



Welsh Government
Consultation Document

Representatives for young people, and parents of children, lacking mental capacity

A consultation on Chapter 31 of the draft ALN Code; relating to representatives for parents of children and young people who lack capacity in relation to the Additional Learning Needs and Education Tribunal (Wales) Act 2018

Date of issue: 3 September 2020
Action required: Responses by 29 October 2020

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Chapter 31 - Representatives for young people, and parents of children, lacking mental capacity

Overview

This consultation seeks views on Chapter 31 of the Welsh Government's draft ALN Code. The chapter relates to young people who lack capacity at the relevant time, and also to parents of a child where a parent lacks capacity at the relevant time, and their right to a representative under the Additional Learning Needs and Education Tribunal (Wales) Act 2018.

How to respond

Responses to this consultation should be e-mailed/posted to the address below to arrive by 29 October 2020 at the latest.

Further information and related documents

- Consultation response form – Consultation on the draft parents and young people lacking capacity regulations
- Consultation on the draft parents and young people lacking capacity regulations – young person's version
- Consultation on the draft parents and young people lacking capacity regulations – easy read version

The documents above can be accessed from the Welsh Government website at:

- Consultation on the draft Additional Learning Needs Code (December 2018-March 2019): <https://beta.gov.wales/draft-additional-learning-needs-code>

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

Contact details

For further information:
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General Data Protection Regulation (GDPR)

The Welsh Government will be data controller for any personal data you provide as part of your response to the consultation. Welsh Ministers have statutory powers they will rely on to process this personal data which will enable them to make informed decisions about how they exercise their public functions. Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about or planning future consultations. Where the Welsh Government undertakes further analysis of consultation responses then this work may be commissioned to be carried out by an accredited third party (e.g. a research organisation or a consultancy company). Any such work will only be undertaken under contract. Welsh Government's standard terms and conditions for such contracts set out strict requirements for the processing and safekeeping of personal data.

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

If your details are published as part of the consultation response then these published reports will be retained indefinitely. Any of your data held otherwise by Welsh Government will be kept for no more than three years.

Your rights

Under the data protection legislation, you have the right:

- to be informed of the personal data held about you and to access it
- to require us to rectify inaccuracies in that data
- to (in certain circumstances) object to or restrict processing
- for (in certain circumstances) your data to be 'erased'
- to (in certain circumstances) data portability
- to lodge a complaint with the Information Commissioner's Office (ICO) who is our independent regulator for data protection.

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

Data Protection Officer:
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

e-mail: Data.ProtectionOfficer@gov.wales

The contact details for the Information Commissioner's Office are:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 01625 545 745 or
0303 123 1113

Website: <https://ico.org.uk/>

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Introduction

1. The Additional Learning Needs and Education Tribunal (Wales) Act 2018 ('the 2018 Act') received royal assent in January 2018.
2. The 2018 Act makes provision for a new statutory framework for supporting children and young people with additional learning needs ('ALN'). This will replace existing legislation surrounding special education needs ('SEN') and the assessment of children and young people with learning difficulties and/or disabilities ('LDD') in post-16 education and training.
3. The 2018 Act has three overarching objectives, which the draft ALN Code and proposed regulations are also intended to support. These are:
 - A unified legislative framework that supports all children of compulsory school age or below with ALN, and young people with ALN in school or further education;
 - An integrated, collaborative process of assessment, planning and monitoring which facilitates early, timely and effective interventions; and
 - A fair and transparent system for providing information and advice, and for resolving concerns and appeals.
4. The Welsh Ministers are required to issue a Code on ALN ('the ALN Code') and requires consultation with the following persons on that Code:
 - (a) each local authority in Wales;
 - (b) the governing body of each maintained school in Wales;
 - (c) the governing body of each institution in the further education sector in Wales;
 - (d) Her Majesty's Chief Inspector of Education and Training in Wales;
 - (e) the Children's Commissioner for Wales;
 - (f) the Welsh Language Commissioner;
 - (g) the relevant committee of the National Assembly for Wales with remit for the education of children and young persons; and
 - (h) any other person the Welsh Ministers consider appropriate.
5. The 2018 Act requires the Welsh Ministers to make regulations in relation to certain provisions, and provides a number of regulation-making powers to Welsh Ministers. This includes a requirement to make regulations to provide for young people (persons over compulsory school age) and parents of children (of compulsory school age and under) who lack capacity¹.

Consultation on the draft ALN Code and draft regulations

6. Between 10 December 2018 and 22 March 2019 the Welsh Government consulted on the draft ALN Code; draft regulations relating to the Education Tribunal for Wales and

¹ Section 83(2) of the 2018 Act. In addition, the 2018 Act amends Schedule 17, part 2, para 6F of the Equality Act 2010 ('the 2010 Act') to require Welsh Ministers to make regulations to provide for parents and persons over compulsory school who lack capacity, in relation to disability discrimination claims to the Education Tribunal against school (Schedule 1, para 19(5)(h) of the 2018 Act). We are drafting these corresponding regulations separately.

