Guest article

Time for a discrete change to the law on infant class size appeals?

In our latest guest article, Tanya Callman considers the case for a change to the rules concerning infant class size appeals.

At the time of writing, a new School Admissions Code is currently awaited (and possibly an amended School Admission Appeals Code). The Department of Education announced their intention to amend the School Admissions Code in a letter from Nick Gibb MP on 8th September 2015 (regarding the admission of summer born children).

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This article discusses a possible discrete amendment to the law affecting infant class size appeals which it is hoped will be included in any such amended Code.

The current law on infant class size appeals is unfair to a small but vulnerable group of children. These children in particular are affected if there is a change in the circumstances after the date of application for a school place and before the date of an appeal. Readers will be aware that the existing regime for infant class size appeals is effectively a *review* mechanism; thereby there is no provision in the law for any changes circumstances to be taken into account.

This is the case by virtue of the School Admission Appeals Code 2012, notably paragraphs 4.4 and 4.8.

Paragraph 4.4 states:

"The panel must consider all the following matters:
a) whether the admission of an additional child/additional children would breach the infant class size limit;
b) whether the admission arrangements (including the area's co-ordinated admission arrangements) complied with the mandatory requirements of the School Admissions Code and Part 3 of the School Standards and Framework Act 1998;
c) whether the admission arrangements were correctly and impartially applied in the case(s) in question; and
d) whether the decision to refuse admission was one which a reasonable admission authority would have made in the circumstances of the case".

Paragraph 4.8 states:

"4.8 The panel must dismiss the appeal at the fi rst stage where:
a) it fi nds that the admission arrangements did comply with admissions law and were correctly and impartially applied; or
b) it fi nds that the admission arrangements did not comply with admissions law or were not correctly and impartially applied but that, if they had complied and had been correctly and impartially applied, the child would not have been offered a place;
and it fi nds that the decision to refuse admission was one which a reasonable admission authority could have made".

In other words, appeals to the independent appeal panel can only be allowed if there has either been error by the admission authority, or unreasonableness (as it is known in the Code) - which should perhaps better be termed "irrationality".

Paragraph 2.15 of the School Admissions Code sets out the provisions regarding pupils whom the admission authority may choose to admit over 30 into an infant class ("excepted" pupils). Regulation 5 and the Schedule to the Regulations underpin paragraph 2.15, namely the School Admissions (Infant Class Sizes) (England) Regulations 2012 (SI 2012/10).

An informal working party established over the past two years has sought to change the law in this regard. The working party was set up at initiative of two independent appeal panel members, who felt that the current system was unjust. The group consists of independent appeal panel members, myself and clerks to the independent appeal panel- and represents a wide regional jurisdiction. The aim has been to seek to amend paragraph 2.15 of the Schools Admissions code (categories of "excepted pupil") and the underlying Regulations to assist the most vulnerable and disadvantaged children.

There is no desire to increase the infant class size limit above 30.

However, the current law does not give discretion to the admission authority to consider the circumstances of a child which may have occurred or been put forward after the date

of the family's application for an infant class place (and before the time of an appeal) but which make a compelling case for the child to attend that particular ("preferred") school. This it is hoped could be achieved by adding a category of "excepted pupil" into paragraph 2.15 of the School Admissions Code.

The group has become aware of a number of case studies which illustrate the injustice. For example, a case where the child's father had committed suicide after the date of the application for a school place, affecting the child's need for the preferred school. In another case, after allocation day, the child had been diagnosed with cancer, requiring treatment locally. The child already attended the nursery at the school. It was an own admission authority school and the school governors wanted to admit the child in these circumstances but could not do so.

These cases are particularly acute in admission authority areas (notably diocesan boards for example) which do not have social or medical criteria in their oversubscription criteria. The authority therefore is unable at any stage to take the family circumstances into account.

The current regime therefore does not build in any discretion for the most vulnerable. At the moment, on a strict reading of the law, neither the admission authority nor the independent appeal panel (reviewing the decision of the admission authority) has the discretion to take these compelling exceptional circumstances into account.

