

**SURREY COUNTY COUNCIL**

**MS DENISE TURNER-STEWART, CABINET MEMBER FOR  
EDUCATION AND LEARNING**

**DATE: 14 SEPTEMBER 2021**

**LEAD OFFICER: LIZ MILLS, DIRECTOR FOR EDUCATION AND LIFELONG  
LEARNING**

**SUBJECT: FAIR ACCESS PROTOCOL 2021/22**

**ORGANISATION** Empowering Communities  
**STRATEGY PRIORITY**  
**AREA:**



#### **SUMMARY OF ISSUE:**

Each local authority must have a Fair Access Protocol in place and all schools in a local authority area must participate in it. The Fair Access Protocol ensures that vulnerable and unplaced children, who are not successful in gaining a place through the normal in-year admissions process, are offered a place at a suitable school within 20 school days. This includes admitting children above the published admission number to schools that are already full.

The proposed Fair Access Protocol for 2021/22 sets out the criteria that the local authority will use to determine which children will be placed under Surrey's Fair Access Protocol and how cases will be considered. It has been updated to ensure it complies with the Department for Education's (DfE) new School Admissions Code which came into force on 1 September 2021, and which introduces changes in relation to fair access. It also complies with the DfE guidance on fair access that was issued in July 2021 alongside the new School Admissions Code.

#### **RECOMMENDATIONS:**

It is recommended that the Cabinet Member agrees the proposed Fair Access Protocol for 2021/22.

#### **REASON FOR RECOMMENDATIONS:**

- The local authority is required to have a Fair Access Protocol in place that all schools must participate in.
- The proposed Protocol meet the requirements of the new School Admissions Code, which came into effect on 1 September 2021.
- The Protocol will ensure that vulnerable and unplaced children can be placed in school quickly where they are unable to secure a place through the normal in-year admissions procedure.
- When seeking to place a child under the Protocol, no school will be asked to take a disproportionate number of children who have been permanently excluded from other schools, who display challenging behaviour, or who meet one of the other categories set out in the protocol.

- It is proposed to consult schools more fully on the practical operation of the Protocol in the autumn term once term is underway and schools become familiar with the requirements of the new School Admissions Code.

<b>DETAILS:</b>
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1. A copy of the proposed Fair Access Protocol for 2021/22 is attached as Annex 1.
2. The Protocol complies with the statutory requirements of the new School Admissions Code which came into force on 1 September 2021.
3. The main changes to the School Admissions Code in relation to fair access which have been incorporated into the 2021/22 Protocol are as follows:
  - a. Confirmation that participation by schools in the Protocol includes making available a representative who is authorised to participate in discussions, make decisions on placing children through the Protocol and admitting children under the Protocol when asked to do so, even when the school is full (paragraph 2.3);
  - b. Clarity that an in-year application can only be refused on the basis of challenging behaviour if the year group is not for a normal year of entry (paragraph 3.4);
  - c. Inclusion of a definition of challenging behaviour, which will be used to consider whether a child might legitimately be refused admission and referred for placement under the Protocol, even if the school has places (paragraphs 3.5 and 3.6);
  - d. A reminder to schools of their duties under the Equality Act 2010 which may include a child with challenging behaviour (paragraph 3.7);
  - e. Requirement that admission can only be refused on the basis of challenging behaviour if the school has a particularly high proportion of either children with challenging behaviour or previously permanently excluded children on roll compared to other local schools and it considers that admitting a child with challenging behaviour would prejudice the efficient use of resources or the provision of efficient education (paragraph 3.8);
  - f. Confirmation that in-year applications must be processed in accordance with usual in-year processes and must not be refused on the basis that they may be eligible to be placed via fair access (paragraph 3.9);
  - g. Confirmation that an admission authority must not refuse to admit a child solely because information has not been received from their previous school (paragraph 3.10);
  - h. Confirmation that fair access can only be applied where a child is having difficulty in securing a place in-year and where it can be demonstrated that reasonable measures have been taken to secure a place (paragraphs 3.2 and 3.13);
  - i. Where it is agreed to consider a placement under fair access, a school place must be allocated within 20 school days and thereafter for the child to start as soon as possible (paragraphs 3.18, 7.1, 7.6 and 7.16);
  - j. Confirmation that when seeking to place a child under the Protocol, no school - including those with available places - will be asked to take a disproportionate number of children who have been permanently excluded

