



Amendments to the Belonging Regulations 1996

Proposed Amendments to the Education (Areas to which Pupils and Students Belong) Regulations 1996

Consultation

Consultation document No: 062/2009

Date of issue: 19 January 2009

Action required: Responses by 13 April 2009

Amendments to the Belonging Regulations 1996

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| Audience | Local authorities; special educational needs and disability voluntary organisations; looked after children's voluntary organisations. |
| Overview | This consultation invites views on proposed amendments to The Education (Areas to which Pupils and Students Belong) Regulations 1996 (the "Belonging Regulations"). In particular, the need to make clear that they do not apply to the making and maintaining of statements for children and young people with statements of special educational need (SEN). |
| Action required | Responses to SEN-Consultation@wales.gsi.gov.uk. |
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| Additional copies | Further information and additional copies may be obtained from David Tutton (see contact details above). |
| Related documents | The Education Act 1996 The Education (Areas to which Pupils and Students Belong) Regulations 1996 The Special Educational Needs Code of Practice for Wales (2002) |

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Summary

The Education (Areas to which Pupils and Students Belong) (Wales) (Amendment) Regulations 2009

Executive Summary

- 1.1 This consultation is about amendments to The Education (Areas to which Pupils and Students Belong) Regulations 1996 (the “Belonging Regulations”). The amendments remove references to further education students (as students can no longer apply for mandatory awards in respect of courses of further education); update the references to legislation; amend regulation 7 (“Children looked after by a local authority”) to make clear that the regulation applies to the exclusion of other regulations within the Belonging Regulations rather than all other regulations; and, most importantly, amends regulation 2 to provide that the Belonging Regulations do not apply for the purpose of determining the education authority responsible for identifying, assessing, making and maintaining statements and the performance of other functions under Part IV of the Education Act 1996 relating to children with special educational needs (SEN).
- 1.2 The decision to amend the Belonging Regulations follows the judgement in the case of a looked after child (LAC) with an SEN statement placed by the London Borough of Waltham Forest, in Staffordshire (“the Waltham Forest Judgement” - R (on the application of L) v the (1) London Borough of Waltham Forest and (2) Staffordshire County Council . The judgement said that the Belonging Regulations had wider application than just for assigning which authority had financial responsibility in inter-authority recoupment cases and, in particular, were applicable when deciding which authority is responsible for identifying a child’s SEN, assessing the child, and drawing up and maintaining a SEN statement. The Welsh Assembly Government’s view has been that the Belonging Regulations do not apply for this purpose and its guidance is that it should be the authority where the LAC is placed (‘the providing authority’) rather than the placing authority (‘the home authority’) that should carry out these SEN duties, recouping the costs from the home authority, other than in the case of 52 week residential placements where it should be the home authority. The Waltham Forest judgement means that it should be the home authority in all cases. The Welsh Assembly Government believes that this is not in the best interests of LAC.

- 1.3 The Belonging Regulations apply to Wales and England. A parallel consultation is taking place in England on a parallel set of amendment regulations.

Introduction

- 2.1 The Education (Areas to which Pupils and Students Belong) (Wales) Regulations 1996 (commonly known as the “Belonging Regulations”) were made under the powers conferred on the Secretary of State by sections 569(2), 569(4) and 579(4) of the Education Act 1996. The then Welsh Office’s guidance Circular 17/96 said that: “The Belonging Regulations 1996 determine to which areas pupils and students belong for the purposes of determining claims relating to inter-authority recoupment and which LEA [local education authority] is responsible for considering an application for a mandatory award”. They work in conjunction with the Recoupment Regulations for this purpose.
- 2.2 The Waltham Forest case concerned a LAC with an SEN statement who was placed by the London Borough of Waltham Forest in a non 52 week placement, in Staffordshire. The case was to determine which authority was responsible for maintaining the child’s statement. The judgement said that regulation 7 of the Belonging Regulations, which says that LAC “shall be treated as belonging to the education authority area which coincides with or includes the area of the local authority which looks after him” and that “this regulation shall apply to the exclusion of any other regulation which would otherwise apply to such a person” did not mean that it should apply to the exclusion of any other regulation in the Belonging Regulations, as the Welsh Assembly Government had intended, but to all regulations which might apply to a LAC. In effect the judgement said that the Belonging Regulations had a wider remit than just determining which authority is financially responsible in inter-authority recoupment cases and that they also determine which authority is responsible for carrying out the duties to identify a child’s SEN and, where necessary, assess, draw up and maintain the child’s statement. The effect of the judgement was that it should be the home authority in all cases of LAC placed out of authority which should carry out these SEN functions and not just in 52 week placement cases.
- 2.3 Section 321 of the Education Act 1996 says that a local education authority is responsible for a child “for the purposes of this Part” [Part IV, Special Educational Needs] “if he is in their area” but does not define this. Section 207 of the Education Act 2002, construed as if it was contained in the Education Act 1996, says that:

