

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

This Explanatory Memorandum has been prepared by the Education Directorate of the Welsh Government and is laid before the Senedd Cymru 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) (Amendment) Regulations 2020.

Kirsty Williams MS  
Minister for Education  
22 December 2020

## **1. Description**

- 1.1 The Education (Admission Appeals Arrangements) (Wales) (Coronavirus) (Amendment)(Amendment) Regulations 2020 (“the Appeal Amendment Regulations 2020”) extend the amendments to certain procedural and constitutional requirements that are set out in the Education (Admission Appeals Arrangements) (Wales) 2005 relating to school admission appeals panels until 30 September 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 measures 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 None.

## **3. Legislative background**

- 3.1 The Education (Admission Appeals Arrangements) (Wales) (Coronavirus) (Amendment)(Amendment) Regulations 2020 are subject to the negative procedure and 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 extend the current disapplications relaxations to 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 apply to the procedure for appeals lodged before 30 September 2021, as well as appeals that are already underway but which have not yet concluded at the time the regulations end.
- 3.7 An Integrated Impact Assessment has been carried out in the making of the Appeal Amendment Regulations 2020. The Impact Assessment 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. The ongoing pandemic and government measures to reduce the spread of the COVID-19 virus impacts on admission authority's (local authorities and governing bodies depending on the type of school) ability to hold school admission appeal hearings in person, secure sufficient panel members and to meet relevant deadlines.
- 4.2 To mitigate this on 4 May 2020 the Welsh Government introduced The Education (Admission Appeals Arrangements) (Wales) (Coronavirus) (Amendment) Regulations 2020. The 2020 Amendment Regulations disapply or relax certain requirements in the Education Admission Appeals Arrangements Regulations 2005 and the School Admission Appeals Code and have allowed admission authorities to undertake appeals despite the restrictions imposed by the Coronavirus pandemic.
- 4.3 The 2020 Amendment Regulations are due to expire on 31 January 2021. Local authorities tell us that whilst the Amendment Regulations will enable them to complete appeals received in the normal admissions round for 2020, they are concerned that the restrictions in place in response to coronavirus pandemic will continue to impact on admission appeals once the 2020 Regulations expire.

- 4.4 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.
- 4.5 Although there appears to be nothing to preclude admission appeals taking 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 number of appeals. The fact that some schools may be closed temporarily may impact on effectiveness of deadlines set out in the School Admissions Appeals Code.
- 4.6 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.
- 4.7 The Appeal Amendment Regulations 2020 extend the disapplications or relaxations provided for in the Appeal Amendment Regulations 2020 by allowing for some continued 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.
- 4.8 In addition, the Appeal Amendment 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 around 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.

- 4.9 These regulations are time limited and expire on 30 September 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 2021/22. 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, during the 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. We also asked local authorities for their views on the implementation of the Appeal Amendment Regulations 2020.

- 5.2 Feedback from local authorities and appeals panels has been positive. Although a small number experienced some initial teething problems with IT they were able to overcome these and undertake appeals successfully. Holding the admissions appeals virtually has been positive in terms of travelling time, expediency and availability of panel members and the flexibility has enabled panels to clear the backlog of appeals quickly. Parents have appreciated being able to continue with their appeals during the pandemic. Local authorities and admission authorities welcome the intention to extend the flexibilities around how an appeal is administered until the end of September 2021.

- 5.3 To ensure that local authorities and admission authorities have notice of the extension to the current relaxations and are able to notify parents, we notified them of the intention well in advance of the national offer days for secondary and primary school places.

## **6. Regulatory Impact Assessment**

- 6.1 There are no costs or savings resulting from the 2020 Amendment Regulations, therefore a Regulatory Impact Assessment has not been completed. No impact on business, charities or voluntary bodies is foreseen.
- 6.2 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.

## **7. Welsh Language**

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

## **8. Children's Rights**

8.1 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.

## **9. Equality and Human Rights**

9.1 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.

9.2 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.

## **10. Privacy**

10.1 There are no impact implications on privacy matters. Paragraph 5.2 of the Appeals Code continues to apply in relation to remote-access appeals.

10.2 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.

## **11. Justice Impact Assessment (JIA)**

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