ALN Co-ordinators; the policy intent for a number of other proposed regulations; and proposed revisions to the Social Services and Well-being (Wales) Act 2014 ('the 2014 Act') Part 6 Code of Practice – Looked After and Accommodated Children, that have been primarily made relating to looked after children with ALN.

7. The consultation document the accompanied the draft Code and draft regulations explained that regulations to be made under section 83(2) of the 2018 Act (to provide for parents and young people lacking capacity) had not yet been drafted as the Supreme Court decision on Re D (UK SC 2018/006) heard on the 3 and 4 October 2018 was still pending. The outcome of this case may have had implications for 16 and 17 year olds who lack capacity and the operation of the Mental Capacity Act 2005 in relation to this age group. The consultation document explained the Welsh Government's intention to draft and consult on the section 83 regulations following the Re D judgment² and any relevant changes to the Mental Capacity Act 2005 which may have been made by the Mental Capacity Act (Amendment) Bill during its passage through Parliament.³

Consultation on the draft ALN Code chapter - Representatives for young people, and parents of children, lacking mental capacity

8. Draft regulations to be made under section 83(2) of the 2018 Act to provide for young people and parents lacking capacity, along with a corresponding draft chapter of the ALN Code have now been drafted. This consultation seeks views on the draft parents and young people lacking capacity regulations and draft Code chapter.
9. The Welsh Government welcomes the views of children and young people (for whom a separate consultation document is available); parents; practitioners working with children and young people; third sector organisations working with families; representatives of young people and parents lacking capacity; and anyone else with an interest. An easy read version and a plain English version of the consultation is also available.
10. The coronavirus pandemic has impacted on all areas of life, causing an unprecedented challenge to how Welsh Government continues with its existing legislative priorities. Due to the urgent redeployment of resources, this planned consultation has been significantly delayed. Given the short length of the draft code chapters, draft regulations and consultation document itself, and the relatively small numbers of people it will affect, we are confident the consultation period will allow sufficient opportunity for consultees to participate in the consultation and consider the proposals in a meaningful way.

UK Government Codes of Practice

11. The draft ALN Code chapter on representatives for parents of children and young people lacking mental capacity refers to the existing guidance set out in the Mental Capacity Act Code of Practice⁴ in relation to assessing capacity; the role of representatives and how they are appointed or created; how the Mental Capacity Act

² The Supreme Court judgment was handed down on 29 September 2019.

³ Consultation document - Draft ALN Code (page 5): https://gov.wales/sites/default/files/consultations/2018-12/consultation-document-draft-additional-learning-needs-code_0.pdf

⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

2005 applies to young people; and access to information about a person who lacks capacity⁵.

Our proposals

Context

12. One of the key principles underpinning the ALN system, as reflected in the draft ALN Code and the 2018 Act, is a rights-based approach where the views, wishes and feelings of the child, child's parent or young person are central to the planning and provision of support; and the child, child's parent or young person is enabled to participate as fully as possible in the decision making processes and to exercise their rights as necessary.
13. For young people and parents of children who lack capacity at the relevant time, the draft Young people and parents of children lacking capacity Regulations 2020 make provision for a child's parent or young person who lacks capacity to have a representative to ensure that their rights are realised⁶.

Who can be a representative?

14. Regulation 2 specifies who can act as a representative for a child's parent or young person who lacks capacity at the relevant time (i.e. at a time when a decision relating to ALN needs to be made or information needs to be shared). In short, a representative may be one of the following three, as provided under the Mental Capacity Act 2005; a deputy appointed by the Court of Protection; the donee of a lasting power of attorney; or an attorney with an enduring power of attorney.
15. However, where a young person does not have a representative listed in regulations 2(a)(b) and (c) and mentioned above, regulation 2(d) provides for the parent of that young person to act as their representative. This is because, in most cases, we believe a parent will have a good understanding of the young person's ALN and make decisions based in the best interests of the young person.
16. If a person is lacking capacity and does not have a representative, the professionals engaged with the person would be expected to seek to ensure that steps are taken in order to ensure that people lacking capacity do have a representative.
17. In order to have a representative, the requirements set out in the Mental Capacity Act 2018, and supporting guidance included in the Mental Capacity Act Code of Practice, will need to be followed as appropriate for each of the three types of representatives listed in draft regulations 2(a)(b) and (c). This can include going to the court of protection in order to get a deputy appointed.

⁵ The UK government will be consulting on an amended Code of Practice in preparation for the coming into force by the changes made to the Mental Capacity Act 2005 by the Mental Capacity (Amendment) Act 2019

⁶ For children who lack capacity (as defined in the 2018 Act), their rights can be exercised by their parent or through the use of a 'case friend' appointed by the Education Tribunal (see section 83 of the 2018 Act).

18. The provision for parents of children and young people who lack capacity largely reflects those set out in Part 6 of England’s Special Educational Needs and Disability Regulations 2014 (‘the SEND regulations’). The exception is that these draft regulations do not replicate regulation 64(2)(c) of the SEND regulations, which allows a representative of the young person’s parent to represent that young person, where the young person’s parent also lacks capacity at the relevant time and the young person does not have a representative.