Regulations may provide, in relation to cases where any provision for education to which this section applies is made by a local education authority (in this section referred to as the ‘providing authority’) in respect of a person *who belongs to the area of another local education authority* [emphasis added], for requiring or authorising the other

authority (in this section referred to as the 'home authority') to pay the providing authority [agreed amounts].

The Welsh Assembly Government takes the view that 'belonging' is a recoupment concept.

- 2.4 The Belonging Regulations determined which authority was responsible for considering an application for a mandatory (further education (FE) student) award. These have not been available to student entering FE on or after 1 September 1999. The last two students in receipt of mandatory awards finished their courses in the summer of 2008. There is therefore no longer a need for the references to FE in the Belonging Regulations.
- 2.5 No Impact Assessment accompanies this consultation document. The amendments to the Belonging Regulations will not of themselves affect the number of LAC being placed in independent and non-maintained special schools and, while there are net importers and net exporters of LAC with statements these amendments will be broadly neutral in its impact on the public sector.

The Proposals

- 3.1 The proposed amendments delete references to FE in the Belonging Regulations and replace references to legislation that is no longer in existence for references to current legislation.
- 3.2 The policy intent of amending regulation 7 of the Belonging Regulations and regulation 2 is to re-establish the Welsh Assembly Government's position that the Regulations do not apply for the purposes of determining which local authority is responsible for identifying children's SEN and, where necessary, assessing, drawing up and maintaining a statement for a child, and performing other functions under Part IV of the Education Act 1996. The Waltham Forest Judgement means that the home authority would be responsible for performing these functions in every case of LAC with statements placed out of authority. The Welsh Assembly Government's view is that with the exception of 52 week residential placements, it should be the providing authority that carries out these functions and that in the case of 52 week residential placements it should be the home authority that carries out these functions. It is the Welsh Assembly Government's belief that this view is in the best interests of LAC. Some LAC are placed out of authority at an early age before their SEN are identified. Some LAC are placed hundreds of miles from their home authority making, for instance, identification or attendance at annual reviews of statements difficult for the home authority. The Welsh Assembly Government's view is that it is better, in non-52 week placement cases, for the providing authority to identify

and assess the child and decide, with its knowledge of provision in the local area, at which school the child might have their needs met or which 'education otherwise' provision might be suitable rather than the home authority which may be far away from the child. Where the child is placed in 52 week residential independent or non-maintained schools the Welsh Assembly Government's view is that the SEN functions are best carried out by the home authority as the providing authority is likely to have very little or no contact with the child.

- 3.3 Arguments can be made in support of the responsibility for carrying out the SEN functions remaining with the home authority. Assigning responsibility in this way would mean that an authority's education responsibilities in respect of LAC would align with its social care responsibilities and it can be argued that this would be more in keeping with the establishment of Children's Services departments within authorities. It is also the case however, that disagreements could occur between local authorities where for example the home authority assesses and makes a statement and the providing authority disagrees with the provision the home authority wishes to make for the child.

Finally, there would be no bar on local authorities making arrangements between themselves for the providing authority to carry out the SEN functions on behalf of the home authority even following the Waltham Forest judgement and that, therefore, there is no need to make the amendments to regulations 2 and 7.

- 3.4 The Welsh Assembly Government's view is that such ad hoc arrangements lead to uncertainty and are less efficient than a clear and consistent application of the Welsh Assembly Government's guidance on how to deal with these matters. The application of the Welsh Assembly Government's guidance has largely worked satisfactorily in the past. The Welsh Assembly Government's view is also that the difficulties for local authorities of identifying, assessing and deciding on suitable provision in areas outside their own and the possibility of children's needs being missed and delayed or less appropriate provision being made for children outweigh any advantages gained from aligning local authorities' education and social care responsibilities in respect of LAC placed outside their home authorities.

