

ADDITIONAL LEARNING NEEDS AND EDUCATION TRIBUNAL (WALES) ACT 2018

EXPLANATORY NOTES

COMMENTARY ON SECTIONS OF THE ACT

Part 2 – Additional Learning Needs

Chapter 2 – Individual Development Plans

Additional learning provision for detained persons (sections 39 – 45)

101. **Section 39** provides the definitions for these sections, sections 40 – 43 set out duties on local authorities relating to “detained persons” and section 44 deals with the application of duties in the Act to both detained persons and those detained otherwise than in relevant youth accommodation in Wales or England. Section 45 contains a regulation power to apply particular functions with or without modification in respect of children or young persons subject to a detention order and detained in a hospital under Part 3 of the Mental Health Act 1983.
102. The application of duties in the Act to children or young people who are subject to a detention order depends upon where they are detained. If the person is a “detained person”, that is detained in relevant youth accommodation in Wales or England (for example, in a secure college), then various duties on governing bodies and local authorities cease to apply but the duties set out in sections 40 to 43 apply instead. These duties are similar to other duties in the Act, but adapted in light of the detention situation. For example, only local authorities are responsible for ALN matters (not governing bodies) during the detained person’s detention and their duty is to arrange appropriate ALP, rather than secure the ALP set out in the IDP. This takes account of the possibility that the local authority might not be able to secure the particular ALP because the person is detained.
103. If a child or young person subject to a detention order is detained in other accommodation (for example in a prison), then various duties on governing bodies and local authorities do not apply during detention in such accommodation (see section 562 of the 1996 Act and section 44(3)-(7)). This is because education in relevant youth accommodation is fundamentally different to that in prisons (for example, it is compulsory in the former, but not in the latter).

Section 39 - Meaning of “detained person” and other key terms

104. **Section 39** defines “detained person” as a child or young person who is subject to a detention order and detained in relevant youth accommodation in Wales or England (and in the case of provisions applying on release, covers someone who was detained immediately before release). The definitions of being subject to a “detention order” and “relevant youth accommodation” are in section 562 of the 1996 Act:

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- a “detention order” is an order made by a court, or an order of recall made by the Secretary of State (but not the orders or authorisations mentioned in section 562(2) and (3) of the 1996 Act);
 - “relevant youth accommodation” is youth detention accommodation (within the meaning given by section 107(1) of the Powers of Criminal Courts (Sentencing) Act 2000), and is not a young offender institution, or part of such an institution, that is used wholly or mainly for the detention of persons aged 18 and over.
105. This section also defines other related keys terms used in the Act, including “home authority” (which refers to the definition in section 562J of the 1996 Act). A home authority is a local authority identified in relation to an individual in accordance with the definition. In addition, it allows for regulations to be made which apply, with modifications, particular aspects of the definition of “home authority” provided for in section 562J of the 1996 Act.

Section 40 - Duty to prepare individual development plans for detained persons

106. The purpose of section 40 is to ensure that where it is brought to the attention of, or otherwise appears to, a home authority in Wales that a detained person may have ALN and an IDP is not being kept for them under section 42 the home authority must decide whether the child or young person has ALN. If the home authority decides that the person does have ALN, it must decide in accordance with regulations under section 45 whether it will be necessary to maintain an IDP for that child or young person once they have been released from detention in order to meet their reasonable needs for education or training.
107. In order to make this decision, there is a duty placed on the home authority to invite the person in charge of the relevant youth accommodation to participate in the decision-making process, and if necessary in the preparation of an IDP. A copy of the IDP must be given to the detained child and their parent, or the detained young person, and the person in charge of the relevant youth accommodation.
108. The home authority must notify the detained child and their parent, or the detained young person, and the person in charge of the relevant youth accommodation, if it decides that the child or young person does not have ALN or that maintaining an IDP would not be necessary when he or she is released. The home authority must provide an explanation of the reasons for their decision. See sections 84 and 85 in respect of the requirements to notify, or give copies of a plan to, a child.

