

2020 No. (W.)

EDUCATION, WALES

**Additional Learning Needs and
Education Tribunal (Wales) Act
2018**

**Young people, and parents of
children, lacking capacity
Regulations 2020**

EXPLANATORY NOTE

(This note is not part of the Regulations)

These regulations supplement the procedural framework in the Additional Learning Needs and Education Tribunal (Wales) Act (“the 2018 Act”). The regulations deal with young people, and parents of children, who lack mental capacity to take the decisions or actions required. For the purposes of the 2018 Act a person lacks capacity when they lack capacity within the meaning of the Mental Capacity Act 2005, that is, when they lack mental, not legal capacity. The regulations provide that where a child’s parent lacks capacity all references to the child’s parent are to be read as references to a representative of the parent. The regulations also provide that where a young person lacks capacity, the references to the young person are to be read as references to the young person’s representative, or to the young person’s parent.

The regulations make it clear that the provisions concerning mental capacity have effect in spite of section 27(1)(g) of the Mental Capacity Act 2005.

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Made ***

Laid before the National Assembly for Wales

Coming into force ***

The Welsh Ministers in exercise of the powers conferred on them by section 83 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018(1) make the following regulations:

Title, commencement

1. The title of these Regulations is the Young people, and parents of children lacking capacity Regulations 2020 and they come into force on [].

Interpretation

2. In these Regulations,

“the 2018 Act” means the Additional Learning Needs and Education Tribunal (Wales) Act 2018;

“child” means a person not over compulsory school age;

“relevant time” has the same meaning as in section 83(3) of the 2018 Act;

(1) 2018 anaw.

“representative” means—

- (a) a deputy appointed by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005 to make decisions on the parent’s or young person’s behalf in relation to matters within Part 2 of the 2018 Act;
- (b) the donee of a lasting power of attorney (within the meaning of section 9 of the Mental Capacity Act 2005) appointed by the parent of a child or by a young person to make decisions on his or her behalf in relation to matters within Part 2 of the 2018 Act;
- (c) an attorney in whom an enduring power of attorney (within the meaning of Schedule 4 to the Mental Capacity Act 2005) created by the parent or young person is vested, where the power of attorney is registered in accordance with paragraphs 4 and 13 of that Schedule or an application for registration of the power of attorney has been made;
- (d) the young person’s parent, where the young person does not have a representative listed in (a), (b) or (c) above.

“young person” means a person over compulsory school age, but under 25.

When a child’s parent lacks capacity

3.—(1) When a child’s parent lacks capacity at the relevant time, references in the provisions of the 2018 Act listed below to a child’s parent are to be read as references to a representative of that parent:—

- (a) section 11(4);
- (b) section 13(3)
- (c) section 18(3);
- (d) section 20(3)(a) and (3)(b);
- (e) section 22(1)(b) and (2)(b);
- (f) section 23(8), (10) and (11);
- (g) section 24(7), (9) and (10);
- (h) section 26(1)(b);
- (i) section 27(1)(b) and (4);
- (j) section 28(2)(b), (4), (5), and (7);
- (k) section 31(7)(b), (8), and (9);
- (l) section 32(1)(a), (1)(b) and (3);
- (m) section 64(3) and (4)

(2) When a child’s parent lacks capacity at the relevant time, references to parents of children, and parents of pupils in sections 9(3)(b) and 9(4)(a) of the 2018 Act respectively are to be read as including both the parents and a representative of the parents.

When a parent of a child who is a detained person lacks capacity.

4. When a parent of a detained person who is a child lacks capacity at the relevant time, references in sections 40(4), (5)(b) and section 42(6) of the 2018 Act to the parent of a detained person who is child are to be read as references to a representative of that parent.

When a young person lacks capacity

5.—(1) When a young person lacks capacity at the relevant time, references to a young person in the provisions of the 2018 Act listed below are to be read as references to the representative of the young person—

- (a) section 11(3)(c) where second occurring;
- (b) section 11(4) where second occurring;
- (c) section 12(2)(b) where second occurring;
- (d) section 13(2)(d) where second occurring;
- (e) section 13(3) where second occurring;
- (f) section 14(3) where second occurring;
- (g) section 20(3)(a) and (b);
- (h) section 22(1)(a) and (2)(a);
- (i) section 23(8) where second occurring;
- (j) section 23(10) and (11)(a);
- (k) section 26(1)(b) where first occurring;
- (l) section 27(1)(b) where first occurring;
- (m) section 27(4);
- (n) section 28(2)(a), (4), (5), (7);
- (o) section 31(7)(a), (8), (9);
- (p) section 32(1)(a);
- (q) section 32(1)(b) where first occurring;
- (r) section 32(3).

(2) When a young person lacks capacity at the relevant time, the references to young people in section 9(3)(a) and to students in section 9(5) of the 2018 Act respectively are to be read as including both the young person and the representative of the young person.

When a detained person who is a young person lacks capacity

6. When a detained person who is a young person lacks capacity at the relevant time, references in sections 40(4), (5), section 41(2)(a) and section 42(4) and (6) to a detained person and to a detained person who is a young person respectively are to be read as references to a representative of that detained young person.

Arrangements for avoidance and resolution of disagreements under section 68 of the 2018 Act

7. When a child’s parent or a young person lacks capacity at the relevant time arrangements made by a local authority under section 68 of the 2018 Act must provide for a representative to engage in the arrangements on behalf of that child’s parent or that young person.

Independent advocacy services under section 69 of the 2018 Act

8. When a young person for whom a local authority is responsible lacks capacity at the relevant time, that local authority must refer that young person’s representative to an independent advocacy service if the representative requests an independent advocacy service.

Representation in appeals

9. When a child’s parent lacks capacity at the relevant time, or a young person lacks capacity at the relevant time, their representative may appeal to the Education Tribunal for Wales on their behalf and sections 70 and 72 of the 2018 Act are to be interpreted accordingly.

Mental Capacity Act 2005

10. Regulations 3, 4, 5 and 7 have effect despite section 27(1)(g) of the Mental Capacity Act 2005.(1)

Name

Title of Minister, one of the Welsh Ministers

Date

(1) 2005 c.9 Section 27(1)(g) does not permit decisions on discharging parental responsibilities in matters not relating to a child’s property to be made on a person’s behalf.