

Explanatory Memorandum to the Education (Areas to which Pupils and Students Belong) (Wales) (Amendment) Regulations 2009

This Explanatory Memorandum has been prepared by the Department for Children, Education, Lifelong Learning and Skills and is laid before the National Assembly for Wales in accordance with Standing Order 24.1.

Description

The Education (Areas to Which Pupils and Students Belong) Regulations 1996 ('the Belonging Regulations') [SI 1996/615] set out the general principle that a child is treated as belonging to the area in which he or she is ordinarily resident or, where he or she has no ordinary residence, the area of the authority in which he or she is for the time being resident. Looked after children are treated as belonging to the local authority area which coincides with or includes the area of the local authority which looks after them – regulation 7.

The Belonging Regulations are intended to apply solely for the purposes of determining recoupment and mandatory awards. However, the case of *R on the application of L v London Borough of Waltham Forest and Staffordshire County Council* [2007] held, in relation to a looked after child, that regulation 7 of the Belonging Regulations had a wider remit than recoupment and could be used for deciding who makes and maintains statements.

Both the Welsh Assembly Government and the Department for Children, Schools and Families (DCSF) in England are aware that local authorities in Wales and England are now unclear how to interpret the Belonging Regulations and in tandem propose to amend the regulations to make it clear that they do not apply for the purposes of determining which local authority is responsible for identifying children with special educational needs, assessing and statementing.

Several amendments are being made. The amendment regulations will amend 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). The amendment regulations will also amend regulation 7 ("Children looked after by a local authority") to make clear that regulation 7 applies to the exclusion of other regulations within the Belonging Regulations themselves (rather than all other regulations). The amendments also remove references to further education students (as there are no longer any such students in receipt of mandatory awards) and update the references to legislation.

Matters of special interest to the Subordinate Legislation Committee

None.

Legislative Background

The Power to make this legislation is contained in sections 569(4) and 579(4) of the Education Act 1996. The functions of the Secretary of State under these sections were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 and then to the Welsh Ministers by virtue of paragraph

30 of Schedule 11 to the Government of Wales Act 2006.

Purpose and intended effect of the legislation

The 1996 Belonging Regulations are intended to operate so that, where a child with a statement moves from one local authority to another, it will be clear which authority that child 'belongs to' for the purposes of determining which authority is financially responsible for the costs of maintaining the statement and educating the child. For example, if Cardiff has parental responsibility for a child and places that child on a long term basis with foster carers in Newcastle, the child would 'belong' to Cardiff, so Newcastle could recoup the costs from them, but Newcastle would be responsible for arranging the child's special educational provision.

In 2007 the High Court ruled in the Waltham Forest Judgment that, in the case of a statemented looked after child, the regulations determine responsibility for both arranging the provision in SEN statements, as well as for the purposes of recoupment. This means that the authority which places the looked after child outside its own area ("the home authority") would be responsible for identifying the child's needs, assessing them and arranging suitable provision for them. In terms of the example given above, if the judgement were followed, Cardiff would be responsible for deciding on the appropriate provision to be given to the child in Newcastle. If the Assembly Government's original interpretation of the Belongings Regulations was applied, Newcastle would be responsible for carrying out these duties, recouping the costs from Cardiff.

The amended regulations are intended to give effect to the Welsh Assembly Government's interpretation to ensure that the Belonging Regulations no longer have the effect that the court held in the Waltham Forest judgment. The regulations will make it clear that the regulations do not apply for the purposes of determining which local authority is responsible for identifying children with special educational needs, assessing and statementing. They also remove all obsolete references to 'further education students'.

This will be welcomed by local authorities many of whom have abided by the Assembly's interpretation of how the regulations operate, as set out in guidance and, most importantly, will create certainty for the children concerned.

Implementation

The Regulations will come into force on 24 June 2009.

Regulatory Impact Assessment

No Impact Assessment has been undertaken. The strengthening of the Department's guidance would not itself affect the number of looked after children placed in independent or non-maintained special schools.

Consultation

Consultation on these Regulations was included in a consultation document entitled "Amendments to the Belonging Regulations 1996 – Proposed Amendments to the Education (Areas to which Pupils and Students Belong) Regulations 1996" which was issued to local authorities, special educational needs and disability voluntary organisations and looked after children's voluntary organisations, in electronic format on 19 January

2009 for a period of 12 weeks. The DCFS in England have also undertaken an identical consultation within the same time frame.

The document can be viewed at:

<http://new.wales.gov.uk/consultations/education/2870832/?lang=en>

Consultees were asked to respond to the consultation by indicating whether they agreed 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.

The majority of respondents agreed with the proposals contained within the consultation, albeit with the proviso that clear guidance should issue in due course. Within these, one welcomed clarification of the regulations but saw arguments both in favour and against applying the Waltham Forest judgement. They felt that whatever conclusion is reached, it is imperative that the new regulations are clear enough not to be open to interpretation and are consistently applied across England and Wales. One other, although broadly in agreement, felt the amendments do not go far enough in that they do not confirm the responsibilities of the host and home LEAs in relation to identifying, assessing, drawing up and maintaining statements of SEN for looked after children.

Finally, two respondents focussed on the potential conflict between the amended regulations and the 'Towards a Stable Life and Brighter Future' (Standing Order 31) document which contains guidance and regulations for the placement, health, education and well-being of looked after children and young people and secondary health care for vulnerable young children placed away from home.

After careful consideration of 'Towards a Stable Life and Brighter Future', the Welsh Assembly Government has concluded that the document does not conflict with the amendment regulations because the document is concerned with ensuring effective corporate parenting and the amendment regulations are part of achieving that.

Whilst we believe that responsibility for identifying provision should remain with the host authority, we also believe that the home authority, as a 'parent' should be encouraged to stay involved in discussions regarding the nature and extent of any special educational provision to be provided to the learner. This is the message contained within the 'Stable Life' document and we will ensure that the subsequent guidance that will issue on the Belonging Regulations will address this issue.

The Department for Children, Schools and Families in England received 42 responses within the consultation period and four after the consultation closed, two of which supported the proposal, one was against and one was not sure. 28 of the 42 respondents (some 68%) agreed with the Department's proposal.