage the high numbers of appeals. The fact that some schools may have closed temporarily (or may close in the future) has also impacted on effectiveness of deadlines set out in the School Admissions Appeals Code.
- 4.3 It is important that those parents who are unhappy with the school they have been offered for their child are given the right of appeal when they need it. Anecdotal evidence from LAs suggests that the majority of all appeals are held between April and mid-July. To delay all appeals into the autumn or even later would not be fair on parents or children who may have to start at one school and then move to another if their appeal is upheld.
- 4.4 The Appeal Amendment Regulations 2020 introduce some constitutional and procedural flexibility allowing, in some circumstances, appeal panels to consider appeals as a panel of two (rather than three), hearings to be held remotely on the basis of written submissions (rather than in person), and giving more flexibility in relation to the deadline for the determination of appeals. This will support both the rights of parents, admission authorities and appeal panels while maintaining certain requirements to safeguard procedural fairness and natural justice (including retaining the requirement for the panel to be supported by a trained clerk). This will allow admission authorities to effectively and fairly continue to deal with school admission appeals where it is not reasonably practicable for them to comply with existing requirements due to the coronavirus (COVID-19) outbreak.
- 4.5 In addition, the Appeal Amendments Regulations 2020 revise the deadlines relevant to the appeal process so that they refer to calendar days or a fixed date rather than "school days" (which is the term used in the School Admissions Appeals Code). This has been necessary due to the fact that schools may be subject to different and unpredictable levels of closure as a result of coronavirus (COVID-19). Schools may not be able to give clear predictions about when they will be in session and when they will not. It may be difficult in practice for parents and admission authorities to get a clear picture of this, which could create uncertainty about when appeal deadlines will actually fall. Moreover, if a school has closed, the appeals process may be undesirably paused for the duration of the school closure. These impacts are exceptional and were unforeseeable.
- 4.6 These regulations are time limited and expire on 31 January 2021. This is considered a suitable expiry date because it should allow sufficient time to deal with the annual peak in appeals relevant to children starting new

schools at the beginning of the academic year 2020/21. It will also support handling of appeals that are delayed into the autumn, which is also a busy period for appeals from in-year applications, often for year groups other than reception or year 7. The Appeal Amendment Regulations 2020 are subject to review for the time that they are in force.

5. Consultation

- 5.1 There is no statutory requirement for us to consult on the Appeal Amendment Regulations 2020. However, over the three week period leading up to the laying of the Appeal Amendment Regulations 2020, we have engaged with a number of stakeholders, including the Association of Directors of Education, Wales (ADEW) school admissions authority group which has representation from all local authorities in Wales and diocesan authorities along with a number of individual local authority officers responsible for appeals. The feedback has been positive and the proposed flexibilities around how an appeal is administered, have been welcomed.
- 5.2 A statement was issued to interested parties and published on the Welsh Government website on 16 April 2020, on Primary Offer Day. This set out the headline proposals and provided a frequently asked questions section. This announcement assisted local authorities and admission authorities to advise parents about their proposed admission appeal process.

6. Regulatory Impact Assessment

- 6.1 The emergency nature of the instrument means it has not been possible to prepare a Business and Regulatory Impact Assessment. No significant impact on business, charities or voluntary bodies is foreseen and the Appeal Amendment Regulations 2020 have effect for a temporary period up to 31 January 2021.
- 6.2 There is no, or no significant, impact on business, charities or voluntary bodies. The impact on the public sector is on the state-funded schools sector including local authorities and school governing bodies to the extent that these bodies are responsible for appeal panels. As a result of these amending regulations, the bodies involved in school admission appeals will have more flexibility as to how they can respond and deploy their resources in relation to school admissions appeals during the coronavirus (COVID-19) outbreak. This flexibility is welcomed by the sector, including parents who will not face delays around uncertainty of where their child will attend school. The needs of Welsh admission authorities have closely informed the preparation of these Regulations.

Welsh Language

- 6.3 There are no positive or adverse impact implications on the Welsh Language.

Children's Rights

- 6.4 We have undertaken a Children's Rights Impact Assessment. No conflict with UNCRC has been identified and there are no negative impacts on children and young people. The purpose of the Appeals Code is to ensure the independence of admission appeal panels and to ensure that all admission appeals for maintained schools are conducted in a fair and transparent way.

Equality and Human Rights

- 6.5 We have undertaken an equality and Human Rights Assessment. Whilst the new Regulations will relax current requirements the vast majority of the requirements of the School Admission Appeals Code remain appropriate and must still be complied with. We will not be removing any of the clerking duties for admission appeals. Clerks carry out a key role in relation to appeal hearings in providing advice on admissions law as well as keeping an accurate record of proceedings and ensuring that the appeal hearing is fair. Paragraph 3.3 of the Appeals Code stipulates that clerks must have a good understanding of the law on admissions and must have received appropriate training that includes equality law. This applies equally to appeal hearings held remotely, or determined on the basis of written submissions only.
- 6.6 Where an appeal cannot take place in person, the appeal panel must take steps to ensure that the parties are able to fully present their cases virtually or in writing, and be satisfied that the appeal is capable of being determined fairly and transparently. Panels will still be required to comply with all relevant legislation, including the Equality Act 2010. This includes when considering an appellant's attendance and representation at the hearing where this involves remote access and the duty to consider any reasonable adjustments that may be needed. The clerk will be responsible for ensuring that any decisions taken in relation to requests for reasonable adjustments are recorded as part of the appeal record and confirmed with the appellant in writing prior to the appeal hearing. The guidance accompanying the regulations will make specific reference to the Equality Act 2010. We will keep the regulations and their effect on protected groups under ongoing review maintaining continuing discussion with admission authorities and monitoring any correspondence or complaints

Privacy

- 6.7 There are no impact implications on privacy matters. Paragraph 5.2 of the Appeals Code continues to apply in relation to remote-access appeals. The chair should ensure the remote access appeal is held in private, all the parties can hear everything that is said and have an equal chance to participate. If this proves impossible or impractical for some parties, the hearing can be based on the written submissions supplied only.

Justice Impact Assessment (JIA)

6.8 Whilst no formal JIA has been undertaken, no impacts have been identified when considering these Regulations.