

Fair Access Protocols for school admissions: Addressing common issues

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In this article, we consider Fair Access Protocols (**FAPs**) for schools admissions based on some of the issues we've recently seen, and the basis on which concerns can be raised and placements challenged.

What are the categories of Fair Access Protocols?

The rules governing FAPs are found in the statutory [School Admissions Code 2021](#) (**Code**) and the Department for Education's (DfE) departmental guidance [Fair access protocols: advice for local authorities and school admission authorities](#) (**FAP Guidance**).

Para. 3.17 of the Code sets out an exhaustive list of the categories of children who are eligible to be placed under the FAP. Local authorities cannot add to the list or change/expand on the criteria set out in each category.

The 'pre-condition' for a referral for a FAP placement

Crucially, the preamble to Para. 3.17 makes it clear that the FAP:

*"...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**⁸⁰".*

Footnote 80 states:

"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".

This is emphasised in the FAP Guidance which states:

*"Where it can be demonstrated that **reasonable measures have been taken to secure a school place through the usual in-year admissions process and this has not been successful**, or where a school place has not been sought due to exceptional circumstances, a child may be eligible **for referral** to the Fair Access Protocol".*

This means that in-year applications must have been considered and in most cases at least one application refused, **before** the child is eligible to be referred to the FAP for placement, which makes this a 'pre-condition' of accepting a referral.

Your representative attending FAP meetings or otherwise involved in placement decisions should therefore be ready to ask probing questions and/or obtain evidence that this 'pre-condition' has been met before agreeing to an admission.

Overlooking pre-conditions of Fair Access Protocols

Unfortunately, we've seen this 'pre-condition' overlooked in some FAPs and by FAP Panels, and have come across parents who have been told that their child **must** be placed under the FAP and discouraged from making in-year applications to schools (in some cases, told they can't).

This breaches Para. 2.23 of the Code which confirms that:

“A parent can apply for a place for their child at any school, at any time.”

And the FAP Guidance which says:

*“FAPs **must not** be used in place of the usual in-year admissions process. A parent can make an in-year application at any time and is entitled to have their preference met wherever possible, as well as the opportunity to appeal a decision when a place is not offered”.*

Alternative provision for permanently excluded children

The problem outlined above seems to be most common in the case of permanently excluded children who are placed in alternative provision from the sixth day by the local authority, which can result in them staying in alternative provision for months when they could have been secured a place in a school in-year.

This might be because the category in which they fall (Para. 3.17d) states:

“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”.

And Para. 3.16 of the Code, which says:

“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.”

Which may be interpreted by local authorities to mean that they can control when and where permanently excluded children are placed as part of a wider consideration as to whether they are suitable for mainstream education.

However, this ignores Para. 2.23 which makes it clear that parents cannot be prevented from applying to any school of their choice at any time.

Furthermore, Para. 2.27 states:

*“Local authorities **must**, on request, provide information to prospective parents about the places still available in all schools within their area. To enable them to do this, the admission authorities for all schools in the area **must** provide the local authority with details of the number of places available at their schools whenever this information is requested, to assist a parent seeking a school place. Such details should be provided no later than two school days following receipt of a request from the local authority”.*

This information would let parents submit in-year applications to schools they **know** have places available, which could then only be lawfully refused under the ‘twice excluded’ rule (see Para. 2.8 of the Code), or under the Para. 3.10 ‘challenging behaviour’ ground’ which only applies to non-entry year groups, is complex/difficult to rely on and is not advisable in the case of pupils who may have behavioural disabilities (see our recent article on [refusing admissions on the basis of challenging behaviour](#)).

Your representative should keep this in mind when considering a placement for a permanently excluded pupil under the FAP, as part of their wider exploration as to whether the ‘pre-condition’ has been met for referral in the first place.

Proportionality and schools’ views on placement

Para. 3.16 of the Code says that:

*“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**” [emphasis added].*

The FAP guidance expands on this, stating:

*“All schools should be treated in a **fair, equitable and consistent** manner. This means that no school – including those with places available – is asked to take a disproportionate number of children who have been permanently excluded from other schools, who display challenging behaviour, or who are otherwise being placed via the FAP.*

What constitutes a ‘disproportionate number of children’ should be defined locally when agreeing the FAP. It must be clear that schools with available places should not be expected to admit all children being placed via the FAP where doing so would mean they are being

asked to take a disproportionate number of such children compared to other local schools. FAPs must also not require schools to automatically admit a child via the FAP in place of another child permanently excluded from the school.

Where a school expresses compelling reasons for not being able to admit a child via the FAP, for example due to health and safety reasons, this should be taken into consideration before a decision is made to place a child in that school."

You will therefore need to have access to statistical information about children placed at other local schools, along with basic information about their behaviour (e.g. excluded, challenging, etc.) for you to be able to decide if you have been asked to admit a disproportionate number, and challenge on this basis.

Children leaving elective home education

Again, unfortunately we have seen examples of FAPs which oblige the school the child previously attended before their parents withdrew them and elected home education to readmit the child if the elective home education ends for any reason.

