

ADDITIONAL LEARNING NEEDS AND EDUCATION TRIBUNAL (WALES) ACT 2018

EXPLANATORY NOTES

COMMENTARY ON SECTIONS OF THE ACT

Part 2 – Additional Learning Needs

Chapter 1 – Key Terms, Code and Participation

Key terms

Section 2 - Additional learning needs

12. **Section 2** defines the term ‘additional learning needs’ (ALN) for the purposes of the Act. This definition is very similar to the definition of ‘special educational needs’ (ALN) under the 1996 Act but is not limited to children and registered pupils of a school below the age of 19, as in the case of the definition of ALN. A person has ALN if the person has a “learning difficulty or disability” (see subsections (2) – (3) for the meaning of this) which calls for additional learning provision (see section 3 for the definition of this).
13. Subsection (1) clarifies that a learning difficulty or disability may, but need not, arise from a medical condition. Also, a person is not considered to have ALN because their home language is different to the language in which they are taught (subsection (4)).

Section 3 - Additional learning provision

14. **Section 3** defines the meaning of ‘additional learning provision’ (ALP), which itself forms part of the definition of ALN in section 2. This definition is very similar to the definition of ‘special educational provision’ found in the 1996 Act but in particular widens the definition by reference to mainstream institutions in the further education sector in Wales (mainstream FEIs) because, unlike the ALN definition, it applies in relation to young people who are students at such institutions. Mainstream FEIs are defined in section 99.
15. The definition of ALP included in the Act has been made by reference to a child’s age, with a slightly different definition operating in relation to children under the age of three (compared to children under the age of two in the 1996 Act). This reflects the fact that for children under the age of three there is no formal educational provision made by the state. Regulations under this section allow the Welsh Ministers to replace the references to the age of three with references to a different age.

Code of practice

Section 4 - Additional learning needs code

16. **Section 4** requires the Welsh Ministers to issue and publish on their website a code on ALN. This can contain guidance about the exercise of functions under Part 2 of

the Act, and about other matters relating to ALN and it must include guidance on a governing body's duty to take all reasonable steps to secure ALP for a pupil or student whilst an IDP is being prepared for that person (see section 47(3)). The persons listed in section 4(3) must have regard to the code when exercising their functions under this Act in relation to ALN. This means that the guidance in the code should be adhered to unless there is a good reason to depart from it. Subsection (4) signposts section 153 of the Education Act 2002 which, as amended by this Act (see Schedule 1), requires local authorities, in funding non-maintained providers of nursery education, to require the provider to have regard to relevant guidance in the code.

17. The code may also impose requirements on local authorities and governing bodies of maintained schools or FEIs in respect of specific matters (see subsection (5)). It may also set out what is required of a local authority and local health board to discharge their duties in sections 7(1) and 8(1) to have due regard to particular United Nations Conventions (see sections 7(4) and 8(4)).
18. There are certain requirements on governing bodies and local authorities which the code must include (subsection (6)). It must include one or more standard form or forms for an IDP and require that the appropriate form is used. It must also require those bodies to do the following within a period of time set by the code, subject to any exceptions (also provided for in the code):
 - a. give any notification that a child or young person does not have ALN; and
 - b. where it is determined that the child or young person has ALN, prepare and give a copy of the IDP.
19. The code may make different provision for different purposes or cases, and make transitory, transitional or saving provision in relation to both a requirement imposed under subsection (5) or provision made under section 7 or 8.
20. The Tribunal must have regard to the code where relevant to any questions arising on an appeal under Part 2 (subsection (10)).

Section 5 - Procedure for making the code

21. **Section 5** ensures that there is consultation on the code (or a revised code) and scrutiny by the National Assembly for Wales before it is issued. Subsection (1) lists the public bodies or persons who must be consulted on a draft code or a draft revised code, which includes anyone else the Welsh Ministers consider appropriate. Then, a proposed code or revised code (which may have been modified from the draft consulted upon) cannot be issued unless the draft has been laid before and approved by resolution of the Assembly. If the draft is approved, it must be issued as the code. The code comes into force on the day or days appointed by the Welsh Ministers in an order. The code must be published on the Welsh Ministers' website (section 4(11)).

Participation, United Nations conventions and access to information

Section 6 - Duty to involve and support children, their parents and young people

22. **Section 6** seeks to ensure that local authorities, governing bodies and others exercising functions under Part 2 place children, their parents and young people at the centre of decisions taken under the Act which directly affect them, and so enable them to participate in a fully informed way. It does this by requiring persons exercising functions under Part 2 in relation to a child or young person to have regard to the matters listed. In practice, this means that, for example, if a governing body is preparing an IDP for a child under section 14, it would need to provide information and support to the child and their parent to enable them to participate in decisions such as what ALP is called for by the child's ALN, give them an opportunity to do so and take into account their views, wishes and feelings.

