

Fair Access Protocol

Primary Schools

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1. INTRODUCTION

- The purpose of Middlesbrough’s Fair Access Protocol, developed in partnership with local schools, is 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.¹
- This document refers to Middlesbrough Local Authority (LA) procedures in relation to primary school children, a separate document is available which outlines the procedures in relation to secondary school children.
- Where school is referred to in this document this relates to any LA maintained school or Academy.

This document should be read in conjunction with the Department for Education, School Admissions Code, ‘Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels’- 2021 and ‘Fair Access Protocols- Guidance for school leaders, admission authorities and local authorities’- July 2021.

2. PRINCIPLES

- Every LA must have a Fair Access Protocol, agreed with the majority of its schools, in which all schools (including academies) must participate since it is binding on all schools.² There is a shared commitment to ensuring that all children access school places as soon as it is possible to do so and schools **must** comply with the protocol.
- 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.
- The Fair Access Protocol may only be used to place the identified 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. 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 distance³.

¹ Department for Education, *School Admissions Code*, ‘Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels’ (May 2021) s. 3.14, p. 32

² Department for Education, *Fair Access Protocols: Principles and Process*, p. 3

³ Reasonable Distance- Department for Education, *Home to school travel and transport guidance Statutory guidance for local authorities*, (July 2014 s.34, p. 14) ‘As a general guide, transport arrangements should not require a child to make several changes on public transport resulting in an unreasonably long journey time. Best practice suggests that the maximum each way length of journey for a child of primary school age to be 45 minutes and for secondary school age 75 minutes, but these should be regarded as the maximum. For children with SEN and/or disabilities, journeys may be more complex and a shorter journey time, although desirable, may not always be possible.’

- 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. 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 Protocol⁴.
- There is no duty to comply with parental preference when allocating places through the Fair Access Protocol, but parents' and child's views will be taken into account.
- The Fair Access Protocol will seek to place a child in a school that is appropriate to any particular needs they may have.
- When seeking to allocate a place to a child under the protocol all schools will be treated in a fair, equitable and consistent manner.
- An application to direct a school to admit will only be requested as a last resort and where a school refuses to admit a child allocated under the protocol without demonstrating good reasons for the refusal.
- All of Middlesbrough's schools, alternative education providers and the LA will continue to work together to develop transparent and consistent arrangements to ensure an equitable distribution of unplaced and vulnerable children in Fair Access categories, taking in to account the educational requirements of the child and the needs of the school.

⁴ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (May 2021) s. 3.18, p. 34

3. KEY STATUTORY GUIDANCE

3.1 Routine In-Year Admissions:

- In accordance with the School Admissions Code, the majority of children requiring an in-year transfer will continue to be admitted under routine admission procedures. The Fair Access Protocol will only be used when a parent of an eligible child has not secured a school place under in-year admission procedures.
- A parent can apply for a place for their child at any school (academy), at any time.⁵
- With the exception of designated grammar schools, all maintained schools, and academies, including schools designated with a religious character, that have places available **must** offer a place to every child who has applied for one, without condition or the use of any oversubscription criteria, unless admitting the child would prejudice the efficient provision of education or use of resources ⁶
- Admission authorities **must not** refuse to admit a child solely because:
 - a) they have applied later than other applicants;
 - b) they are not of the faith of the school in the case of a school designated with a religious character;
 - c) they followed a different curriculum at their previous school; or
 - d) information has not been received from their previous school⁷
- Parents must not be refused the opportunity to make an application or be told that they can only be placed on a waiting list rather than make a formal application. Upon receipt of an in-year application, the LA will aim to notify the parents of the outcome of their application in writing within 10 school days, parents must be notified in writing within 15 school days. Where an application is refused the LA will notify the parent of the reason for the refusal and information about the right to appeal in accordance with the School Admissions Code⁸.
- Schools must notify the local authority of the outcome of every application as soon as reasonably practicable, but should aim to be within two school days, to allow the local authority to keep up to date figures on the availability of places in the area and to ensure they are aware of any children who may not have a school place.⁹