Section 41 - Circumstances in which the duty in section 40(2) does not apply

109. **Section 41** sets out the exceptions to the duties on home authorities in section 40(2) in relation to deciding whether a detained person has ALN and whether an IDP will be needed for when the person is released. These duties do not apply if a detained young person does not consent to the decision as to whether he or she has ALN being made or to a plan being prepared. Nor do they apply if the home authority has previously decided whether the child or young person has ALN and is satisfied that the person’s needs have not changed materially since that decision was made, and that there is no new information which materially affects that decision or the one that it will not be necessary to maintain an IDP for the person when released.

Section 42 - Duty to keep individual development plans for detained persons

110. If a detained person had an IDP immediately before becoming detained, or one is prepared during their detention by the home authority in preparation for their release (under section 40), unless the person is a young person who does not consent to it, section 42 places a duty on the home authority to keep the IDP while the person is detained in relevant youth accommodation. This is different from the duty to maintain

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an IDP, which involves the body maintaining it being required, amongst other things, to secure the ALP set out in it. By contrast, keeping an IDP simply involves keeping it (but not reviewing it) and arranging for 'appropriate ALP' to be provided to the detained person whilst so detained (subsection (8)). Appropriate ALP is the ALP set out in the IDP, or if that is not practicable, educational provision which corresponds as closely as possible to it, or, where the ALP in the plan is no longer appropriate, ALP which the home authority considers appropriate (subsection (9)).

111. A home authority will only be responsible for keeping an IDP previously maintained by another body or authority once the fact that an IDP was being maintained is brought to their attention (subsection (5)).
112. The detained child and their parent, or the detained young person must be informed by the home authority if an IDP is being kept and a copy of it given to the person in charge of the relevant youth accommodation (subsections (6) – (7)). See sections 84 and 85 in respect of the requirement to inform a child.

Section 43 - Release of a detained person

113. **Section 43** ensures that when a detained person is released from detention and on the date of release a local authority in Wales is responsible for the child or young person, that local authority is responsible for maintaining a plan which was being kept for the person under section 42 and for securing the ALP set out in it. This plan is treated as maintained under section 14. However, if the released person is a looked after child upon release, it is the local authority in Wales that looks after the child that must maintain the plan, which is treated as maintained under section 19.

Section 44 - Certain provisions of Part 2 not to apply to children and young persons in detention

114. **Section 44** deals with the application of duties in the Act in relation to children and young people who are detained. Subsection (1) provides for the duties on governing bodies and local authorities listed in subsection (2) to cease to apply in relation to a detained person (defined in section 39(1)) from the start of the detention.
115. Subsection (3) provides for the duties on governing bodies listed in subsection (4) not to apply in relation to a child or young person who is detained in accommodation other than relevant youth accommodation in Wales or England.
116. Subsections (5) to (7) deal with the interaction between Part 2 and section 562 of the 1996 Act. Section 562 disapplies a local authority's functions under the 1996 Act in relation to certain persons who are detained. The Apprenticeships, Skills, Children and Learning Act 2009 amends section 562 so that the disapplication no longer applies to those who are detained in relevant youth accommodation. Section 562 applies to the Act (see section 99(6)). Subsections (5) to (7) apply section 562 for the purposes of the Act as if the amendments to it made by the Apprenticeships, Skills, Children and Learning Act 2009 were already fully in force in relation to Wales, and its reference to relevant youth accommodation were to relevant youth accommodation in Wales or England. The result is that the duties in Part 2 of the Act on home authorities are not disapplied in relation to those detained in relevant youth accommodation in Wales or England, but duties on local authorities in Part 2 do not apply in relation to a child or young person who is detained in accommodation other than relevant youth accommodation in Wales or England.

Section 45 – Detention under Part 3 of the Mental Health Act 1983

117. **Section 45** gives the Welsh Ministers a regulation power to apply functions provided for by Part 2 in respect of persons who are subject to a detention order and detained in a hospital under Part 3 of the Mental Health Act 1983. The power is available where

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the functions do not apply due to section 562 of the 1996 Act or section 44. The power is to apply the functions with or without modification.