Sections 7 and 8 – Duties to have regard to the United Nations Convention on the Rights of the Child and the United Nations Convention of the Rights of Persons with Disabilities

23. **Sections 7 and 8** place duties on local authorities and NHS bodies (that is, Local Health Boards and NHS trusts) exercising functions under Part 2 to have due regard to the United Nations Convention on the Rights of the Child (section 7) and to the United Nations Convention on the Rights of Persons with Disabilities (section 8). See subsection (2) of each section for how each Convention is to be treated as having effect for these purposes.
24. These duties do not require local authorities and NHS bodies to give specific consideration to the Conventions on each occasion that a function is exercised (see sections 7(3) and 8(3)) and the code may make provision about what is required in order to discharge the duty in which case, the duty is to be interpreted accordingly (sections 7(4) and 8(4)).

Section 9 - Advice and information

25. **Section 9** requires local authorities to ensure that those who have an interest in the operation of the new ALN system (including children, children’s parents and young people) are provided with information and advice about ALN and the system provided for by the Act. In doing so local authorities must have regard to the principle that the information and advice is provided in an impartial manner. Local authorities must also make the availability of information and advice services, dispute avoidance and resolution services, and independent advocacy services, known to schools and others. In turn, governing bodies, when informed of these matters, have a duty to make them known to their pupils, pupils’ parents and case friends or their students (subsections (4) and (5)). The ALN code may impose further requirements related to advice and information (see section 4(5)).

Chapter 2 – Individual Development Plans

Preparing and maintaining individual development plans

Section 10 - Individual development plans

26. **Section 10** sets out what an individual development plan (IDP) is. This plan will form the basis of the system for planning and providing ALP for children and young people with ALN as set out in the Act. Generally, all children and young people with ALN will have an IDP, in contrast to the system under the 1996 Act, which only provided for statements of ALN for those with greater needs.
27. The ALP called for by a child or young person’s ALN must be set out in the IDP, as must other matters required to be included by or under Part 2. For example, where it is decided that a particular kind of ALP should be provided in Welsh, that must be specified in the IDP (sections 12(6), 14(5), 19(3), 21(4) and 40(6)). There are appeal rights in respect of certain content of an IDP, or a failure to include something in an IDP (sections 70 and 72), including in respect of the description of the person’s ALN and the ALP set out (including whether it is specified that ALP should be provided in Welsh). For looked after children with ALN, their IDP must be incorporated into their personal education plan if they have one (section 16).
28. The code must contain at least one standard form IDP and require that it (or where more than one, the appropriate one) is used (section 4(6)). The code may include guidance about the process for preparing an IDP (see section 4).

Section 11 - Duty to decide: maintained schools and further education institutions

29. **Section 11** requires the governing body of a maintained school or FEI, if it appears to it that one of its learners (who is a young person, in the case of an FEI) may have ALN or

this has been brought to its attention, to decide whether that child or young person has ALN. However, the governing body does not have to do so in certain circumstances (see subsection (3)). For example, where a young person does not consent to the decision being made about them; where the governing body has previously decided whether the child or young person has ALN and is satisfied that there has been no material change in the child or young person's needs or new information that materially affects the decision; where a learner (for whom a local authority is responsible) is registered or enrolled at more than one institution (see subsection (3)(d) and section 30(1) and (2) which requires the governing body to refer the case to the local authority).

30. Where the governing body decides that the child or young person does not have ALN it must notify the child and their parent, or the young person, of the decision and the reasons for that decision. Where a child does not have sufficient understanding and intelligence to understand what this means, the duty to notify the child does not apply (see section 84). However, where a child has a case friend under section 85, the governing body must notify the child's case friend. The code will set a deadline for the notification of these decisions, subject to any exceptions specified in the code (see section 4(6)(a)).
31. The duties in this section apply in respect of children and young people resident in England where they attend the maintained school or FEI in Wales, except where an Education Health and Care plan (EHC plan) is being maintained for the learner by a local authority in England under the Children and Families Act 2014. This is because that plan will address the special educational provision that their needs call for.
32. The duties in this section apply to a child looked after by a local authority who is resident in England, but not to other looked after children (subsection (5)). See sections 17 to 19 for the applicable duties in such cases.
33. [Section 44](#) deals with the effect upon the duties in this section if the person becomes subject to a detention order.

Section 12 - Duties to prepare and maintain plans: maintained schools and further education institutions

34. [Section 12](#) requires the governing bodies of maintained schools and FEIs to prepare and maintain an IDP for those learners they have decided have ALN; or in the case of a governing body of a maintained school, where it is directed to do so by a local authority; or in the case of a governing body of an FEI, where it has agreed to, or the Welsh Ministers have determined that it should, maintain a plan previously maintained by a local authority (see section 36). They must also consider whether any ALP should be provided in Welsh and where they decide that is the case, specify this in the IDP.
35. The code will set a deadline within which the governing body must prepare the plan and give a copy of it to the child or young person, and if the plan is for a child, to the child's parent (under section 22), subject to any exceptions specified in the code (see section 4(6)(b)).
36. However, in certain circumstances (set out in subsection (2)), a governing body is not required to prepare and maintain an IDP for a learner it has decided does have ALN. Some of these recognise that in some cases (generally involving greater needs) it is more appropriate for needs to be considered or provision secured by the local authority in whose area the person is. This includes instances where the governing body considers that the learner's needs may call for ALP that it would not be reasonable for the governing body to secure. In that case, the governing body must refer the matter to the relevant local authority for it to decide under section 13(1).
37. Similarly, there is also provision for the duties not to apply where the learner is in the area of a local authority in England and their needs are being considered or addressed by that local authority under the Children and Families Act 2014 (subsection (2)(c) and

(d)). Again, this is likely to be in cases of greater needs where a local authority is likely to be better placed to deal with the matter.