What we are proposing

19. We are proposing that these regulations will provide for references to a child’s parent or a young person in the 2018 Act, to be interpreted as a reference to their representative, **or** the representative and a child’s parent or young person so both parties are involved.

20. Where specified in the draft regulations, a representative may, on behalf of a child’s parent, or young person, who lacks capacity, make decisions; send or receive documentation and notifications relating to ALN; attend assessments and individual development plan (IDP) review meetings; be involved in discussions about and the development of IDPs; and make an appeal to the Education Tribunal⁷.

Interpreting parent of a child or young person as ‘representative’ or both

References in the 2018 Act

21. In most cases we think that it would be appropriate for references in the 2018 Act and the equivalent references under the relevant sections of the 2010 Act, to a young person or child’s parent to be interpreted as a reference to the representative only. Our proposal and rationale is set out below.

Right/Duty	Interpret reference as representative, or parent/young person and representative	Rationale
For a young person’s rights to consent to individual development plans being prepared and maintained , specifically sections 11(3)(c) (second reference), 12(2)(b) (second reference), 13(2)(d) (second	References to a young person’s right to consent should be interpreted as the representative only.	Given that a person must have mental capacity to be able to give their consent, it is reasonable for young people who lacks capacity at a relevant time to have a representative to act on their behalf on matters of consent.

⁷ Regulation 13 of the Draft Education Tribunal for Wales Regulations 2019

reference), 14(3) (second reference)		
For rights to request or challenge a decision, specifically sections 23(8); 24(7); 26(1)(b); 27(1)(b); 28(2)(a),(b), (4), (5) & (7); 32(1)(b); 84(5)(b); 70(2) & (3); 72(2); 84(5)(b).	References to a child's parent or young person that relate to requests for something should be interpreted as the representative only.	Where a person lacks capacity at a relevant time, it is appropriate to enable their representative to make such challenges and requests on their behalf, for example to request a review of an IDP.
For duties to notify and provide information to parents and young people, specifically sections 22(1)(b), (2)(b); 23(10), (11); 24(9), (10); 27(4); 28(4), (5), (7); 31(7)(b), (8), (9); 32(1)(a), (3); 42(6); 64(3).	References to a child's parent or young person that relate to duties to notify should mainly be interpreted as representative only.	These sections relate to notifications about reviews and revisions of IDPs, providing copies, communicating decisions not to revise plans, LA decisions on whether to take over governing body plans, decisions on ceasing to maintain plans and health body decisions to notify parents that a child has ALN.
For duties relating to advice and information, specifically sections 9(3)(a)(b), (4)(a)(b)	References to a child's parent or young person that relate to duties to make arrangements for providing advice and information should be interpreted as both the young person and their representative, or the child's parent and their representative.	A local authority could produce an Easy Read version of their arrangements for resolving disputes, which would be appropriate to send to an individual who lacks capacity.
For duties relating to arrangements for the avoidance and resolution of disagreements and independent advocacy services, specifically sections 68 and 69.	Arrangements made by a local authority for the avoidance and resolution of disagreements must provide for a representative to engage in the arrangements on the child's parent or young person's behalf. If a representative requests independent advocacy services on behalf of the young person, a local authority must refer the representative to an independent advocacy service provider.	Without the support of a representative, it is unlikely that a person who lacks capacity would be able to properly engage with such arrangements or services.

Question 1:

Are the provisions for interpreting a child's parent as the representative, or both the parent and the representative, in instances where that parent lacks capacity, appropriate?

Question 2:

Are the provisions for interpreting a young person as the representative, or both the representative and the young person, in instances where that young person lacks capacity, appropriate?

References in other regulations and the ALN Code to be made under the 2018

22. We are proposing any references to a child's parent or young person in other regulations and Code requirements to be made under the 2018 Act will be interpreted as representative where there is a right for a child's parent or young person to request or challenge a decision or receive information.

Question 3:

The provisions in the draft regulations and code chapter allow for a young person's parent, where the young person does not have a representative (as defined in regulation 2) to act as their representative. Does this proposal strike the right balance between allowing individuals to make their own decisions, and allowing representatives to make decision on behalf of those individuals who are lacking capacity?

Question 4:

Do you have any other comments related to the draft regulations or code chapter?

Next steps

23. It is intended that the final draft of the ALN Code and regulations will be laid before the Senedd early in 2021, with a view to implement the new ALN system on a phased basis from September 2021. The statutory roles created under the Act - the ALN Co-ordinator, Designated Education Clinical Lead Officer and Early Years ALN Lead Officer – should still commence in January 2021.

24. Until such time, local authorities and governing bodies of maintained schools must continue to comply with their existing statutory duties (in particular those in Part 4 of the Education Act 1996 and regulations made under it).

25. For further information on the implementation of the 2018 Act, please see:
<https://beta.gov.wales/additional-learning-needs-special-educational-needs>