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Consultation – summary of responses

The draft Special Educational Needs Tribunal for Wales Regulations 2011

Date of issue: March 2012



The draft Special Educational Needs Tribunal for Wales Regulations 2011

Audience	Local authorities, schools, parents and other interested parties.
Overview	<p>The consultation sought the views on draft regulations which set out procedures relating to special educational needs (SEN) appeals and claims of disability discrimination in education made to the Special Educational Needs Tribunal for Wales (SENTW).</p> <p>The draft regulations consolidated and overhauled the existing four sets of regulations that apply to SEN appeals and claims of disability discrimination into one comprehensive and user-friendly piece of legislation.</p> <p>This document summarises the views received in response to the consultation.</p>
Action required	None – for information only.
Further information	<p>For further information: Additional Learning Needs Branch Support for Learners Division Department for Education and Skills Welsh Government Cathays Park Cardiff CF10 3NQ Tel: 029 2082 3003 Fax: 029 2080 1044 e-mail: AdditionalLearningNeedsBranch@wales.gsi.gov.uk</p>
Additional copies	This document can be accessed from the Welsh Government's website at www.wales.gov.uk/consultations
Related documents	None.

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Introduction

The consultation sought the views on draft Regulations which set out procedures relating to special educational needs (SEN) appeals and claims of disability discrimination in education made to the Special Educational Needs Tribunal for Wales (SENTW)

The draft Regulations consolidated and overhauled the existing four sets of regulations that apply to SEN appeals and claims of disability discrimination into one comprehensive and user-friendly piece of legislation.

The consultation was launched on 6 July 2011 and concluded on 12 August 2011. In total, the Welsh Government received 23 responses from a wide range of stakeholders.

In general, the responses received were very positive with the inclusion of an overarching objective being welcomed by all. The majority of the responses concerned the scope or effect of the provisions with some minor changes suggested. The main points raised by the consultation are highlighted as follows with the Welsh Government's response.

Question 1: The Overriding Objective

- a. What are your views on the practical application of the overriding objective?
- b. Are there any obvious practical difficulties?
- c. Do you think it will strengthen the ethos of co-operation?
- d. Could this be strengthened any further?

Comments

The vast majority of respondents strongly welcomed the inclusion of the overriding objective within the Regulations (regulation 6). Almost all agreed with the ethos of co-operation and for ensuring that appeals and claims are dealt with fairly and justly.

The majority of respondents did not suggest any obvious practical difficulties with the overriding objective. Some did suggest that there maybe difficulties with the current time limits to allow for the process to meet the aspirations of fair and just. Namely that 5 days is a short period of time to allow for changes to be made to an appeal.

Generally, it was agreed that the overriding objective will strengthen the ethos of co-operation.

There were however some suggestions of ways to strengthen the overriding objective. It was suggested that the President of the SENTW and panel members have a working knowledge of the National Standards for Participation. Some also agreed for the need to ensure that those children who can understand are given the relevant and accurate information. Likewise it was suggested that families wishing to take a case forward receive information and instructions in a format that is appropriate to their needs.

In addition to this, there was also the suggestion that children should be involved at early stages with regard to their SEN and the provision for it and that case friends accurately represent the views of the child.

Finally, there was a suggestion that the SENTW receive clear power to take action against a party where there maybe obvious breach of provision with regard to regulation 6.

Reaction

The Welsh Government has agreed to increase the period specified within the notice that either makes written representations or request an opportunity to make oral representations. This has been increased from 5 working days to 10 working days.

The local authorities that will be piloting the children's right to appeal and make a claim will be expected to ensure that children are given accurate an easy to understand information. Likewise local authorities will need to consider reviewing their exiting information to ensure its format is appropriate for the needs of families wishing to take a case forward.

The Welsh Government are looking at a person centred approach as part of the reforms of the current statutory process for identifying, accessing and making provision for children with SEN. It is expected that this approach will include that children who have SEN are involved at an early stage of their process and consider their views thereafter. The children's rights to appeal and make a claim duty will need to apply this approach once the reforms are implemented.

Question 2: Appeal and Claim application (Regs 13 and 14)

Are there any requirements that should be added to or deleted from the appeal or claim application and if so what?