38. As education or training is not compulsory for young persons, the duties to prepare or maintain an IDP cease to apply in respect of a young person if that person no longer consents (at any time) to its preparation or maintenance (subsection 2(b)).
39. A governing body may also, in effect, be under the duty in this section to maintain an IDP as a result of a transfer of a duty to maintain an IDP (see section 35 and the regulation power in section 37 about transfers). For example, this would be the case where a child with an IDP maintained by a school governing body moves to another maintained school.
40. Where a governing body maintains an IDP, it must secure the ALP set out in that IDP and take all reasonable steps to secure provision in Welsh where that is specified (subsection (7)). The duty is qualified in this way as there may be circumstances where it cannot reasonably be provided in Welsh, for example in the case of specialised services where it is not possible to obtain a Welsh speaking practitioner despite attempts to find one.
41. See section 31 for the circumstances in which the duties in this section cease to apply. Also, section 44 deals with the effect upon the duties in this section if the person becomes subject to a detention order.

Section 13 - Duty to decide: local authorities

42. **Section 13** requires a local authority to decide if a child or young person has ALN where it comes to its attention or appears to it that the child or young person may have ALN. A local authority would exercise the functions set out in this section where, for example, a decision about a child or young person's ALN has been referred by a governing body under section 12 or a child, a child's parent or a young person has made a direct request to the local authority; or a Local Health Board has made a referral under section 64.
43. However, there are certain exceptions to the duty to decide (see subsection (2)). For example, where a young person does not consent to the decision being made about them; where the local authority has previously decided whether the child or young person has ALN and is satisfied that there has been no material change in the child or young person's needs or new information that materially affects the decision.
44. Generally, if the person is a registered pupil of a maintained school or an enrolled student of an FEI, it will be for the respective governing body to determine whether the person has ALN under section 11. In the case of a pupil, the local authority does not have the duty to do so if satisfied that the question is being decided by the governing body under section 11. In the case of an FEI student, the local authority is only subject to the duty if the student is dual registered (see section 30(1)-(2)) or the governing body has referred the case to the local authority under section 12(2)(a).
45. Where the local authority decides that the child or young person does not have ALN it must notify the child and their parent, or the young person of the decision and the reasons for that decision (subsection (3)). See sections 84 and 85 in respect of the requirement to notify a child. The code will set a deadline for the notification of this decision, subject to any exceptions specified in the code (see section 4(6)(a)).
46. The duty to decide in this section applies in respect of children or young persons for whom the local authority is responsible, namely those in its area (including if they attend school in a different area), except for children who are looked after for the purposes of this Act (see the definition in section 15 and the duties in sections 17 and 18 which apply instead). See also section 562 of the Education Act 1996 and section 44 for the effect on these duties where the person to whom they relate is subject to a detention order.

Section 14 - Duties to prepare and maintain plans: local authorities

47. Where a local authority decides that a child or young person has ALN, section 14 sets out the circumstances where it is required to prepare and maintain an IDP and secure the ALP set out in that IDP; or, if the child or young person attends, or will attend, a maintained school, the local authority may prepare an IDP and direct the governing body of the school to maintain the plan; or direct the governing body of the school to prepare and maintain a plan.
48. These duties apply in relation to children, young people who are registered pupils at maintained schools or enrolled students at FEIs, and to other young people where the local authority decides it is necessary to prepare and maintain a plan under this section to meet the person's reasonable needs for education or training. Consideration of where it is so 'necessary' is to be undertaken in accordance with regulations made by the Welsh Ministers under section 46.
49. The section also sets out matters which may need to be set out in an IDP prepared or maintained by a local authority, namely:
 - a. the local authority must consider whether any ALP should be provided in Welsh and where it decides that is the case, so specify in the IDP (subsection (5)); and
 - b. if the local authority is satisfied that the reasonable needs of a child or young person for ALP cannot be met unless it also secures a place at a particular school or institution (provided the person or body responsible for admissions to the institution consents, unless it is a maintained school in Wales); and/or board and lodging, that 'other provision' must be described in the plan and must be secured by the local authority. Where this applies, the local authority is unable to direct the governing body of a maintained school to prepare and/or maintain the IDP. (subsections (6) – (9)).
50. See sections 35 (and the related regulation making power in section 37) and 43 for other situations in which a local authority is, in effect, subject to the duty in this section to maintain an IDP, for example where a child with an IDP maintained by another local authority moves into its area.
51. Where the local authority maintains an IDP it must secure the ALP and any other provision described in the plan and take all reasonable steps to secure provision in Welsh where that is specified (subsection (10)). The duty to secure ALP in Welsh is qualified in this way as there may be circumstances where it cannot reasonably be provided in Welsh, for example in the case of specialised services or treatments where it is not possible to obtain a Welsh speaking practitioner despite attempts to find one.
52. The duties in this section apply in respect of children or young persons for whom the local authority is responsible, namely those in its area (including if they attend school in a different area), except for children who are looked after for the purposes of this Act (see the definition in section 15 and the duties in sections 17 and 18 which apply instead). See section 31 for the circumstances in which the duties in this section cease to apply. Also, see section 562 of the Education Act 1996 and section 44 for the effect on these duties where the person to whom they relate is subject to a detention order.

