

Legal basis for fair access protocols

Last review date: August 2024

Next review date: August 2025

Introduction to the law

All local authorities in England must comply with the legislative code on admissions in the exercise and discharge of local authority functions in relation to admissions under the School Standards and Framework Act (SSFA) 1998. The SSFA and relevant regulations confers a number of duties which require the local authority to carry out different functions at different times of the admissions cycle. The current code for school admissions came into force on 1 September 2021.

This code imposed mandatory requirements and includes guidelines, setting out aims, objectives and other matters in relation to the discharge of functions relating to school admissions by the bodies listed below.

- Local authorities
- Admission authorities of maintained schools
- Academies and academy trusts (this includes maintained schools converted to academies and free schools)
- Governing bodies
- Schools adjudicators
- Admission appeal panels

These bodies have a statutory duty to act in accordance with the relevant provisions of the code. The local authority has the duty to provide suitable education or otherwise for all children of compulsory school age resident in the borough. Academies are required by their funding agreement to comply with the code and the law relating to admissions, though the Secretary of State has the power to vary this requirement where there is a demonstrable need.

The school admissions code states that each local authority must have a fair access protocol agreed with the majority of schools in its area to ensure that, outside the normal admissions round, unplaced children - especially the most vulnerable, are offered a place at a suitable school as quickly as possible.

In agreeing a protocol, the local authority must ensure that no school - including those with available places is asked to take a disproportionate number of children who have been excluded from other schools, or who have challenging behaviour. The protocol must include

how the local authority will use provision to ensure that the needs of pupils who are not ready for mainstream schooling are met.

All admission authorities must participate in the fair access protocol to ensure that unplaced children are allocated a school place quickly. There is no duty for local authorities or admission authorities to comply with parental preference when allocating places through the fair access protocol. To support schools and officers in complying with these mandatory requirements the Royal Borough of Windsor and Maidenhead (RBWM) developed and manages the required local protocols and procedures. The operation of fair access protocols is outside the arrangements of co-ordinated normal admission rounds and is triggered when a parent of an eligible child has not secured a school place under in-year admission procedures. The protocol must describe the circumstances in which it will be applied and set out how decisions about admissions of vulnerable, hard to place and pupils with challenging behaviour.

The Department for Education (DfE) states that fair access protocols should not be used as a means to circumvent the normal in-year admissions process. A parent can apply for a place as an in-year admission at any point and is entitled to an appeal when a place is not offered. It will also be used to ensure that schools do not admit a disproportionate number of hard to place:

- vulnerable pupils
- pupils with challenging behaviour

This protocol has been formulated to ensure its compliance with the School Admissions Code and Equality Act 2010. Therefore, seeks to ensure that there is no discrimination against pupils, parents or carers because of their sex, race, disability, religion or belief and sexual orientation or pupils who are pregnant or undergoing gender reassignment. The exception to the discrimination provisions for schools that existed under previous legislation is admissions to single-sex schools.

All local authority officers and school staff must adhere to this protocol. Internal and external auditors may complete monitoring exercises on an ad hoc basis.

Admissions code September 2021

The numbered paragraphs within this section of the document relate directly to the admissions code.

3.8 Where a child has been permanently excluded from two or more schools, there is no need for an admission authority to comply with parental preference for a period of two years from the last exclusion. The twice excluded rule does not apply to the following children:

- children who were below compulsory school age at the time of the permanent exclusion
- children who have been reinstated following a permanent exclusion (or would have been reinstated had it been practicable to do so)

- children whose permanent exclusion has been considered by a review panel, and the review panel has decided to quash a decision not to reinstate them following the exclusion
- children with education, health and care plans naming the school

3.9 Admission authorities must not refuse to admit a child on behavioural grounds in the normal admissions round or at any point in the normal year of entry, except for where the above paragraph applies.

3.10 Where an admission authority receives an in-year application for a year group that is not the normal point of entry and it does not wish to admit the child because it has good reason to believe that the child may display challenging behaviour, it may refuse admission and refer the child to the fair access protocol.

3.11 An admission authority should only rely on the provision in the paragraph above if it has a particularly high proportion of either children with challenging behaviour or previously permanently excluded pupils on roll compared to other local schools and it considers that admitting another child with challenging behaviour would prejudice the provision of efficient education or the efficient use of resources.

3.12 The provision in paragraph 3.10 cannot be used to refuse admission to looked after children, previously looked after children and children who have education, health and care plans naming the school in question.

3.13 Admission authorities must not refuse to admit a child thought to be potentially disruptive, or likely to exhibit challenging behaviour, on the grounds that the child is first to be assessed for special educational needs.

Fair access protocols

3.14 Each local authority must have a fair access protocol to ensure that unplaced and vulnerable children, and those who are having difficulty in securing a school place in-year, are allocated a school place as quickly as possible.

3.15 The protocol must be consulted upon and developed in partnership with all schools in its area. Once the protocol has been agreed by the majority of schools in its area, all admission authorities must participate in it. Participation includes making available a representative who is authorised to participate in discussions, make decisions on placing children via the protocol, and admitting pupils when asked to do so in accordance with the protocol, even when the school is full. Local authorities must provide admission authorities with reasonable notice and information as to how and when discussions around the placement of children via the protocol will take place.

3.16 No school, including those with places available, should be asked to take a disproportionate number of children who have been permanently excluded from other schools, who display challenging behaviour, or who are placed via the protocol. Fair access

protocols must also set out how the needs of children who have been permanently excluded, and children for whom mainstream education is not yet possible, will be met.