Comments

The vast majority of responses did not offer any amendments to the appeal and claim application. Of those that were received, similar amendments were suggested.

A number of responses highlighted that it may not always be possible for a child or even adults to present an appeal in writing. Many suggested that alternative ways of presenting this should be considered, for example, via video recording.

Some suggested that as well as medical diagnosis being given of the child's disability as part of the application, information indicating how the disability affects the child in school should also be provided if the child is content for this to be provided. This would be in line with the social model of disability.

The matter was raised regarding the naming of an absent parent and to notify this person who has or shares parental responsibility for the child or has care of the child. It was suggested that if a natural parent (who maybe absent in the child's life) has to

be informed of the application to appeal or make a claim then, when a caring parents requests it, the contact should be made by the SENTW with strict confidentiality.

Reaction

The local authorities that will be piloting the children's right to appeal and make a claim will be expected to consider making the application widely accessible to cater for those who may not be able to apply via writing.

The Welsh Government has agreed to amend Regulation 13 to provide the option for the applicant to not name the person who has or shares parental responsibility for the child or has care of the child. However, this has been amended to state that where the applicant opts out of providing this information, the application must state reasons why the names and addresses of such persons are not provided.

Likewise where previously stated that the appeal application must be accompanied by written confirmation that the person making the appeal has notified the person who has or shares parental responsibility for the child or has care of the child, the applicant may choose to opt out of notifying the person but must provide written confirmation explaining why the person making the claim has not notified.

Question 3: Voice of the Child (Reg 26(a)(vii))

- a. Do you agree that a person giving voice to the child is a beneficial addition? Please give reasons.
- b. Are there any practical difficulties with allowing both parties to name a person who can give voice to the child and if so, what?

Comments

All respondents agreed that a person giving voice to the child, where appropriate, is a beneficial addition. Many of the responses recognised the importance of having the child's view considered as part of the tribunal process.

Whilst all welcomed this addition, there were a high number of responses that highlighted the practical difficulties of allowing both parties to name a person who can give voice to the child. Many suggested that there could be difficulties arising whereby both parties nominate a different person. Also that those nominated may present different views which could be contradictory. Some suggested that in such circumstances, the SENTW should ultimately take responsibility for unravelling the context and validity of the views presented.

A few respondents suggested that the child may feel pressured to respond in the way the person wants them to if the person is nominated by both parties to give voice to the child. Some suggested also that there may be potential confusion between the role of the case friend, voice of the child and independent advocate and that the introduction of additional people could lead to the child feeling under pressure.

It was recognised that it is important that those appointed to act as the voice of the child are able to communicate effectively with the young person. It was also suggested that the regulations are amended to seek that the SENTW ask whether the party or a witness requires communication assistance.

Reaction

The Welsh Government acknowledges the responses received to question 3. It is anticipated that the children's rights to make an appeal and claim pilots will tease out the intricacies around the new duties imposed, including testing the practicalities of allowing both parties to name a person who can give voice to the child. It is hoped that a clear distinction between the role of the case friend, the voice of the child and the independent advocate will become evident throughout the pilot.

Question 4: Case friends (Regs 63–68)

- a. Are there any other requirements that a person should satisfy to act as a case friend? If so, what?
- b. Are there any other circumstances that should apply for a person to act as a case friend and if so, what?
- c. Should there be different criteria for 'professional'* case friends?

*this could be a service that supplies persons to act as case friends.

Comments

The majority of respondents were content with the requirements of the person acting as a case friend. Some suggested the importance of impartiality when representing the child while others were content for family members to represent. Many agreed it important that the case friend must represent the child's views and wishes and not of their own. Some highlighted the need to be able to communicate effectively with the child and gain their views on proceedings.

Some respondents suggested the case friend should have an understanding of the child's previous educational history to be suitable to act in this role. Similarly, others suggested that the case friend should have sufficient knowledge of the child's needs. There was a suggestion to allow a child to appoint a case friend at a later date in the proceedings with they wish to do so. It was also suggested that the person acting as a case friend is able to access guidelines, support and legal advice. In addition to this, it was suggested that the person acting in this role ideally has an understanding of the tribunal process.