Additional learning provision for looked after children

Sections 15 to 19 - Key terms, Amendments to the Social Services and Well-being (Wales) Act 2014, Duty to refer a matter to a local authority that looks after a child, Duty to decide whether a looked after child has additional learning needs, Duties to prepare and maintain plans for looked after children

53. **Sections 15 to 19** contain provisions on ALN which are to apply in the case of children looked after by a local authority in Wales. Generally, looked after children have care and support plans which include a personal education plan ('PEP') by virtue of the

Social Services and Well-being (Wales) Act 2014. In the case of such children (subject to exceptions – see section 15(2)), the authority that looks after the child is to be responsible for any decision on ALN, maintaining an IDP and incorporating it into the child's PEP. Accordingly, the equivalent duties (in sections 12 – 14) on the governing body of a maintained school the child may attend and on the local authority in whose area the child is, do not apply. The result is that the educational planning, including planning for the provision of ALP of the looked after child who has ALN, is done by one body, namely the local authority looking after the child, and is set out in one document, rather than potentially being split between two documents and potentially also two bodies. For young persons who are looked after or were formerly looked after, the duties under the Act apply as they do to other young persons.

54. The duty to decide whether a looked after child has ALN does not apply if the child is in the area of a local authority in England (section 18(2)(c)). If the child is not in the area of a local authority, for example a child may be placed in Scotland, there is no duty to prepare and maintain an IDP (section 19(2)). This is because a local authority's ability to secure ALP for a child living outside Wales may be relatively limited in many cases. However, the child may be within the local education system and have entitlements under it. For example, if the child is in the area of a local authority in England, that authority may be responsible for the child under section 24 of the Children and Families Act 2014 (Part 3 of that Act deals with children and young people in England with special educational needs or disabilities).
55. **Section 15** sets out the meaning of key terms used in the Act which relate to children who are looked after by a local authority. A person who is looked after for the purposes of Part 6 of the Social Services and Well-being (Wales) Act 2014 is not looked after for the purposes of the Act if the person is a young person, a detained person (defined in section 39(1)) or within a category of looked after child prescribed in regulations.
56. **Section 16** amends the Social Services and Well-being (Wales) Act 2014 so that a PEP is usually an element of the care and support plan prepared for those who are looked after by a local authority under that Act. Furthermore, section 16 amends the Social Services and Well-being (Wales) Act 2014 so that any IDP maintained under section 19 must be incorporated into the PEP in the case of looked after children of compulsory school age and below who have ALN.
57. **Section 17** requires the governing body of a maintained school which a looked after child attends, or the local authority in whose area a looked after child is, to inform the local authority which looks after the child if it becomes aware that the child may have ALN.
58. **Section 18** imposes a duty on the local authority which looks after a child to decide whether the child has ALN which is equivalent to the duty in section 13 in relation to children and young people who are not looked after. This duty does not apply if the child is in the area of a local authority in England. See sections 84 and 85 in relation to the requirement in subsection (3) to notify a child of a decision that the child does not have ALN.
59. **Section 19** imposes on the local authority which looks after a child (provided that the child is in the area of a local authority in Wales), duties to prepare and maintain individual development plans which are equivalent to the duties on local authorities in section 14(2) in relation to children and young people who are not looked after. However, the local authority must prepare and maintain the plan itself: it cannot direct a maintained school attended by the looked after child to do so.
60. **Sections 35** (and see the related regulation making power in section 37) and 43 set out other situations in which a local authority is, in effect, subject to the duty in section 19 to maintain an IDP for a looked after child. Section 31 provides for the circumstances in which the duties in this section cease to apply. If a looked after child becomes a detained person, the duties in these sections also cease because the person ceases to be a

looked after child for the purposes of the Act (section 15). The duties that apply instead are found in sections 40 – 42 . Section 562 of the Education Act 1996 and section 44 set out the effect on the local authority duties under sections 17 – 19 where the person to whom they relate is subject to a detention order.