- from other schools, who display challenging behaviour, or who meet one of the other fair access categories (paragraph 3.20);
- k. A prescribed list of set categories that are eligible to be placed under the Protocol (paragraph 5.2);
  - l. Provision for the Protocol to be reviewed if the majority of schools (more than 50%) no longer support its principles or approach - subject to the matter under dispute not being a statutory requirement (paragraphs 14.1 to 14.4).
4. Other changes to the Protocol for 2021/22 compared to the Protocol for 2020/21 are as follows:
- a. There is now just one Protocol that applies to primary and secondary (last year there was a separate protocol for each as different categories applied);
  - b. The layout and order of the sections has been reviewed, making the Protocol shorter and easier to read;
  - c. The Protocol sets out clearly the legal basis for refusing an application for admission in-year, depending on whether or not the year being applied for is a normal year of entry, which is one of the triggers for a case to be considered under the Protocol (paragraphs 3.3 and 3.4);
  - d. In line with other aspects of the School Admissions Code, confirmation that applications for admission in-year must be decided upon within a maximum of 15 school days (paragraph 6.3);
  - e. Introduction of a process to benchmark cases where admission has been refused on the basis of challenging behaviour, to ensure the threshold of challenging behaviour has been met and to ensure consistency (paragraph 6.5 and Appendix 1);
  - f. The process for deciding whether a case should be referred directly to a school for placement or to a panel has been more clearly set out (paragraph 7.2);
  - g. The process for referring to a panel has been streamlined to reduce the involvement of Area teams to ensure greater consistency and oversight for all referrals in Surrey (paragraph 7.7 and Appendix 1);
  - h. The process for deciding which schools should consider a placement at a panel meeting has been reviewed and will no longer be restricted to borough/district boundaries. Instead, dates will be set and schools will be invited according to the circumstances of the case (paragraphs 7.8 to 7.10);
  - i. Clarification that a child who is being placed from a PRU should be placed on the roll of the school and should not be dual registered (paragraph 7.19);
  - j. The roles and responsibilities of the key stakeholders involved in fair access have been reviewed and are now included in Appendix 1 rather than within the body of the document;
  - k. The Expectations of Fair Access Panels have been moved from the body of the document to Appendix 3 and these set out good practice in the event of panels needing to operate to agree fair access placements.
5. New categories that have been added to the Protocol because they are now on the prescribed list of categories within the School Admissions Code and those which have changed from the previous Code are as follows:

- 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;
  - children living in a refuge or in other Relevant Accommodation at the point of being referred to the Protocol;
  - children in formal kinship care arrangements;
  - 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 School Admissions Code;
  - children for whom a place has not been sought due to exceptional circumstances;
  - 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; and
  - previously looked after children for whom the local authority has been unable to promptly secure a school place.
6. As a consequence of the DfE prescribing a set list of categories that are eligible to be placed under the Protocol, the following categories have been removed from Surrey's Protocol for 2021/22:
- children known to the Police or other similar agencies where there has been active involvement or support received from Surrey's Community Incident Action Group (CIAG) within the past six months;
  - Children with a history of serious unauthorised attendance problems (below 85%) within the past academic year, as assessed by the attached Inclusion Officer;
  - Children withdrawn from school by their parent following fixed term exclusion for persistent breaching of internal behaviour policies in school;
  - Children who have applied to return to mainstream schooling after a period of elective home education and whose application for a school place through the normal in year admission process is refused;
  - Children applying to enter Year 11 whose application for a school place through the normal in year admission process is refused
  - Children of UK service personnel and other Crown Servants, where a change of location ordered by the service leads to a need for a change of schoolchildren of UK service personnel and Crown Servants
7. Some of the children who would have qualified under one of these removed categories may still qualify under one of the prescribed categories set out in the School Admissions Code and in paragraph 5.2 of the Protocol.
8. Surrey's Fair Access Protocol has generally worked well, with 214 children being referred under the Protocol in 2020/21 (91 primary and 123 secondary). Of these, 180 were placed in school during 2020/21, with only 16 secondary children and no primary children being placed in school by a panel. The remaining 174 children were all placed in a school directly by the School Admissions team.