⁵ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 2.23, p. 27

⁶ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 2.28, p. 28

⁷ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 2.28, p. 28

⁸ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 2.30, p. 29

⁹ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 2.30, p. 29

- Where an applicant is offered a school place following an in-year application, and the offer is accepted, arrangements should be made for the child to start school as soon as possible, particularly where the child is out of school.¹⁰
- Schools must provide the LA with details of the number of places available at their school whenever this information is requested. Such details should be provided no later than two school days following receipt of a request from the local authority.¹¹ To ensure the LA has information available regarding the availability of school places all schools are to share via a weekly return the current numbers on roll in each year group.
- Where a school 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, if the school 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, it may refuse admission and refer the child to the Fair Access Protocol.¹² 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.¹³
- In accordance with The Registration (Child Registration) Regulations 2006 for a routine in-year admission the school must place the child's name on the admissions register from the beginning of the first day on which the school has been notified that the child will attend the school.
- Local authorities have a duty under Section 436A, Education Act 1996 to make arrangements to identify children of compulsory school age who are not registered pupils at a school, and are not receiving suitable education otherwise (Elective Home Education). The Local Authority is obliged to take enforcement measures where it is established that there is no suitable education in place for a child of statutory age, and issue a School Attendance Order (Section 437, Education Act 1996) naming a school on the order. The LA will utilise the Fair Access Protocol in order to identify a school to allocate via a School Attendance Order (SAO).

¹⁰ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 2.31, p. 29

¹¹ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 2.27, p. 27

¹² Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.11, p. 32

¹³ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.10, p. 32

3.2 Fair Access Protocol:

- In accordance with the School Admissions Code each LA **must** have a Fair Access Protocol, agreed with the majority of schools in its area to ensure that – outside the normal admissions round - unplaced children, especially the most vulnerable, are offered a place at a suitable school as quickly as possible. In agreeing a protocol, the LA **must** ensure that no school - including those with available places - is asked to take a disproportionate number of children who have been excluded from other schools, who have been permanently excluded from others schools, who display challenging behaviour or who are placed via the Protocol. The protocol **must** include how the local authority will use provision to ensure that the needs of children who have been permanently excluded, and for children whom mainstream education is not yet possible, will be met.¹⁴
- The operation of Fair Access Protocols is outside the arrangements of co-ordination and is triggered when a parent of an eligible child has not secured a school place under in-year admission procedures.¹⁵
- Fair Access Protocols may only be used to place the identified 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 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.
- 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. Schools **must** process these applications in accordance with the published in-year admission procedures. 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.¹⁶
- 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.¹⁷
- 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

¹⁴ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.14, p. 32

¹⁵ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.15, p. 33

¹⁶ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.18, p. 34

¹⁷ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.19, p. 34

school automatically to admit a child via the Fair Access Protocol, in place of a child permanently excluded from the school.¹⁸

- 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.¹⁹
- 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. The existing Protocol will remain binding on all schools in the local area until the point at which a new one is adopted.²⁰

¹⁸ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.20, p. 34

¹⁹ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.21, p. 34

²⁰ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.35, p. 34

4. FAIR ACCESS PROTOCOL- PRIMARY SCHOOLS IN MIDDLESBROUGH

4.1 FAIR ACCESS CATEGORIES

The School Admissions Code identifies that 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 Plan²¹ 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 (As evidenced by either a child arrangements order not relating to either birth parent or a special guardianship order);
- 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 the School Admissions Code;- see section regarding Challenging Behaviour
- k) children for whom a place has not been sought due to exceptional circumstances²²;
- 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; and

²¹ Child in Need Plans and Child Protection Plans are plans of help and protection to address safeguarding and welfare needs, where a child has been assessed by the local authority as being a child in need under Section 17 of the Children Act 1989 and/or as suffering or likely to suffer significant hardship under Section 47 of the Children Act 1989. See also statutory guidance Working Together to Safeguard Children (2018) (pages 35 and 48-49). Footnote 81- School Admissions Code 2021, pg 33.

²² It is for the local authority to decide whether a child qualifies to be placed via the Protocol on this basis, based on the circumstances of the case. Footnote 83, School Admissions Code 2021, pg. 34.

m) previously looked after children for whom the local authority has been unable to promptly secure a school place²³.

4.2 CHALLENGING BEHAVIOUR

The School Admissions Code 2021 paragraph 3.10 states 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 behaviour⁷⁶, it may refuse admission⁷⁷ and refer the child to the Fair Access Protocol⁷⁸.

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.

⁷⁸ Paragraph 1.9(g) does not apply where an admission authority takes account of past behaviour as evidence for concerns about challenging behaviour, solely for the purpose of making a decision on whether it would be appropriate to refuse admission on the basis described in paragraph 3.10.

*** Reasonable Distance

The LA will determine whether a child qualifies to be placed via the protocol on this basis, based on the circumstances of the case.