Section 20 - Additional learning provision: Local Health Boards and NHS Trusts

61. **Section 20** enables a local authority and (if it is preparing or maintaining an IDP for the young person) the governing body of an FEI to ask an NHS body (defined in section 99(1) as a Local Health Board or NHS trust, but see also the power in section 99(8)) whether there is any treatment or service (normally provided as part of the comprehensive health service) which is likely to be of benefit in addressing the ALN of a child or young person. Before making such a referral, the referring body must discuss the matter with the child, the child's parent or the young person and be satisfied that making the referral is in the best interests of the child or young person (subsection (3) and, in respect of a child, see sections 84 and 85). If a referral is made, the NHS body must consider the matter and if it identifies any such treatment or service, it must secure its provision, decide whether it should be provided in Welsh and if so take all reasonable steps to secure its provision in Welsh.
62. **Section 21** deals with related procedural steps, including the consequences for the person's IDP.

Section 21 - Individual development plans: Local Health Boards and NHS Trusts

63. **Section 21** requires an NHS body to inform the body that has made a section 20 referral, and if different, the body that maintains an individual development plan for the child or young person concerned, of the outcome of the referral (subsections (1) and (2)). It must do so within the period of time to be prescribed in regulations, subject to any prescribed exceptions (subsection (10)). In cases where a relevant treatment or service is identified, once informed, the body maintaining the individual development plan must include the treatment or service as ALP within the plan as provision to be delivered by the NHS body (subsection (3)). If it was decided that the provision should be provided in Welsh, this must also be specified in the plan (subsection (4)). The NHS body, not the governing body or local authority, is then under a duty to secure the provision, which may only be changed or removed from the plan on a review under section 23 or 24 and with the agreement or at the request of the NHS body. If so requested, the governing body or local authority must comply with the request (subsections (5) – (7)). As any relevant treatment or service identified and included in an IDP is ALP, then there can be an appeal in relation to it, or the fact that it is not in the IDP (see section 70).
64. Where the Tribunal orders a revision to the ALP included in the plan under this section, the NHS body is not required to secure the revised provision unless it agrees to do so (subsection (9)). If it does not agree, the body maintaining the IDP is under a duty to secure the ALP set out (sections 12(7), 14(10), 19(7)).

Information about plans

Section 22 - Provision of information about individual development plans

65. **Section 22** requires a local authority or governing body which prepares an IDP to give a copy of the plan to the child, the child's parents or the young person and if the child is looked after, the independent reviewing officer appointed under section 99 of the Social Services and Well-being (Wales) Act 2014. If a local authority or governing body becomes responsible for maintaining a plan in place of another authority or body, it must inform the child, the child's parents, or the young person and in the case of a looked after child, provide a copy of the plan to the independent reviewing officer.
66. See sections 84 and 85 in respect of the requirements to give copies of the plan to, and to notify, a child.

Review of plans

Section 23 - Review and revision of individual development plans

67. **Section 23** provides for reviews of an IDP for a child who is not looked after, unless the child is in the area of a local authority in England and attending a maintained school in Wales, or a young person. A review must take place before the end of each review period. The first review period is a year starting with the date on which a copy of an IDP is given under section 22. Usually, subsequent review periods are a year starting with the date in the previous review period when (a) a copy of a revised plan was given in relation to that previous review period, or, (b) if the plan was not revised during the previous review period, notice of a decision not to revise the plan was given in relation to that review period. The result is that the plan should be reviewed at least once in any 12 month period. There is also provision for cases where neither a revised plan nor notice that no revision is to be made is given during the previous review period (subsection (4)). Subsection (6) provides for the duty to be treated as met in situations where a body other than that which is maintaining it, in effect, reviews it. This is to minimise the scope for parallel reviews for example, so that the governing body of a school is not obliged to review a plan at a time when the end of the review period is approaching but the Tribunal has just considered what should be in the plan and ordered the local authority to revise it accordingly.
68. An IDP must also be reviewed at the request of a child or a child's parent, or a young person unless considered unnecessary by the local authority or governing body (subsection (8)), for example where there have clearly been no material changes since the last time that the IDP was reviewed; and at the request of an NHS body required to secure provision under section 20 (subsection (7)). This section also permits the plan to be reviewed and then revised at any time (subsection (9)). This will enable prompt review of the IDP when circumstances change or in accordance with review dates set out in the IDP. If the IDP is revised under any provision of Part 2 or legislation made under it, a copy of the revised plan must be provided to the child and their parent, or the young person (subsection (11)). If it is decided not to revise the IDP following a review under any provision of Part 2 or legislation made under it, the child, their parent, or the young person must be notified of the decision and reasons for it (subsection (10)). See sections 84 and 85 in respect of a review request by a child and the requirements to give copies of the plan to, and to notify, a child.
69. **Section 24** deals with reviews for looked after children not covered by this section (subsection (12)).

