

# **SL(6)219 – The Education (Temporary Exceptions for Individual Pupils and Children) (Wales) Regulations 2022**

## **Background and Purpose**

The Curriculum and Assessment (Wales) Act 2021 (the “Act”) establishes a new legal framework for a curriculum and makes provision about assessment for pupils and children in Wales, the Curriculum for Wales (the “CFW”).

These Regulations have been laid as part of a suite of regulations to support the implementation of the CFW from September 2022.

These Regulations will enable head teachers of maintained schools and maintained nursery schools and providers of funded non-maintained nursery education to determine that the provisions of the CFW should not apply to a child or pupil, or should apply with modifications.

Regulation 4 provides that a determination may only be given in cases where a relevant person considers that it is not appropriate for the time being to implement the relevant curriculum for that child or pupil. However, circumstances are likely to change so that within 6 months of the determination, it will be appropriate to implement the relevant curriculum for that pupil or child.

Regulation 5 provides that an initial determination cannot exceed 6 months.

Regulation 6 allows for the variation of a determination, whilst regulation 7 allows for the revocation of a determination. Regulation 8 provides that a further determination can be made in some circumstances, with consent from the local authority or governing body where required. Regulation 9 makes similar provision for providers of funded non-maintained nursery education.

Regulation 10 enables a pupil or parent to request that the relevant person make, vary, or revoke, a determination. Regulation 11 requires the relevant person to make, vary, or revoke a determination within two weeks, or refuse the request.

## **Procedure**

Negative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.



## Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument.

### **1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation**

Where a pupil or parent makes a request for the head teacher, or a provider of funded non-maintained nursery education to make, revoke or vary a determination pursuant to regulation 10(1) or (2) (as applicable), the request must be “made orally or in writing and must include the reasons for which it is made” (see regulation 10(3)). The relevant person is required to make, vary or revoke the determination or give notice of the decision to refuse to do so, within 2 weeks of receiving a request (see regulation 11). However, there appears to be no express requirement for the relevant person to give reasons for their decision if they refuse the request. This seems inconsistent with the express requirement for parents or pupils to provide reasons when they make a request. We note the requirement for information (including reasons) to be provided by head teachers in accordance with section 44 of the Act, but this only applies to situations where a head teacher “makes, varies or revokes a determination under regulations made under section 42” (section 44(1) of the Act). This does not include a refusal. We note that the Explanatory Note accompanying the Regulations states that “Regulation 11 provides that the relevant person must make, vary, or revoke a determination within two weeks, with reasons if the request is refused”. However it is unclear how the provision in regulation 11 makes an express requirement for the relevant person to give reasons where a request is refused.

## Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

### **1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd**

These Regulations do not define the term “head teacher” but this term is used in the Regulations. Other instruments in the suite, such as The Curriculum and Assessment (Wales) Act 2021 (Consequential Amendments) (Secondary Legislation) (No.2) Regulations 2022 define “head teacher” as having “the meaning given to it in section 579(1) of the 1996 Act”. This inconsistency in approach could cause confusion to the reader, particularly given the significance of the term head teacher to the operation of these Regulations (whether used independently or as part of the wider definition of a relevant person).



## Welsh Government response

### Technical Scrutiny point 1:

The Welsh Government notes the committee report but respectfully disagrees on this point. The Education (Temporary Exceptions for Individual Pupils and Children) (Wales) Regulations 2022 (“Temporary Disapplication Regulations”) are made under section 42 of the 2021 Act. Section 44 of the 2021 Act makes supplementary provision to section 42. Section 44 states that when a head teacher makes, varies or revokes a determination under regulations made under section 42 he or she must provide the information described in subsections (3) and (4) of section 44. The determination in question is a decision by the head teacher as to whether or not a temporary exception is to be made, varied or revoked. That information includes amongst other matters the reasons for making, varying or revoking the determination. The scheme of section 44 is to require the head teacher to provide certain information, including reasons for a decision, when making a decision as to whether to make (and, we argue, implicitly or not make) a determination, vary (and, we argue, implicitly or not vary) a determination, or revoke (and, we argue, implicitly or not revoke) a determination. It is not for regulation 11 of the Temporary Disapplication Regulations to explicitly require reasons for refusing to make a determination and nor does it seek to do so – that, we say, is the effect of section 44 itself. In any event we consider that the public law principle of fairness would require the head teacher to provide reasons for his determination. The text in paragraph 8 of the explanatory note reflects the Welsh Government’s overall views on this matter.

### Merit Scrutiny point 1:

The Welsh Government notes the Committee Report and agrees with its conclusion. There is a partial definition of the term “head teacher” in section 579(1) of the Education Act 1996 to the effect that head teacher includes acting head teacher. The term acting head teacher is not itself defined in the 1996 Act. The Welsh Government agrees that it would have been helpful to the reader to have referred the reader to the partial definition in section 579(1) of the 1996 Act. We will amend the 2022 Regulations to address this point at the next available opportunity.

## Committee Consideration

The Committee considered the instrument and Government response at its meeting on 4 July 2022 and reports to the Senedd in line with the reporting points above.