This lack of discretion is leading to arbitrary justice, as some independent appeal panels are in reality refusing to consider the exceptional circumstances, whereas others are "swayed" by the personal circumstances without having any legal power to take them into account.

It is hoped that a specifi c and discrete amendment to Paragraph 2.15 of the school admissions code would assist this small but vulnerable group of disadvantaged children.

Lobbying by the group has led to the issue being addressed in a debate in the House of Commons on 7 January 2016. This was an Adjournment Debate on Primary School Admissions and Exceptional Circumstances. The debate was led by Suella Fernandes MP, who notably concluded her comments by stating (as reported in Hansard):

"My response is to ask whether the rules can be changed.

The representatives to whom I have spoken made some suggestions about what might need to be changed. There is an existing precedent for protecting categories of vulnerable pupils in the admissions process in the treatment of previously lookedafter children in the current schools admissions code as exceptional cases. That seems to offer a useful model, and it would appear that a specifi c and discrete amendment to paragraph 2.15 of the school admissions code would be what is required, inserting a new category that could be worded along the lines of "children in crisis for whose mental health and/or physical well-being it is in their best interests to be admitted to that particular school."

What the campaigners on this issue are seeking is not an immediate commitment to such a change, but merely that the Government should consult on it, examine its likely effects and consider the inclusion of a general discretion. They feel that this would allow the issues I have summarised today to be properly considered and aired in detail.

Fundamentally, the problem comes down to whether the current admissions regime builds in suffi cient discretion for vulnerable children to be treated as exceptional cases. I believe that it does not. I am persuaded by the argument that an admissions authority should be able to consider the exceptional and compelling circumstances of a child in crisis, where they believe that the child would suffer a signifi cant detrimental impact by not being admitted to the particular school. I also believe that making provision for this discretion would be consistent with the protection already afforded to previously looked-after children.

We all know how emotive and controversial school admissions can be. Parents pin their hopes for their children on getting them into a school that is right for them, and where places are limited, tough choices have to be made. So I realise how carefully the Government will need to consider any change, but I hope I have been able to

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demonstrate that there is an issue here worthy of that consideration. I thank the Minister for his attention, and look forward to hearing his response".

The Minister of State for Schools, Nick Gibb MP, replied at length and concluded as follows (again as reported in Hansard):

"When parents are refused a school place for which they have applied, they have the right to appeal to an independent panel. The panel can uphold a non-infant class size appeal if it considers that the admission of an additional child would not adversely affect the school's ability to operate effectively. The panel can also uphold an appeal if it considers that the parents' reasons for wanting their child to attend the school outweigh the school's reasons for refusal. To ensure that the statutory class size limit is not breached, the school admissions appeals code requires infant class size appeals to be treated differently from those applying to other year groups. When a child is refused a school place because it would breach the infant class size limit, the appeal can be upheld only if the admissions arrangements were unlawful or had not been applied properly, or if the decision for refusal was not one that a reasonable admission authority would make.

There will, of course, always be circumstances in which good schools are full and unable to increase the number of pupils whom they admit. In such cases, an appeals panel is unlikely to uphold the appeal, even when the child in question is an excepted pupil. My hon. Friend is suggesting an amendment to paragraph 2.15 of the School Admissions Code and the infant class size regulations, to include a new category of excepted pupil for children in crisis whose mental health or physical wellbeing mean it is in their interests to be admitted to a particular school. The important point my hon. Friend makes is that, although admissions authorities are able to give priority to children with social or medical needs, when those particular needs only arise after applications have been made, the infant class size limit means admission authorities are unable to admit the child and an appeal panel would not feel able to uphold their appeal.

We are currently considering a number of possible changes to the admissions system to support families and schools while ensuring the system remains fair for all, and we will look at my hon. Friend's suggestions in carrying out this work. I am grateful to her for raising this important issue today. I hope that she is reassured to learn that we will look carefully at the important issues she has raised and consider her suggestions for changes to the codes".

It is hoped that this issue will be addressed in the forthcoming consultation on the new School Admissions Code. Readers are urged to respond accordingly to the consultation should they be supportive of this issue.

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