Consultation Question

- 4.1 **Do you agree with the proposal to amend regulations 2 and 7 of the Belonging Regulations so that the Regulations no longer determine which local authority is responsible for identifying children's SEN, assessing them, drawing up SEN statements and maintaining those statements in respect of LAC placed outside their home local authority areas? (Amending the Regulations in this way would mean that the Welsh Assembly Government guidance, that it should be the authority where the LAC is placed which should identify and assess the child's SEN and, where necessary, draw up and maintain an SEN statement except in the cases of 52 week residential placements, could be reaffirmed.)**
- 4.2 A copy of the draft amendment regulations is enclosed toward the end of this consultation document.
- 4.3 Should the consultation result in a decision to go ahead with these amendments the Welsh Assembly Government would reaffirm its guidance to local authorities on the carrying out of SEN functions under Part IV of the Education Act 1996 in respect of LAC placed out of authority.

Plans for making results public

- 5.1 It is proposed that the results of the consultation and the Welsh Assembly Government's response will be published on the Welsh Assembly Government website by May/June 2009.

DRAFT

WELSH STATUTORY INSTRUMENTS

2009 No. (W.)

EDUCATION, WALES

The Education (Areas to which Pupils and Students Belong) (Wales) (Amendment) Regulations 2009

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Education (Areas to which Pupils and Students Belong) (Wales) (Amendment) Regulations 2009 amend the Education (Areas to which Pupils and Students Belong) Regulations 1996 (“the Principal Regulations”).

Regulations 2(2), 2(4), 2(5), 2(10) and 2(11) remove references to further education students in regulations 2(1) and 3(a) of the Principal Regulations and revoke regulations 3(b), 7(2)(d), 8, 9, 10 and 11 of those Regulations. The effect of this is that the Principal Regulations will cease to make provision about the areas to which further education students are to be treated as belonging.

Regulation 2(3) amends regulation 2 of the Principal Regulations to provide that those Regulations do not apply for the purpose of determining the education authority responsible for identifying, assessing, making and maintaining statements and performance of other functions under Part 4 of the Education Act 1996 relating to children with special educational needs.

Regulations 2(6) to (8) amends various regulations in the Principal Regulations by substituting references to legislation that is no longer in existence for references to current legislation.

Regulation 2(9) amends regulation 7 of the Principal Regulations to make clear that the regulation applies to the exclusion of other regulations in the Principal Regulations only.

2009 No. (W.)

EDUCATION, WALES

**The Education (Areas to which Pupils and Students Belong) (Wales)
(Amendment) Regulations 2009**

Made 2009

Laid before the National Assembly for Wales 2009

Coming into force 2009

The Welsh Ministers, in exercise of the powers conferred on the National Assembly for Wales by sections 569(4) and 579(4) of the Education Act 1996⁽¹⁾ and now vested in them⁽²⁾ make the following Regulations.

Title, commencement and application

1.—(1) The title of these Regulations is the Education (Areas to which Pupils and Students Belong) (Wales) (Amendment) Regulations 2009 and they come into force on [.....2009].

(2) These Regulations apply in relation to Wales.

Amendment of the Education (Areas to which Pupils and Students Belong) Regulations 1996⁽³⁾

2.—(1) The Education (Areas to which Pupils and Students Belong) Regulations 1996 are amended as follows.

(2) In regulation 2(1), omit—

““further education student” means a person in respect of whom provision for further education is made;”.

(3) In regulation 2, after paragraph (3), insert—

“(4) These Regulations do not apply for the purposes of determining which authority’s area a child is in for the purposes of section 321(3) of the Education Act 1996.”.

(4) In regulation 3(a), omit—

“other than a further education student” and “and”.

(5) Paragraph (b) of regulation 3 is omitted.

(6) In each of regulations 4(2)(a), 5(2)(a) and 7(2)(a), for “Part III of the Education Act 1993”, substitute “Part 4 of the Education Act 1996”.

(1) 1996 c.56.

(2) The functions of the Secretary of State under these sections transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) and then to the Welsh Ministers by virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c. 32).

(3) S.I. 1996/615.

(7) In regulation 4(2)(b), for “section 50(1) of the Education Act 1944, substitute “section 514(1) of the Education Act 1996”.

(8) In each of regulations 6(2)(b) and 7(2)(c), for “section 298(1) of the Education Act 1993”, substitute “section 19(1) of the Education Act 1996”.

(9) In regulation 7(1), after the words “other regulation”, add—
“in these Regulations”.

(10) In regulation 7(2)—

(a) omit “or” at the end of sub-paragraph (c), and

(b) omit sub-paragraph (d).

(11) Regulations 8, 9, 10 and 11 are omitted.

The Minister for Children, Education, Lifelong Learning and Skills, one of the Welsh Ministers
Date