

Fair Access Protocol (FAP) : Primary

(Revised Summer 2021 for September 2021 implementation).

Introduction

The purpose of a Fair Access Protocol is to ensure that - outside the normal admissions round - unplaced children, especially the most vulnerable, are found and offered an education place quickly, so that the amount of time any child is out of school is kept to the minimum. Principles and Processes for Fair Access Protocols are explained in detail in key documents:

- ***DfE Fair Access Protocols: Principles and Process guidance (November 2012)***
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275580/fair_access_protocols_departmental_advice.pdf
- ***DfE School Admissions Code 2021***
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/989176/School_admission_code_2021_slip.pdf (Subject to Parliamentary Approval)

These documents explain the requirement on every Local Authority to develop and operate a Fair Access Protocol (FAP) as follows:

DfE Fair Access Protocols: Principles and Process guidance (November 2012):

Every Local Authority must have a Fair Access Protocol, agreed with the majority of schools, in which all schools (including Academies) must participate since it is binding on all schools.

DfE School Admissions Code 2021:

- 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.*

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.

Rotherham Agreement

In order to comply with DfE guidance and to meet local need, options for organisation of FAP in Primary and Secondary schools have been agreed and will remain in place until any new protocol is agreed, if at any time, the majority of schools can no longer agree the current protocol format.

Primary schools/academies

The first step will be to seek a local solution to placements for pupils referred to the respective Local Area under the Fair Access Protocol by constituting a panel of all local headteachers. The majority of cases should be resolved at this local level.

Cases that cannot be resolved at a local level should be referred to a Strategic FAP Panel (constituted to consist of a panel of 3 Headteachers from outside the Local Area) for decision.

Appendix 1: Rotherham Agreement (Page 9)

Appendix 2: TERMS OF REFERENCE FOR THE ROTHERHAM SECONDARY FAP (Page 10)

2021 Admissions Code clarifies and amends the criteria for referral to FAP as follows:

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.

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 this 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 procedures (as set out in paragraphs 2.23-2.31). 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.

Also,

- 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.

Children who have been permanently excluded twice or display challenging behaviour

A Student with 'challenging behaviour' is defined in the Admissions Code 2021, page 32, footnotes 76/77 as follows:

76. For the purposes of this Code, behaviour can be described as challenging where it would be unlikely to be responsive to the usual range of interventions to help prevent and address pupil misbehaviour or it is of such severity, frequency, or duration that it is beyond the normal range that schools can tolerate. We would expect this behaviour to significantly interfere with the pupil's/other pupils' education or jeopardise the right of staff and pupils to a safe and orderly environment.

77. A child with challenging behaviour may also be disabled as defined in the Equality Act 2010. When considering refusing admission on these grounds, admission authorities must consider their duties under that Act. Admission Authorities should also consider the effect of the decision of the Upper Tribunal in C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN) [2018] UKUT 269 (AAC) about the implications of the Equality Act 2010 when a pupil exhibits a tendency to physical abuse of other persons as a consequence of a disability.

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: a) children who were below compulsory school age at the time of the permanent exclusion; b) children who have been reinstated following a permanent exclusion (or would have been reinstated had it been practicable to do so); c) 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; and d) 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 paragraph 3.8 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 paragraph 3.10 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.*

The Local Authority will use Alternative provision to ensure that the needs of pupils who are not ready for mainstream schooling are met as follows:

Rotherham Aspire

Entry criteria: This provision will be used from day 6 (day 1 for LAC) for the provision of education following a permanent exclusion and for children new to the Local Authority area who were attending Alternative Provision in their previous home Local Authority area. Children allocated a place via Strategic Fair Access Panel decisions will also be admitted.

The role of Aspire is to provide turn-around provision and to refer cases to the Fair Access Panel for placement. (Eligibility for FAP list point d) *children in alternative provision who need to be reintegrated in to mainstream education or who have been permanently excluded but are deemed suitable for mainstream education).*

Places may also be allocated at Aspire through the emerging Inclusion Pathway Panel. Schools may use Aspire and the associated Outreach Teams for advice, support and guidance.

Note: 3.18 Admissions Code 2021:

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 procedures (as set out in paragraphs 2.23-2.31). 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.

In the unlikely event that a school/academy refuses to admit a child allocated a school place through the fair access protocol, the following processes are applicable.

Maintained Schools: Local authority powers of direction (general)

3.23 A local authority has the power to direct the governing body of a maintained school for which they are 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 head teacher 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 either 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.

Academies: The process for requesting that the Secretary of State direct an Academy to admit a child

- Local authorities and Academies are expected to mediate between themselves before a request is made to the Secretary of State to direct an Academy to admit a child.
- Where a local resolution cannot be found, it is the responsibility of the local authority and the Academy to document the case for and against admission.
- When reviewing an Academy direction case, the Education Funding Agency will act on behalf of the Secretary of State to consider whether due process has been followed in applying the provisions of the Fair Access Protocol.