9. Surrey may see a reduction in the number of children who are placed under fair access in 2021/22 for the following reasons:
- A change within the School Admissions Code to the categories of children who will be eligible for placement under the Protocol;
  - Confirmation within the Code that a child must only be placed through fair access when they have been unable to secure a place through the in-year admission procedures;
  - Confirmation within the Code that admission must not be refused on the basis that they may be eligible to be placed via fair access; and
  - Clarification within the Code of the circumstances when admission might legally be refused in year, for a year group that is the normal year of entry and a year group that is not (different rules apply).

<b>CONSULTATION:</b>
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10. Draft Protocols were distributed on 13 May 2021 to all schools and Pupil Referral Units and to the Primary and Secondary Phase councils for consideration. The Education and Inclusion Service Managers and the Area Inclusion Managers were also consulted.
11. However, at that point, the new School Admissions Code had not been issued, so the draft Protocols did not reflect the changes within it and reflected a carry forward of the 2020/21 Protocol with dates updated.
12. The School Admissions team received no comments to that consultation.
13. The proposed new School Admissions Code was published on 13 May 2021 but was subject to Parliamentary approval which was not confirmed until 13 July 2021. In addition the DfE confirmed that they would issue updated guidance on Fair Access Protocols and this was not issued until 13 July 2021.
14. The late confirmation that the Code had passed through Parliament and the publication of the updated guidance so close to the end of the summer term has meant that no further consultation has taken place with schools or other stakeholders.
15. However, the School Admissions team informed all schools of the detail of the new School Admissions Code on 2 June 2021, including the implications for fair access in Surrey.
16. Whilst there is much within the Protocol that the local authority is legally obliged to implement and cannot be changed, the intention is to consult with schools in the autumn term 2021 on some of the operational detail of the Protocol to ensure it seeks views on the aspects that can be developed locally. This includes:
- the decisions about how placements will be decided upon
  - the operation of panels and the information they receive
  - the roles and responsibilities of the different stakeholders
  - the monitoring and reporting of information in relation to fair access

17. Surrey's Fair Access Review Group will also review the operation of the Protocol for 2021/22 to identify any in-year changes that may be needed. The Review Group consists of representatives from primary and secondary schools, Pupil Referral Units, local authority Education & Inclusion Service Managers, Area Inclusion Managers and Surrey's School Admissions Team.

#### **RISK MANAGEMENT AND IMPLICATIONS:**

18. The Fair Access Protocol reduces the risk of children being left out of school by ensuring there is a shared responsibility between the local authority and schools to place a child in school within 20 school days where they have been unable to secure a place through the normal in-year admissions process.
19. Once placed in a school, the Protocol ensures that children will be placed on roll as soon as possible, but within no more than five days, to ensure that no child remains out of school for longer than necessary.
20. The Protocol reduces the risk of undersubscribed schools being asked to admit more than their fair share of children who need to be placed under the Protocol.

#### **Financial and value for money implications:**

21. Funding remains available to schools in 2021/22 for permanently excluded pupils, dependent on the date of the exclusion and the school that the child had previously been permanently excluded from. The basis of this funding is specified by the DfE and it is generally funded from sums recovered from the excluding school.
22. In addition, maintained schools and academies will continue to receive Age Weighted Pupil Unit (AWPU) funding for Year 11 pupils placed on roll after 07 October 2021 and before the end of the spring term 2022 under categories d) and j) of the Protocol (but not previously permanently excluded), on a pro rata basis. Late Year 11 placements are particularly problematic because schools will not ordinarily receive funding at any stage because this cohort will have left the school by the next October census date. It is hoped that this will offer some incentive to schools to admit Year 11 children. The cost of this funding has been negligible in recent years as few Year 11 pupils are placed under the Protocol.
23. The Fair Access Protocol is important in ensuring timely placement of vulnerable pupils in mainstream schools when that is appropriate. It is recognised that inclusion in mainstream schools is generally the best option for the child, as well as the most cost-effective solution for the Council.
24. Whilst the cost of payments to schools admitting Year 11 pupils under the Fair Access Protocol is already provided for within the High Needs Block (HNB) of the Dedicated Schools Grant, there is an overall need for major cost reductions to be found in the high needs block to remove the current operating deficit. Continuation of payments for Year 11 pupils supports inclusion of these pupils and may avoid incurring much higher costs for alternative placements elsewhere and should continue but needs to be kept under review in the overall context of the HNB.

