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Welsh Government
Consultation Document

Subordinate legislation under the Curriculum and Assessment (Wales) Act 2021 –

Consultation on temporary exceptions and provision for children receiving education in more than one setting

Date of issue: 5 April 2022
Action required: Responses by 17 May 2022

Overview

Under sections 42 and 69 of the Curriculum and Assessment (Wales) Act 2021 (“the 2021 Act”) respectively, the Welsh Ministers have powers to make subordinate legislation:

- i. enabling head teachers and the providers of funded non-maintained nursery education to temporarily disapply some or all of their curriculum in relation to a learner in certain circumstances for a definite period of time; and
- ii. making provision for those learners registered at more than one school or setting.

How to respond

Responses to this consultation should be completed via the online form or, alternatively, it can be emailed/posted to the address below to arrive by **17 May 2022** at the latest.

Further information and related documents

Large print, Braille and alternative language versions of this document are available on request.

The consultation documents can be accessed from the Welsh Government’s website at gov.wales/consultations

Contact details

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This document is also available in Welsh: [hyperlink](#)



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In order to show that the consultation was carried out properly, the Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing. You should also be aware of our responsibilities under Freedom of Information legislation.

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For further details about the information the Welsh Government holds and its use, or if you want to exercise your rights under the UK GDPR, please see contact details below:

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The contact details for the Information Commissioner's Office are:
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0303 123 1113
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Glossary

ALN	Additional Learning Needs
EOTAS	Education other than at school is education provision to meet specific needs of pupils who, for whatever reason, cannot attend a mainstream or special school. In law, local authorities are responsible for providing these services.
FNNE	Funded non-maintained nursery education refers to education, funded by the local authority pursuant to section 118 of the School Standards and Framework Act 198,, delivered in some non-maintained childcare settings, for example, private day nurseries, Cylch Meithrin and playgroups, for children aged 3 and 4.

Legislation index

Title of the legislation:

[The Curriculum and Assessment Act \(Wales\) 2021](#)

[The Education Act 1996](#)

[The Education Act 2002](#)

[The Education \(National Curriculum\) \(Temporary Exceptions for Individual Pupils\) \(Wales\) Regulations 1999](#)

Also referred to as:

The 2021 Act

The 1996 Act

The 2002 Act

The 1999 Regulations

Introduction

1. The Curriculum and Assessment (Wales) Act 2021 (the 2021 Act), which received Royal Assent in April 2021, set out the legislative framework for a new purpose led curriculum and assessment framework for children and young people from 3 to 16 years old receiving education at:
 - maintained schools
 - settings providing FNNE
 - pupil referral units; and
 - settings providing EOTAS arranged by local authorities.
2. It also makes limited provision for post compulsory education at maintained schools.
3. The Curriculum for Wales framework is due to come into effect for nursery, reception and year groups 1 to 6 from 1 September 2022. Secondary schools and other settings have the option to start implementing the new curriculum framework for their year 7 learners from that date. If they do not take up that option they will begin implementing the Curriculum for Wales for year 7s in 2023 together with their year 8s.
4. For more detail on the timetable for roll-out see [here](#).

Consultation

5. This consultation covers a limited range of proposals on two topics relating to the implementation of the 2021 Act. Please feel free to respond to the questions relating to one or both of these topics depending on your interest or experience.
6. The consultation covers proposals on:
 - enabling head teachers and the providers of funded non-maintained nursery education to temporarily disapply some or all of their curriculum in relation to a learner in certain circumstances for a definite period of time; and
 - making provision for those learners registered at more than one school or setting.

Guidance

7. Guidance on both these areas will be updated in the [Curriculum for Wales: Summary of Legislation](#) on Hwb, subject to making the proposed new regulations.

Temporary exceptions

8. Under section 42 of the 2021 Act the Welsh Ministers have powers to make regulations to enable a head teacher at a maintained school or provider of funded non-maintained nursery education (FNNE) to make a determination to disapply or modify the implementation of their curriculum for learners who do not have additional learning needs, where they believe it is required. For example if a child is seriously ill; a child who has suffered a significant trauma; or migrant children who are new to education, language and culture in Wales. In these cases it may not be practical or fair to expect them to cope with teaching and learning of the full curriculum. Head teachers and FNNE providers should be able to make an informed decision to disapply all or part of the curriculum for learners where appropriate for a limited time.
9. The 2021 Act makes supplementary provision about that power in section 43. It provides that a determination can only be for a fixed period not exceeding 6 months.
10. It is not practicable to provide an exhaustive list of the circumstances that would merit such a determination. Such instances will relate specifically to the circumstances/context of the individual child and it is important to allow head teachers and FNNE providers to use their professional judgement.