This does not comply with the Code or FAP Guidance because:

- It fails to meet the 'pre-condition' that reasonable measures have been taken to secure a place in-year.
- It fails to consider whether the child meets the criteria for inclusion in any FAP category (noting there isn't a category dedicated to children leaving elective home education per se).
- It requires you to ignore your legal obligations in respect of admission applications and your determined admission arrangements, and by-pass your waiting lists (where you have one), in breach of the Code.

The FAP Guidance states:

*"During the COVID-19 outbreak, some parents of children who are clinically extremely vulnerable (at very high risk of serious illness from coronavirus) decided to electively home educate their child. **Where a parent decides they want their child to return to school and subsequently apply for a school place, applications should be processed in accordance with the local in-year admissions process.** Most children should secure a school place this way. For those experiencing difficulties, local authorities should be aware that **those children with medical conditions qualify to be allocated a school place via the FAP under category (e) above. Other children in this situation may also qualify to be placed via the FAP under category (I) above**".*

Although this advice was given when significant numbers of children were leaving elective home education at the end of the pandemic, the same still principles clearly apply now.

Managed moves

A 'managed move' happens when a child registered at one school is to be permanently transferred to another school as a 'fresh start', usually where they are at risk of permanent exclusion. The FAP is for children **without** a school place where attempts to secure one in-year have been unsuccessful, which clearly does not apply to 'managed moves'.

In any event, 'managed moves' are usually preceded with a period of dual registration while the child attends the proposed new school on a trial basis. FAP placements are permanent, with the receiving school expected to admit them as registered pupils on a single role basis in all but a few cases.

'Managed moves' should not therefore be referred to within FAPs.

FAP referrals after school refusal for challenging behaviour

Where there is a place available, this is difficult to apply in practice. There are a number of definitions and exclusions that apply, restricting the ability to use the Para. 3.10 'challenging behaviour' ground to refuse admission where there is a place available.

Our recent [article on Para. 3.10 considers the definitions and exclusions](#) in further detail.

However, Para. 3.10 of the Code makes it clear that the 'admission authority' for the school has the power to **refuse** admission (which must be confirmed in writing to the parents, with reasons and information about their right of appeal), and **then** refer the child for placement under the FAP. Indeed, it is this refusal that meets the 'pre-condition' for reasonable measures to have been taken to secure a place in-year.

Changing, expanding or restricting FAP criteria in relation to Para. 3.10

Unfortunately, we have come across FAPs which try to change, expand or restrict the criteria set out in Paras. 3.9 to 3.13 of the Code, making it harder for schools to rely on it.

We have also come across FAPs that try to give the FAP Panel the power to interfere with/challenge the 'admission authority's refusal of the place by deciding for itself whether it thinks the Para. 3.10 requirements are met, and refusing to accept the referral to the FAP if it doesn't. This does not comply with the Code or FAP Guidance, which set out the legal criteria and processes that apply in these situations.

If you find yourself in this situation, you should firmly maintain that the child has **already** been refused a place under Para. 3.10, **before** the referral to the FAP is made, and that the FAP Panel is now required to place the child on the basis that they have not managed to secure one in-year, and not to try to act as an informal 'appeal panel' in respect of the application of Para. 3.10 outside of the School Admission Appeals Code 2022 (Appeals Code) which sets out the appeal process that applies in reality.

If the parents lodge an appeal (as they will be told they have a right to in the refusal letter), the Admission Appeal Panel (Appeal Panel) appointed will need to decide (among other things) whether the school's 'admission arrangements' complied with admission law and were correctly and impartially applied to the appellant's application. This will include deciding whether the requirements and criteria in Paras. 3.9 to 3.13 (and the footnotes) were met when the place was refused. This is supported at Page 9 of the FAP Guidance which states:

"Interaction with the appeals process

The appeals process¹⁴ is independent from the FAP. Where a child has been referred to the FAP, their parents retain the right to make further in-year applications and appeal against the refusal of a school place as normal.

*Admission authorities should be aware that where they refuse a child a school place and subsequently refer them to the FAP, they may later be required to admit that child if an appeal is upheld. This would still be the case when an alternative school place is offered to the child via the FAP. In all circumstances, the decision of an appeal panel is binding and must be complied with. **The fact that an appeal has been lodged for a child is not a reason to delay the FAP process**".*

Our conclusion and recommendations

As well as challenging FAP placements on the bases explored above, FAPs must be consulted on and developed by the local authority in partnership with all schools, and agreed by the majority of schools, in its area. Once agreed, all schools must participate in it.

However, Para. 3.22 provides that:

"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".

You are of course able to raise concerns formally with the local authority in writing on an individual basis, however where these are ignored, you may want to collaborate with a majority of other local schools in order to force a review on this basis.

Alternatively, if your concerns are ignored, you can make a complaint about the local authority's conduct to the Secretary of State for Education on the basis that it has acted unreasonably and/or failed to discharge its duties under the FAP, seeking a direction for remedial action. We can provide specialist support in this respect (including help with drafting correspondence), if and as needed.

If you have any queries about school admissions, please get in touch.

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