- In requesting a direction from the Secretary of State, the local authority must provide evidence that the provisions of the Fair Access Protocol have been applied in a fair and appropriate manner, the Academy's reasons for refusal and the local authority's response.
- The local authority should send the information using the template to the Education Funding Agency. (Weblink below) On receipt of a request to direct, the Education Funding Agency will inform the school that it has received a request for a direction. The letter will request that the Academy provide any evidence other than that already received that the process has not been properly applied within seven calendar days.
- Where the Secretary of State is asked to consider a direction, he will make that decision on the basis of the papers provided, taking into account:
 - whether the local Fair Access Protocol has been applied appropriately
 - the arguments of the Academy and local authority, whether the authority has considered the arguments for refusal and why it still considers the Academy to be the appropriate provision for the child
 - whether the Academy has been asked to accept a disproportionate number of children under the Fair Access Protocol compared to other schools.

Seeking a Secretary of State Direction – process link:

https://form.education.gov.uk/en/AchieveForms/?form_uri=sandbox-publish://AF-Process-31680cf0-42bc-43e5-a349-b137a03e25b5/AF-Stage-0831a08c-2898-4a51-af77-66e2a1272c1b/definition.json&redirectlink=%2Fen&cancelRedirectLink=%2Fen&consentMessage=yes

An Annual Report of FAP effectiveness and data will be made to the Schools Adjudicator as requested.

Appendix 1: Rotherham Agreement

1. Schools will consider all 'in-year' applications even when the year group is full up to indicated number of places available (Current Admission Number). Places can still be allocated via Education, Health and Care Plan – where the school is named, Child Looked After / previously Looked After by the Local Authority placement, Appeal Panel placement, FAP placement / SEMH partnership placement etc.
2. Managed Moves and Permanent Exclusions - Schools will continue to support pupils through the agreed managed move protocol, through local agreements as a result of the Social, Emotional and Mental Health (SEMH) strategy for collective responsibility. Schools will endeavour to avoid permanent exclusion.
3. Rotherham's existing FAP Panel has agreed that FAP cases will be heard when all statutory processes are concluded e.g. right of appeal waived / refused a place at appeal etc and as an appeals panel decision is statutorily binding on all parties, then any school refusals upheld at appeal are observed and the respective school / schools cannot be considered at FAP.
4. The FAP would look to support the full range of Rotherham schools to prevent a disproportionate impact of admissions falling upon a single School / setting or limited number of schools / settings.
5. Schools will be required to feed in intelligence to the FAP, as and when it is required, on individual children or families of children. There is an imperative to be open and honest about the records of individual pupils. This will allow any receiving school to establish an appropriate support package for any child who is requesting a move between schools
6. Out of Authority 'hard to place' pupils refused a place at a Rotherham School would be referred to their own Local Authority of residence under the FAP protocol for placement. However, the right of appeal must be offered in relation to any refusal of a school place.

Appendix 2: TERMS OF REFERENCE FOR THE ROTHERHAM PRIMARY FAP

(amended July 2021)

Roles and Remit of the Primary Fair Access Protocol Panel:

1. The Panel initially will aim to secure mainstream school places for children and young people of statutory school age and discuss transitions for children currently in Alternative Provision. The children will be resident in the Metropolitan Borough of Rotherham and have proved to be 'hard to place' through normal in-year admissions arrangements.
2. The Panel will be familiar with the relevant legislation and representatives present have a mandate to administer the requirements of the published and agreed Fair Access Protocol.
3. The LA will approach what it considers to be the most appropriate school to seek a placement for the child in the first instance. If a positive response is received the child will be admitted to the school. If the request is declined a Fair Access Panel will be convened. All of the schools in the local geographical area, including the original school approached, will be invited to attend the meeting. Where a local panel cannot determine a placement via the Fair Access Protocol, a second tier convened panel consisting of 3 Headteachers from outside the local area of schools will determine placement.
4. To consider and identify for each case referred:-
 - The objections raised by one or more schools against the best interests of the child
 - Where cases have been heard by an independent appeals panels – any Appeals Panel decision will remain a legally 'binding' decision. Any school's case upheld at appeal will be excluded from the Fair Access Placement.
 - Whether statutory process has been exhausted prior to referral of cases to Fair Access Panel
 - Length of time the child has been out of school / education
 - An appropriate and suitable school
 - The timescale for admission
 - Any resource issues
 - Advice on multi-agency support required
5. Item 3.18 of the School Admissions Code states that 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 procedures (as set out in paragraphs 2.23-2.31). 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.

6. Item 3.21 of the School Admissions Code states that 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

Membership of the Primary Panel

The Panel consists of:

1. Permanent LA Officers from the Access to Education Team to facilitate and support the meetings **who have no voting rights**
2. Permanent Officers linked to the Children and Young People's Service **who have no voting rights** but may be able to offer professional advice and opinion
3. Invited other professionals depending on the agenda **who have no voting rights** but may be able to offer professional advice and opinion
4. Primary Head Teachers / representatives with a voting mandate of **1 vote per School represented**
5. Head of Inclusion / SEND Department or deputy **with 1 vote**
6. Head of Service - Access to Education or deputy **with 1 vote**
7. Head of Aspire or deputy **with 1 vote**

To be quorate, the Primary FAP Panel will be 3 representatives from schools / settings with a voting mandate and 2 LA officers.

The Panel will be convened as necessary to consider individual cases.

The agenda and supporting papers will be sent out to members electronically in advance of the Panel meeting date.