Existing provision

11. There are existing powers for head teachers to disapply with or without modifications aspects of the current National Curriculum. Sections 114 to 116 of the Education Act 2002 and the Education (National Curriculum) (Temporary Exceptions for Individual Pupils) (Wales) Regulations 1999 (“the 1999 Regulations”) set out the powers and provisions to enable head teachers of maintained schools to temporarily disapply, with or without modifications, the National Curriculum in relation to any registered pupil.¹
12. The 1999 Regulations set out the circumstances in which head teachers may use their powers to make a determination and specify the timings of the period over which the determination can apply. It places limitations to the duration of determinations; the variation and revocation of determinations; and further determinations. It also makes provision on the sharing of information on the determination.
13. As the 1999 Regulations only apply to the National Curriculum they will not work with the new curriculum. It is therefore proposed to revoke those and make new provision under the 2021 Act for children and pupils in the new curriculum. The new provision will be very broadly similar to that made in the 1999 Regulations.

Proposed provision

14. Sections 42 and 43 of the 2021 Act give the Welsh Ministers powers to make regulations on temporary exceptions and largely replicate provisions in the 2002 Act.
15. By making regulations under section 42 the Welsh Ministers will enable head teachers and FNNE providers to disapply, or apply with or modifications, all or some of the 2021 Act curriculum requirements. However, they will need to be satisfied that the curriculum that will be implemented for the individual or child as a result of the determination will—

¹ They do not apply to other aspects of the basic curriculum such as personal and social education, careers education, sex education, religious education or the local curriculum (the curriculum for 14 to 16 year olds).

- enable the pupil or child to develop in the ways described in the four purposes;
- secure teaching and learning that offers appropriate progression for each pupil or child;
- be suitable for the pupil or child's age, ability and aptitude;
- take account of the pupil's or child's additional learning needs (if any); and
- secure broad and balanced teaching and learning for the pupil or child.

Circumstances for making a determination:

16. The proposal is to enable head teachers and FNNE providers to decide on a case by case basis when and how they would need to apply the provisions. This takes account of the many different reasons why a school or FNNE provider's curriculum would not be appropriate for a child or young person for a limited time.
17. In a change from the 1999 Regulations section 43(2) of the 2021 Act states that the regulations must not allow for a determination to be made on the basis that the child has or may have additional learning needs (ALN). Disapplication due to ALN should instead be made under [section 41 of the 2021 Act](#).

Operative period of the determination²

18. The 1999 Regulations currently requires a lead in time of one month between the determination being made and the operative date (date the determination comes into force), unless the head teacher is satisfied that "it is essential in the interests of the pupil or for other educational reasons that the determination should come into force earlier". This is also the case where a determination is to be varied.
19. The maximum operative period is 6 months but they can be less than this or be cut short when the head teacher is satisfied the circumstances giving rise to the determination no longer apply.
20. The draft regulations make the same provision:
 - operative period of 6 months
 - 1 month lead in period
 - the operative period may be cut short if it the exemption is no longer required
 - there may be further determinations providing for a further temporary exceptions.

Information

21. The 1999 Regulations make requirements in relation to the provision of information about temporary exceptions. However, this detail is set out in [section 44 of the 2021 Act](#) so there is no need to make provision in the proposed new regulations. The information that must be provided is:
 - the fact that the determination has been made, varied or revoked;
 - the effect of the determination, variation or revocation;
 - the reasons for making, varying or revoking the determination;
 - information about—
 - the right to make an appeal under section 45 (in the case of a determination that relates to a pupil);
 - the right to make an appeal under section 46 (in the case of a determination that relates to any other child).

² This is defined in the 2021 Act as the period for which the determination has effect.

- a description of the provision that will be made for the pupil or child's education during the period specified in the determination;
- a description of the way in which the head teacher or provider proposes to ensure that the adopted curriculum is implemented for the pupil or child at the end of that period.

