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The Presiding Officer
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Room G10
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Dear Presiding Officer

THE EDUCATION (MISCELLANEOUS AMENDMENTS) (CORONAVIRUS) (SCOTLAND) REGULATIONS 2020

The Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020, SSI 2020/128 were made by the Scottish Ministers under sections 28A(5) and 28D(3) of the Education (Scotland) Act 1980 (“the 1980 Act”) and section 22 of, and paragraphs 4(3) and 6(6) of schedule 2 of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) on 22 April 2020. The Regulations are being laid before the Scottish Parliament today, 22 April 2020, and come into force on 23 April 2020.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

Under the 1980 Act and the 2004 Act parents can submit a placing request to apply for a place in a school other than their catchment school. Education authorities have to follow statutory criteria when assessing placing requests and making decisions about whether to grant a placing request. If a parent disagrees with an education authority’s decision to refuse a placing request they can appeal to the education authority convened Education Appeal Committee (“EAC”).

Statutory timescales, which are set out in the regulations being amended by this instrument, apply to the stages of this process with most appeals taking place in May and June, so that the bulk of the decisions are made before the end of the summer term and parents have certainty about which school their child will attend in August. If parents are unhappy with the EACs decision, they have a right of appeal to the Sheriff Court though only relatively few will opt to do this.

As a result of the current Coronavirus outbreak, education authorities are reporting significant difficulties in providing the necessary resources needed to successfully carry out the “placing request” process and the consequent appeal hearings. Principally, it will be very difficult for education authorities to allocate staff to this task given that many are currently engaged in “life and limb” activities in response to the current outbreak. Social distancing also prevents hearings from taking place in person.

If education authorities fail to meet the imminent 30 April deadline for processing placing requests for this year’s admissions round (which applies to placing requests received by 15 March, which are the great majority of placing requests received each year), such a failure would result in the local authority being deemed to have refused these placing requests and that the parent could request an appeal hearing.

In addition, education authorities are likely to find it very difficult to convene (and ultimately resource sufficiently) any appeal hearings that are required to be set up within 28 days of notification of a refusal of a placing request. If they fail to meet this deadline, education authorities will be regarded to have confirmed the education authority’s decision refusing the appeal and parents will be able to take legal action via an appeal to the Sheriff Court.

This instrument is required to make temporary amendments to the Education (Appeal Committee Procedures) (Scotland) Regulations 1982, the Education (Placing in Schools Etc. Deemed Decisions) (Scotland) Regulations 1982 and the Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005.

This instrument will amend the 30 April deadline for considering placing requests made before 15 March and mitigate the risk that an education authority’s failure to process placing requests will result in them being deemed as refusals, automatically prompting an appeal hearing. Similarly, the instrument makes changes to the subsequent deadlines that apply to appeals to the EAC and give sufficient time for appeal hearings to be held and mitigate the risk that a failure to hold a hearing will result in legal action via the Sheriff Court.

The instrument will also give education authorities greater flexibility in how appeal hearings are convened so that hearings can be held remotely, via telephone or video conference or, if the appellant is content, solely in writing. This is to provide local flexibility for how references to the Committee are to be determined, enabling video or audio as options so that hearings can take place in line as far as possible with the current process to ensure that they remain fair and transparent. Parents’ right to appeal a decision of the EAC to the Sheriff Court remains in place, albeit within a longer timeframe.

As the 30 April deadline is in 8 days it will not be possible to follow the normal 28 day rule for bringing these regulations into force. While it might be possible to implement the additional changes to the appeal hearing process to a slower timeframe, we believe it is important to give parents and education authorities certainty about the entire process as soon as possible.

These measures are not expressly time limited but are intended to be temporary. We intend to revoke the instrument once the current outbreak is over and this would be effected by 28 February 2021, an undertaking which I will write to the Education and Skills Committee to place on the record. However, if there was to be a further Coronavirus wave either prior to or subsequent to revocation of these changes, and social distancing measures were reintroduced, we would have to consider retaining the changed timescales or introducing similar measures again, depending on the circumstances.

We regret this breach of the 28 day rule, but we consider that in the circumstances it is necessary to bring these modifications into force as early as possible. While parents will remain entitled to make placing requests under the 1980 Act and the 2004 Act, these measures will provide sufficient flexibility to successfully support the process for education authorities to make decisions on these requests and for EACs to consider appeals against such decisions.

Yours sincerely,

Graeme Logan

Director of Learning