Section 24 - Review and revision of individual development plans for looked after children

70. **Section 24** makes provision in relation to looked after children equivalent to that in section 23, unless the looked after child is in the area of a local authority in England and attending a maintained school in Wales, in which case, the governing body has review functions under section 23.
71. In addition to the requirements of this section, a local authority looking after a child has other functions related to the review of the child's IDP. These are the functions in relation to the review of a care and support plan under and by virtue of the Social Services and Well-being (Wales) Act 2014 (see section 83 of that Act as amended by section 16 of the Act). Since any IDP for a looked after child maintained under section 19 must be incorporated into any personal education plan, which in turn is part of the care and support plan, those functions related to reviews cover the IDP.

Section 25 - Relationship of individual development plans to other similar documents

72. **Section 25** enables alignment of the processes of preparing, reviewing and revising IDPs for a child or young person with the preparation, review and revision of other documents for that child or young person, such as any health and social care plans.

Local authority reconsideration of governing body decisions and plans

73. The Act gives appeal rights to children, their parents and young persons in relation to particular matters provided for in Part 2 (see sections 70 and 72). Appeals can only be brought against local authorities and governing bodies of FEIs, but not against governing bodies of maintained schools. In order for children, their parents and young people to be able to challenge school governing body decisions and plans, sections 26, 27 and 32 provide mechanisms for their decisions and plans to be reconsidered by the local authority responsible for the pupil (i.e. the local authority in whose area the child or young person is) at local authority level. In turn, there are equivalent appeal rights in respect of those local authority actions (section 70). This avoids the schools having to manage Tribunal proceedings themselves and allows for disputes to be resolved at a more appropriate level. For pupils who are in the area of a local authority in England, sections 14, 26, 27, 29, 32, 68 and 69 apply with modification (see section 87) – essentially, the local authority that maintains the school is responsible for these reconsideration decisions, but cannot itself take over responsibility for maintaining an IDP.

Section 26 - Reconsideration by local authorities of decisions under section 11(1)

74. **Section 26** enables a child or their parent, or the young person, to request that a local authority which is responsible for the child or young person reconsiders the decision of a maintained school governing body that one of its pupils has or does not have ALN. Where requested, the local authority must make its own decision on the issue; that decision will then replace the decision of the governing body, and the previous decision made by the governing body will cease to have effect. Before making a decision, the local authority must inform the governing body of the request and invite representations from the governing body. This section provides children and their parents, and young people, with an effective means of challenging the decision of the governing body of a maintained school in Wales, in the absence of a right of appeal to the Tribunal against these bodies. The local authority's decision is then challengeable by way of an appeal to the Tribunal under section 70. Section 29 deals with the circumstances in which the duty in this section does not apply. See sections 84 and 85 in respect of a request by a child. See also paragraph 73 above for further information.
75. The decision made under this section is treated as one under section 13(1) (subsection (4)). This means that if the decision is that the pupil does not have ALN, the requirement to notify in section 13(3) applies and if the decision is that the pupil has ALN, the duty in section 14(2) about preparing and maintaining IDPs applies.

Section 27 - Reconsideration by local authorities of plans maintained under section 12

76. **Section 27** enables a child, child's parent or young person to ask a local authority (which is responsible for a child or young person) to reconsider an IDP maintained by the governing body of a maintained school with a view to revising it. Before deciding whether or not to revise the plan, the local authority must inform the governing body of the request and invite representations from the governing body.
77. Where the local authority decides that the IDP does not require revision it must notify the child and their parent, or the young person, of the decision and the reasons for that decision and give a copy of that notification to the governing body (subsections (4) and (5)). Where a local authority revises an IDP, the local authority must give a copy

of the revised plan to the governing body (subsection (7)) and section 23(11) requires that a copy be given to the child, their parent, or young person. See sections 84 and 85 in respect of a request by a child and the requirements to notify, or give a copy of an IDP to, a child.

78. Where the local authority decides that the IDP requires revision, it may direct the governing body to maintain the revised IDP; alternatively, the local authority may take on responsibility for maintaining the IDP itself. The former may occur where the local authority considers that the content of the IDP is such that the governing body can reasonably be expected to deliver the ALP it contains; the latter where this would not be a reasonable expectation of the governing body.
79. The position regarding revisions applies equally to the case of a local authority revising a plan as a result of the Tribunal ordering it to do so.
80. This section provides children, their parents, and young people with an effective means of challenging the content of the IDP put in place for them by the governing body of a maintained school, in the absence of a right of appeal against these bodies (see section 70 which gives rights of appeal relating to local authority actions). See also paragraph 73 above for further information.
81. [Section 29](#) deals with the circumstances in which the duty in this section does not apply.

Section 28 - Local authority duty to decide whether to take over governing body plans

82. [Section 28](#) requires a local authority (which is responsible for a child or young person) to decide whether it should take over responsibility for maintaining an IDP in response to a request to do so. The request may be made by a governing body of a school or FEI – for example where the governing body no longer believes that maintaining the plan and delivering the ALP is within its capability – or by a child, a child’s parent or young person - for example where they do not believe the governing body has proven capable of delivering the ALP required by the child or young person. Where the local authority does decide to take over responsibility for the IDP, the IDP is treated as maintained by the authority under section 14. The decision of the local authority not to take over responsibility for an IDP is challengeable by appeal to the Tribunal under section 70.
83. Where the request is from a governing body, the local authority must notify the child, their parent, or the young person, and invite representations. Where the request is from a child, their parent or a young person, the local authority must inform the governing body and invite representations. The local authority must notify the governing body, and the child, their parent, or the young person, of the decision and the reasons for that decision. See sections 84 and 85, in respect of a request by a child, for the requirements to notify and inform a child.
84. [Section 29](#) deals with the circumstances in which the duty in this section does not apply.