22. The information should be provided to the pupil and the pupil's parent/carer. In the case of children in funded nursery education it must be provided to the parent/carer.

Variation and revocation of determinations

23. The proposal is to enable a determination to be varied or revoked where the head teacher or FNNE provider is satisfied that any provision contained in it is no longer appropriate for that pupil or child. However, as with the 1999 Regulations, the proposed new regulations will not allow changes to the operative period.

24. The 1999 Regulations require notice to be given where a decision is made to revoke the determination. However, this will not be included in the proposed new Regulations because this detail is set out in [section 44 of the 2021 Act](#).

Further determinations

25. Similar to the 1999 Regulations provision will be included in the proposed new regulations to allow a head teacher or FNNE provider to make a further determination in relation to a pupil or child. This will apply either where the circumstances for the original determination still apply or where they differ.

26. The further determination should last no more than three months. However, there is no intention to place a limit on the number of further determinations because head teachers and FNNE providers need the flexibility to use their judgement based on the pupil or child's individual circumstances.

27. In the case of maintained schools and maintained nurseries, the head teacher will need written consent from three members of the governing body and the local authority before making further determinations.

Parental/carer requests

28. Similar to the 1999 Regulations, the proposed new Regulations will enable parents/carers and pupils to request the head teacher make, vary or revoke a determination. In the case of FNNE providers, the parents/carers (not the child) will be able to make a request.

29. Where such a request is made the head teacher or FNNE provider must, within two weeks, make, vary or revoke the determination or give notice of the reasons for refusing to do so.

Appeals

30. Sections 45 and 46 of the 2021 Act make provision in relation to appeals about temporary exceptions for individual pupils and children respectively.

31. The pupil and the parent/carer may appeal to the governing body. However, that right does not apply to pupils if the governing body considers the pupil does not have the capacity to understand what it means to exercise the right of appeal. The governing body must give written notice of its decision to the pupil and the parent/carer.

However, that does not apply if the governing body considers that the pupil does not have the capacity to understand the information that would be given.

Learners Registered in More than one Setting

32. Under section 69 of the 2021 Act the Welsh Ministers have powers to make regulations in relation to compulsory school aged learners who are registered at more than one educational setting.
33. There are a number of reasons why children and young people are registered at more than one setting. For example, children dividing their time between separated parents with joint custody; children from Traveller communities; and children who receive education other than at school (“EOTAS”) for a portion of the week because they are unable, for whatever reason, to attend full-time education in a maintained school.
34. Making provision for planning and co-ordination of the curricula delivered for these learners is important to ensure that they benefit from the full curriculum as appropriate for them; and that assessment arrangements contribute appropriately to their progression throughout their education.

PRU/non-PRU EOTAS

35. EOTAS, including education at pupil referral units (PRU),³ can play a crucial role in educating learners for whom mainstream education is not suitable, including some vulnerable learners. It can be provided in a number of ways including, but not limited to, further education institutions, local authority provided home tuition (which is different to elective home education) or independent schools.
36. Under section 19A of the Education Act 1996,⁴ local authorities must make arrangements for the provision of suitable education at school, or otherwise than at school, for learners of compulsory school age who, for whatever reason, may not for any period receive suitable education unless such arrangements are made for them.
37. Learners receiving EOTAS may receive their education through a combination of provisions. This could include part-time EOTAS provision and part-time mainstream provision or full-time EOTAS made up of two or more types of provision. Regulation 9 of the [Education \(Pupil Registration\) \(Wales\) Regulations 2010](#) makes provision for pupils who attend two registered settings, including independent schools, PRUs and mainstream schools, to be dual registered.
38. In 2020/21 there were 2,186 EOTAS pupils.⁵ Of these:
 - 1,060 were sole registered EOTAS (full-time EOTAS provision)
 - 1,792 were dual-subsidary registered with their school (part-time EOTAS provision, spending the minority of their time at their school)
 - 394 were dual main registered with their school (part-time EOTAS provision, spending the majority of their time at their school).
39. There is currently disparity in the statutory curriculum requirements for learners in maintained schools and the statutory curriculum requirements for learners in PRUs

³ PRU are generally regarded as a form of EOTAS although a PRU is a school maintained by an LA.