The Department for Education Home to School Travel and Transport Statutory Guidance para 34 states as a general guide, transport arrangements should not require a child to make several changes on public transport resulting in an unreasonably long journey time. Best practice suggests that the maximum each way length of journey for a child of primary school age to be 45 minutes and for secondary school age 75 minutes, but these should be regarded as the maximum. For children with SEN and/or disabilities, journeys may be more complex and a shorter journey time, although desirable, may not always be possible.²⁴

²³ In most cases use of the Fair Access Protocol should be unnecessary for a previously looked after child. We would expect the local authority to aim to secure a school place particularly promptly for a previously looked after child and for admission authorities to cooperate with this. The local authority may consider swift use of their general powers of direction (under paragraphs 3.26-3.28) or asking the Secretary of State to consider a direction (under paragraph 3.29) to be the most suitable course of action if a school place for a previously looked after child cannot be agreed with an admission authority promptly. Footnote 84- School Admissions Code 2021, p.g. 34.

²⁴ Home to school travel and transport guidance Statutory guidance for local authorities (July 2014).s.34, p.g. 14.

4.3 PROCEDURE FOR FAIR ACCESS ALLOCATION – PRIMARY SCHOOLS

The flowchart on page 12 outlines the procedure for the allocation of children under the Primary Fair Access Protocol.

- Where the LA seek to pursue a School Attendance Order (SAO) they will consider the circumstances of the case and identify and allocate a school place via the Fair Access Protocol under Category K- children for whom a place has not been sought due to exceptional circumstances.
- For children who have been previously excluded, and for whom mainstream education is not yet possible the LA will ensure suitable provision is in place. This will be considered on a case by case basis and if necessary a referral will be made by the Admissions Team to the multi-disciplinary Pupil Inclusion Panel for a decision to be made as to the most appropriate provision for the child, where this requires the child to be on a school roll and the child is eligible to be considered under the Fair Access Protocol a place will be allocated via the protocol.
- If an application is made for multiple children- siblings will all be allocated to the same school even if this results in the school being allocated over their published admission number.
- Primary Fair Access Meetings will be arranged on an ad-hoc basis by the Admissions Team when it is identified that an application is eligible to be considered under the Fair Access Protocol. This will only occur where a child is 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 in-year admissions process.
- If, **under exceptional circumstances**, a school wishes to refuse to place a child allocated under the protocol, the school must respond to the Admissions Team within seven calendar days indicating in writing its reasons for doing so. The Admissions Team will seek to resolve the issue.
- If the issue is not resolved the case will be discussed at the next Fair Access Meeting for consideration. If it is felt that school should admit the child then schools will be advised and consultation will take place between the head teacher, the governing body of the school, the parent and the child. If agreement is not reached Middlesbrough LA's Head of Access to Education will be asked to determine whether or not the school should admit the child, and if required will direct the school or seek a direction from the Secretary of State
- If the LA's Head of Access to Education, after considering the allocation of the child and the argument for refusal presented by the school, determines that the child should not be allocated to the identified school then discussions will take place regarding suitable school placement and if necessary an alternative school may be allocated using the Fair Access Protocol.

- The allocation decision made by the LA's Head of Access to Education will be binding on all schools. Refusal by a school to take on roll an allocated child will result in the LA directing a LA maintained school to admit or in the case of an Academy will seek a direction from the Secretary of State requesting the Secretary of State, via the Education Funding Agency, to direct the school to admit the child.

To allow scrutiny and observation of the application of the Primary Fair Access Protocol by the Admissions Team the following is to be adopted:

- Where a child is eligible to be considered under the Primary Fair Access Protocol the Admissions Team will convene and minute a meeting to discuss the case and identify and allocate a suitable school.
- A head teacher from another cluster will be invited to attend the meeting to ensure transparency.
- Prior to the meeting any relevant information regarding the case will be shared by the Admissions Team with those involved.
- Where it is determined a school place will be allocated the child's details will be emailed to the allocated school without delay following the meeting.
- The school must notify the Admissions Team of the intended start date for the child.
- If, **under exceptional circumstances**, a school wishes to refuse to place a child allocated under the protocol, the school must respond within seven calendar days indicating in writing its reasons for doing so.
- Where a child is identified as being suitable for consideration under the Fair Access Protocol parents will be notified of this in writing along with their right to appeal to their preferred school.
- Families will only be notified of their allocated school place under the Fair Access Protocol when a school has confirmed they are admitting the child. The school must notify the Admissions Team of an intended start date as this will be communicated by the Admissions Team to the family, this information must be provided without delay.
- 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.²⁵

²⁵ Department for Education, *School Admissions Code*, 'Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels' (September 2021) s. 3.21, p. 34

5. Fair Access Protocol Flowchart- Primary Schools