Section 29 - Circumstances in which the duties in sections 26(2), 27(2) and 28(3) do not apply

85. [Section 29](#) sets out that where a local authority has previously made a decision under section 26(2), 27(2) or 28(3) in relation to a child or young person and it is satisfied that there has been no material change in the person’s needs or new information that would materially affect the decision, there is no duty to make a new decision under the respective section. In addition, no duty applies under these sections where a child becomes looked after.
86. For a child who has become looked after, the local authority looking after the child becomes responsible for maintaining the plan (section 35(9) and (10)) and has review functions (section 24) unless the child is in the area of a local authority in England (see section 87).

These notes refer to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (c.2) which received Royal Assent on 24 January 2018

87. See section 562 of the 1996 Act and section 44 for the effect on these duties where the child or young person has become subject to a detention order.

Section 30 - Registration or enrolment at more than one institution

88. **Section 30** together with section 11(3)(d) ensures that where a child or young person attends a maintained school or FEI in Wales and another school or FEI (which need not necessarily be in Wales) and a local authority is responsible for the person, responsibility for determining if the person has ALN, and preparing and/or maintaining a plan for them lies with that local authority and the equivalent duties on the governing body of the school or FEI do not apply. The governing body must refer such matters to the local authority.

Ceasing to maintain plans

Section 31 - Ceasing to maintain individual development plans

89. **Section 31** sets out the circumstances in which a governing body's or local authority's particular duty to prepare or maintain an IDP ceases. These circumstances cover where:
- the child or young person ceases to be a registered pupil or enrolled student or the child becomes looked after (in the case of governing bodies),
 - the local authority ceases to be responsible for the child or young person, or a child becomes or ceases to be looked after (for the purposes of Part 2),
 - a looked after child ceases to be in the area of any local authority,
 - the governing body or local authority decides that the child or young person no longer has ALN,
 - in the case of a young person not at a maintained school or FEI, the local authority decides in accordance with regulations made under section 46 that it is no longer necessary to maintain the plan to meet the young person's reasonable needs for education or training.
90. Before deciding to cease to maintain an IDP because it believes the child or young person no longer has ALN or, in the case of a young person, that it is no longer necessary to maintain it, the governing body or local authority must notify the child, child's parent, young person and in the case of a looked after child, the independent reviewing officer, of the proposed decision. It must also notify the same persons when it has made its decision (together with reasons). A governing body of a maintained school must also inform those persons of their right to request a local authority reconsideration of the decision under section 32.
91. **Section 35** deals with situations where a duty to maintain an IDP is transferred to another body (see also the regulation power about transfers in section 37). Section 562 of the 1996 Act and section 44 deal with the effect on duties in the Act (including duties to maintain an IDP) where a child or young person becomes subject to a detention order. See sections 84 and 85 in respect of the requirements to notify a child.

Section 32 - Reconsideration by local authorities of decisions of governing bodies under section 31

92. **Section 32** enables a child, a child's parent or a young person to request that a local authority (which is responsible for the person) reconsiders a school governing body's decision to cease to maintain an IDP. The period during which this request can be made will be set out in regulations. The local authority must decide whether the duty to maintain the IDP should cease and notify (with reasons) the governing body, the child and their parent, or the young person accordingly. See sections 84 and 85 in respect of a request by a child and the requirements to notify a child.

93. If the local authority decides that the IDP should be maintained, the governing body must continue to maintain it. Where the local authority agrees that the IDP should cease to be maintained, its decision is appealable under section 70 and the appeal must be determined or the time for bringing an appeal must have expired with no appeal being made, before the governing body can cease to maintain the IDP (see section 33).
94. See also paragraph 73 above for further information.

Section 33 - Limitation on ceasing to maintain plans to allow reconsideration or appeal

95. **Section 33** ensures that where there has been a decision that an IDP should cease to be maintained, it continues to be maintained until the child, the child's parent or young person has had the opportunity to exhaust their appeal options. So the governing body of a maintained school may not cease to maintain the IDP unless the period prescribed for requesting reconsideration by the local authority under section 32 has ended without a request being made. If a request is made in that period, the governing body of a maintained school may not cease to maintain the IDP until the local authority has made its decision and the period for appealing it has ended, or where an appeal is brought within that period, it has been fully determined. Similarly, a governing body of a FEI or a local authority may not cease to maintain the IDP until the period for an appeal to be made ends without an appeal being brought or, where an appeal is brought in that period, it has been fully determined. The period for bringing an appeal is to be set out in regulations made under section 75.