3.17 Fair access protocols may only be used to place the following groups of vulnerable and/or hard to place children, where they are having difficulty in securing a school place in-year, and it can be demonstrated that reasonable measures have been taken to secure a place through the usual in-year admission procedures.

- (a) Children either subject to a child in need plan or a child protection plan or having had a child in need plan or a child protection plan within 12 months at the point of being referred to the protocol.
- (b) Children living in a refuge or in other relevant accommodation at the point of being referred to the protocol.
- (c) Children from the criminal justice system.
- (d) Children in alternative provision who need to be reintegrated into mainstream education or who have been permanently excluded but are deemed suitable for mainstream education.
- (e) Children with special educational needs (but without an education, health and care plan), disabilities or medical conditions.
- (f) Children who are carers.
- (g) Children who are homeless.
- (h) Children in formal kinship care arrangements. Decisions about admitting children under the protocol can be made by one individual in an admission authority provided that suitable authority has been delegated to that individual. Admission authorities must ensure this process complies with relevant governance requirements.

For example, where an application has been made to at least one school and this has been refused, or the local authority has confirmed that there are no places available at any school within a reasonable distance. child in need plans and child protection plans are plans of help and protection to address safeguarding and welfare needs, where a child has been assessed by the local authority as being a child in need under Section 17 of the Children Act 1989 and/or as suffering or likely to suffer significant hardship under Section 47 of the Children Act 1989. See also statutory guidance Working Together to Safeguard Children (2018). As evidenced by either a child arrangements order not relating to either birth parent or a special guardianship order.

- (i) Children of, or who are, Gypsies, Roma, Travellers, refugees, and asylum seekers.
- (j) Children who have been refused a school place on the grounds of their challenging behaviour and referred to the protocol in accordance with paragraph 3.10 of the code.
- (k) Children for whom a place has not been sought due to exceptional circumstances.
- (l) Children who have been out of education for four or more weeks where it can be demonstrated that there are no places available at any school within a reasonable

distance of their home. This does not include circumstances where a suitable place has been offered to a child and this has not been accepted.

- (m) Previously looked after children for whom the local authority has been unable to promptly secure a school place.

3.18 Eligibility for the fair access protocol does not limit a parent's right to make an in-year application to any school for their child. Admission authorities must process these applications in accordance with their usual in-year admission. They must not refuse to admit such children on the basis that they may be eligible to be placed via the fair access protocol. The parent will continue to have the right of appeal for any place they have been refused, even if the child has been offered a school place via the fair access protocol.

3.19 There is no duty for local authorities or admission authorities to comply with parental preference when allocating places through the fair access protocol, but parents' views should be taken into account.

3.20 Fair access protocols should seek to place a child in a school that is appropriate to any particular needs they may have. The fair access protocol must not require a school automatically to admit a child via the fair access protocol, in place of a child permanently excluded from the school.

3.21 Where it has been agreed that a child will be considered under the fair access protocol, a school place must be allocated for that child within 20 school days. Once they have been allocated a school place via the fair access protocol, arrangements should be made for the child to start at the school as soon as possible.

3.22 In the event that the majority of schools in an area can no longer support the principles and approach of their local fair access protocol, they should initiate a review with the local authority. There should be a clear process for how such a review can be initiated within each fair access protocol.

It is for the local authority to decide whether a child qualifies to be placed via the protocol on this basis, based on the circumstances of the case. In most cases use of the fair access protocol should be unnecessary for a previously looked after child. We would expect the local authority to aim to secure a school place particularly promptly for a previously looked after child and for admission authorities to cooperate with this.

The local authority may consider swift use of their general powers of direction or asking the Secretary of State to consider a direction) to be the most suitable course of action if a school place for a previously looked after child cannot be agreed with an admission authority promptly. Protocol will remain binding on all schools in the local area until the point at which a new one is adopted.

Local authority powers of direction

3.23 A local authority has the power to direct the governing body of a maintained school for which they are not the admission authority to admit a child in their area even when the school is full. The local authority can only make such a direction in respect of a child in the

local authority's area who has been refused entry to, or has been permanently excluded from, every suitable school within a reasonable distance.

The local authority must choose a school that is a reasonable distance from the child's home and from which the child is not permanently excluded. It must not choose a sixth form that selects by ability unless the child meets the selection requirements, or a school that would have to take measures to avoid breaking the rules on infant class sizes if those measures would prejudice the provision of efficient education or the efficient use of resources.

3.24 Before deciding to give a direction, the local authority must consult the governing body of the school, the parent of the child and the child if they are over compulsory school age. If, following consultation, the local authority decides to direct, it must inform the governing body and headteacher of the school. The governing body can appeal by referring the case to the schools adjudicator within 15 days. If it does this, the governing body must tell the local authority. The local authority must not make a direction until the 15 days have passed and the case has not been referred.

3.25 If the case is referred to the schools adjudicator, the schools adjudicator may uphold the direction, determine that another maintained school must admit the child or decide not to issue a direction. The adjudicator's decision is binding. The schools adjudicator must not direct a school to admit a child if this would require the school to take measures to avoid breaking the rules on infant class sizes and those measures would prejudice the provision of efficient education or the efficient use of resources.

Parents right to appeal

2.32 When an admission authority informs a parent of a decision to refuse their child a place at a school for which they have applied, it must include the reason why admission was refused, information about the right to appeal, the deadline for lodging an appeal and the contact details for making an appeal. Parents must be informed that, if they wish to appeal, they must set out their grounds for appeal in writing. Admission authorities must not limit the grounds on which appeals can be made.