A number of respondents agreed that there should be different criteria for the role of a professional case friend, some of whom favour the use of professionals. A few suggested that the professional case friend should be qualified or obliged to undertake the appropriate qualifications, to include an understanding of disabilities, special educational needs and the operations of the SENTW. It was suggested that the professional case friend must be independent of the local authority.

In addition to this, many suggested that any organisation recruiting people to act as a professional case friend should have robust safeguarding policies in place. Some suggested that CRB checks are undertaken for those acting in this role. Likewise, other suggested that non professional case friends would need to be CRB checked but not necessarily for close members of the child's family.

Reaction

Since this consultation was launched, the UK coalition Government has indicated that they will be repealing section 8 of the Safeguarding and Vulnerable Groups Act 2006 via the Protection of Freedoms Bill. Section 8 previously allowed the person to act as a case friend if the person was required to be monitored by the Independent Safeguarding Authority. As such, the Welsh Government has removed reference to it from the SENTW Regulations.

In recognition of insufficient safeguards as a result of this proposed repeal and the comments received to the consultation, the Welsh Government has inserted new provisions to the SENTW Regulations. The effect of regulation 66(4) and (5) will mean that a person who wishes to act as a case friend will have to submit to the SENTW an enhanced disclosure certificate issued by the Criminal Records Bureau confirming their suitability to work with children. This requirement will not apply however to a person who is the child's parent, step-parent, brother, sister, grand-parent, uncle, aunt, nephew or niece. It will also not apply where the child's parent consents to the person acting as the case friend, for example, where the parent agrees to a family friend being the case friend.

In addition, regulation 66(6) has been inserted that will require the Secretary of the Tribunal to record the disclosure certificate's number and its start and expiry date on the SENTW's register. Part ii of this regulation also requires the Secretary of the Tribunal to use the recorded delivery service to return the certificate to the person.

Question 5: General

We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

Comments

There were a high number of related issues that were reported to the Welsh Government in this consultation.

There were suggestions that the consultation document itself was complicated and not easy to read. It was suggested that child friendly documentation are produced. Linked to this were suggestions that the terminology used in certain parts could be amended. Some suggested that the time limits could be made clearer within the body of the regulations.

It was suggested that there needs to be training made available to all education panel members on disabled children, equality legislation and schools. Others recommended that education panel members' knowledge should extend to

experience of working with children. Furthermore, the matter of training advocates was raised suggesting that there needs to be investment into training those acting in this role to ensure they can elicit preferences and choices from children and young people. It was also recommended that there be further clarity over the role of the advocate.

A few respondents highlighted potential concerns with regard to costs associated with the procedure. Some raised concern about the cost order that the President of the Chair of the tribunal panel has power to award. It was suggested that this could mean that local authorities will have to find costs for legal representation. It was also suggested that it should be made clear that costs awarded should reflect only additional costs resulting from the action or omission of the person and not the total costs of an appeal. It was also suggested that applying the Children's Rights duty will be costly to local authorities who provide access to independent advocacy services to assist children and young people in the resolution process, as well as the preparation and support at the hearings.

With regard to Disagreement Resolution Service (DRS), it was recommended that procedures are adopted to ensure that children and parents understand the impacts of alternative resolution processes and to ensure that where alternative dispute resolution is applied, that it is in the best interests of the child. Likewise it was suggested that guidelines be provided to explain dispute resolution. It was also suggested that a minimum period is set for DRS as mandatory.

It was suggested that there could be difficulties in the case of looked after children (LAC) who have SEN. There could be a potential conflict where a social worker of a foster carer who may act as the case friend is effectively employed by the local authority.

Reaction

The Welsh Government acknowledges the related issues highlighted by respondents and will ensure that the matters raised are considered during the piloting of this duty.

The SENTW will be making available child friendly materials to children who wish to make an appeal of claim. Likewise, local authorities piloting the duty will be expected to make information widely accessible to cater for children's needs.

The Welsh Government has funded an Action Research Project (ARP) to rigorously scrutinise the pilots and this will run alongside the pilots for at least its first 2 years. The ARP's quantitative and qualitative assessments will be based on the experiences of those involved and the information will help to amend good practice models in light of the experiences of the pilot authorities to inform the later roll out across Wales.

The pilot authorities are under an obligation to co-operate with the ARP and provide it with such information as it requires.