⁴ As inserted into the 1996 Act by the 2021 Act.

⁵ [Pupils educated other than at school: September 2020 to August 2021 | GOV.WALES](#)

and EOTAS. The 2021 Act facilitates a more inclusive framework for education by placing comparable curriculum and assessment requirements on providers across maintained schools, PRU and non-PRU EOTAS. This should aid children and young people transitioning from one type of setting to another, for example, from a PRU to a mainstream school.

40. The Curriculum for Wales requires providers to take account of what is appropriate for the learner and their development and it recognises that in some cases learners might move from one setting to another or be registered in more than one school or setting.⁶

Maintained schools

41. There were 474,724 pupils in local authority maintained schools in April 2021. Of these 1,866 pupils were registered at two maintained schools (nursery, primary, middle, secondary or special schools).⁷

Proposal

42. Where a child or young person is registered in more than one school or setting the local authority where the learner is ordinarily resident will be required to prepare a plan setting out how it will secure—
- the teaching and learning to be provided for the pupil at each school or setting
 - the assessment arrangements that will apply to the pupil at each school or setting, and
 - arrangements for reporting the pupil's progress to parents or carers.
43. The current arrangements for reporting are set out in the Head Teacher's Report to Parents and Adult Pupils (Wales) Regulations 2011. It is proposed that these regulations will be disapplied for those children and pupils who are in the new curriculum. In their place it is proposed to make new regulations and these proposals were the subject of a [separate consultation](#). We anticipate that the plan will identify which setting will lead on providing that report.
44. There is no intention to prescribe the detail to be included in this plan. It will be for the local authority to work with the relevant persons responsible for the pupil's teaching and learning:
- Head teachers
 - Governing bodies
 - Teachers in charge
 - Management committees
 - Providers of EOTAS (arranged under section 19A of the Education Act 1996)
 - Local authorities (providing arrangements under section 19A of the 1996 Act or is responsible for a school at which the learner is registered)
45. The proposed Regulations will apply to children and pupils educated in the following settings:

⁶ For more information and guidance on the key features of PRU and non-PRU EOTAS provision under the Curriculum for Wales framework click [here](#).

⁷ School Census April 2021

- Pupils registered at more than 1 maintained school
- Pupils registered at more than 1 pupil referral unit
- Pupils registered in at least 1 maintained school and in at least 1 pupil referral unit
- Pupils registered in at least 1 maintained school and in at least 1 independent school
- Pupils registered in at least 1 pupil referral unit and in at least 1 independent school
- Pupils registered at more than 1 independent school

46. A plan would commence on the day the learner is registered at more than one setting or as soon as possible after that; and the duration of the plan would be up to 12 months.
47. In addition, the local authority should keep the plan under review and revise it if:
- the curricula provided to the learner in either setting is amended⁸
or
 - the authority considered it appropriate to do so at any time.
48. In order to promote transparency the relevant persons will be required to provide a copy of the plan to the learner and their parent or carer. However, the requirement to provide a copy to the learners will not apply if, in consultation with the relevant persons (e.g. the head teacher or teacher in charge), the local authority decides the learner does not have the capacity to understand the information in the plan.
49. The benefits to this approach will be:
- securing a common approach nationally to dealing with learners registered in more than one setting. To ensure consistency and continuity for those registered in schools or settings in more than one authority;
 - making it easier for learners benefitting from PRUs or other EOTAS provision to transition back into mainstream education when they are able to do so; and
 - to reduce the likelihood that responsibility for learners will be lost between schools or settings, e.g. between EOTAS settings and schools (i.e. less ambiguity over who is responsible for the learner).

Looked after children

50. Under current legislation the local authority responsible for a looked after child must prepare a personal education plan (PEP) for that child.⁹ This is a record of the arrangements made to meet the child's needs in relation to education and training. However, the local authority looking after the child may not be the same as the local authority where they are ordinarily resident.
51. In order to ensure consistency the local authority looking after the child will be required to prepare the plan to co-ordinate curriculum provision across settings. This will ensure that the two plans accord and appropriate educational provision is made for that child.

⁸ In the case of a child provided with non-PRU EOTAS curriculum under section 53 of the 2021 Act the curriculum is bespoke to them rather than to the setting.

⁹ Section 83 of the Social Services and Well-being (Wales) Act 2014