**Section 151 Officer commentary:**

25. Although significant progress has been made over the last twelve months to improve the Council's financial position, the medium-term financial outlook is uncertain. The public health crisis has resulted in increased costs which are not fully funded in the current year. With uncertainty about the ongoing impact of this and no clarity on the extent to which both central and local funding sources might be affected from next year onward, our working assumption is that financial resources will continue to be constrained, as they have been for the majority of the past decade. This places an onus on the Council to continue to consider issues of financial sustainability as a priority in order to ensure stable provision of services in the medium term. As such, the Section 151 Officer supports the proposed Protocol and the implications will be factored into the Medium-Term Financial Strategy.

**Legal implications – Monitoring Officer:**

26. The 2021 DfE School Admissions Code requires local authorities to have a Fair Access Protocol in place to ensure that education can be secured quickly for children who have no school place and that all schools in an area admit their fair share of children with challenging behaviour under the Protocol, including children excluded from other schools.
27. The proposed Fair Access Protocol has been updated to reflect the new requirements of the 2021 DfE School Admissions Code and is legally compliant.

## Public sector equality duty:

28. The public sector equality duty (Section 149 of the Equality Act 2010) applies to the decision to be made by the Cabinet Member in this report. There is a requirement when deciding upon the recommendations to have due regard to the need to advance equality of opportunity for people with protected characteristics, foster good relations between such groups and eliminate any unlawful discrimination. These matters are dealt with in the equalities paragraphs of the report and in the attached Equalities Impact Assessment (EIA).

## Consultation:

29. There is a clear expectation in public law that the Council should carry out a consultation process whenever it is considering making significant changes to service provision. Whilst changes have been made to the 2021/22 Protocol, these bring it in line with the new School Admissions Code and these aspects of the Protocol cannot change as a result of consultation as they are statutory requirements. However, because of the date of publication of the new Code, there was no time to undertake consultation with schools on operational aspects of the Protocol before the end of the summer term and so this will take place in the autumn term.

## General Decision-Making:

30. In coming to a decision on this issue, the Cabinet Member needs to take account of all relevant matters. The weight to be given to each of the relevant matters is for the Cabinet Member to decide. Relevant matters in this context will include the statutory requirements, the policy considerations, the impacts of the options

on service provision, the Medium-Term Financial Plan (MTFP), the Council's fiduciary duty, any relevant risks and the public sector equality duty.

Best value duty:

31. The best value duty is contained in section 3 of the Local Government Act 1999 as a result of which the Council is under a duty to make arrangements to secure continuous improvement in the way in which functions are exercised, having regard to a combination of economy, efficiency and effectiveness. The relevant guidance states that Councils should consider overall value, including economic, environmental and social value when reviewing service provision.

#### **Equalities and diversity:**

32. An Equality Impact Assessment has been completed and is included in Annex 2.
33. There are no negative impacts on any equality group. Placements under the Fair Access Protocol are currently in the region of 214 a year and as such this Protocol will not affect many people nor have a severe effect on some people.
34. The Fair Access Protocol is designed to ensure that children who are out of school are placed in school quickly. This will ensure that the equality groups identified in the EIA will face a positive impact as a result of this Protocol as they will be placed in school quickly, even if a school is full.

#### **Corporate Parenting/Looked After Children implications:**

35. Looked After Children are placed in accordance with Surrey's Protocol for the Processing of In Year Admissions for Children in Care, and thus they are not considered under Surrey's Fair Access Protocol.

#### **Safeguarding responsibilities for vulnerable children and adults implications:**

36. The Fair Access Protocol provides for vulnerable or challenging children who are out of school to be placed in school quickly and this contributes to Surrey's safeguarding responsibilities for vulnerable children.

#### **WHAT HAPPENS NEXT:**

37. The Protocol will be shared with all schools and relevant officers and implemented for 2021/22.
38. The Fair Access Review Group will monitor the effectiveness of the Protocol throughout the year.
39. Consultation on the operational aspects of the Protocol will be carried out with schools during the autumn term.

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#### **Contact Officer:**

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**Consulted:**

- Liz Mills, Director for Education & Lifelong Learning
- Rachel Hickman, Legal and Democratic Services
- Area Education teams
- David Green, Strategic Finance - Children, Families and Learning

**Annexes:**

Annex 1 – Fair Access Protocol

Annex 2 – Equality Impact Assessment

**Sources/background papers:**

- DfE School Admissions Code - September 2021
  - DfE Fair Access Protocols Guidance - July 2021
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