Section 34 - Individual development plan after a young person's 25th birthday

96. **Section 34** ensures that if a young person with an IDP (being prepared or maintained) becomes 25, the duty to prepare or maintain it does not immediately cease, rather it continues until the end of the academic year as defined in subsection (2). This means that the body responsible for the IDP and the ALP it contains must continue to deliver the ALP until the end of the academic year.

Transfer of plans

Section 35 - Transfer of duties to maintain plans

97. **Section 35** transfers the duty to maintain an IDP in the various situations set out. Generally, where a child or young person with an IDP transfers between maintained schools, or between a maintained school and an FEI, or moves from one local authority area to another, the IDP transfers/moves with them. Similarly, it deals with a child with an IDP becoming looked after or ceasing to be looked after.

Section 36 – Request to transfer plan to governing body of further education institution

98. **Section 36** permits a local authority to request the governing body of an FEI to become responsible for maintaining an IDP for a young person, where that young person is enrolled at the FEI and the local authority currently maintains an IDP for him or her. If the governing body does not agree with the request within the period prescribed in regulations, section 36 permits the local authority to refer the matter to the Welsh Ministers for them to decide whether the governing body should maintain the plan. If the governing body agrees to the request, or if the Welsh Ministers determine that it should maintain the plan, then it is under a duty to do so (see section 12(4)).

Section 37 - Regulations about transfer of individual development plans

99. **Section 37** enables the Welsh Ministers to make further provision in regulations on the matters listed in subsection (1) which are all about transfers of duties to maintain IDPs. This includes providing for further transfers (besides those in section 35) between

the bodies with responsibility for IDPs under the Act in specific circumstances and provision related to local authorities requesting FEIs to take over an IDP and referring the matter to the Welsh Ministers for them to determine (under section 36).

Powers to direct governing bodies of maintained schools

Section 38 - local authority power to direct governing bodies of maintained schools

100. Where a local authority does not maintain a maintained school, section 38 prevents it from using any of its powers to direct the governing body of that school without having consulted the local authority which does maintain the school.

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:
- 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 key 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 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)).

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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 disappplies 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 disappplied 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 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.

Necessity of plans

Section 46 – Regulations about deciding whether an individual development plan is necessary

118. Generally, for young persons with ALN, if they are at a maintained school or FEI in Wales, they are entitled to an IDP (see sections 11, 14 and 31(6)(b)). If a young person is not such a student or pupil or is detained, whether or not the person is entitled to an IDP depends upon a decision involving whether it is necessary to maintain a plan for the person to meet his or her reasonable needs for education or training (see sections 14(1)

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(c)(ii), 31(6)(b) and 40(2)(b), although the precise wording of the decision is slightly different in each case given the different circumstances involved). Section 46 enables the Welsh Ministers to make provision in regulations about those decisions, specifically the matters listed in subsection (2).

Chapter 3 – Supplementary Functions

Functions relating to securing additional learning provision

Section 47 - Duty to take all reasonable steps to secure additional learning provision

119. **Section 47(1)** and (2) requires that where a child or young person with ALN is a registered pupil at a maintained school or an enrolled student at an FEI, but has no IDP maintained for them, the relevant governing body must take all reasonable steps to secure the ALP called for by the person's ALN. This is to ensure, for example, that such children and young people receive appropriate support whilst their needs are being determined or a plan is being prepared for them. The code must include guidance about situations where a plan is being prepared for the learner (subsection (3)). The duty on the governing bodies will also apply in respect of pupils or students resident in England who do not have an IDP (in which case, they may have an EHC plan, or there may have been a request to the England local authority for an EHC assessment - see section 12).
120. **Section 47(4)** and (5) require that when a local authority maintains an IDP for a child or young person attending a maintained school or FEI, the relevant governing body takes all reasonable steps to help the local authority secure the ALP set out in the IDP.

Section 48 - Duty to admit children to named maintained schools

121. **Section 48** places a duty on governing bodies of maintained schools in Wales to admit children where that school is named for the purpose of admission by a local authority in an IDP. This is similar to the position under the 1996 Act in relation to the naming of a school in a statement of ALN. However, this section limits the circumstances in which schools may be named to those where the local authority is satisfied that the child's interest requires the ALP to be made at that school, and it is appropriate for the child to be provided with education or training there. Before naming a school under this section, the local authority must consult the governing body of the school, and in the case of a maintained school where neither the local authority nor its governing body is the admissions authority for the school (as defined by section 88 of the School Standards and Framework Act 1998), the local authority for the area in which the school is located.
122. Where a maintained school is named under this section, the governing body must admit the child even if this would result in any limit on the size of an infant class being exceeded (see subsection (5)). The duty in this section to admit a child does not affect any power to exclude that child from the school (subsection (6)).

Section 49 - No power to charge for provision secured under this Part

123. **Section 49** ensures that a child, parent (who is an individual rather than a local authority who looks after a child) or a young person does not have to pay for any provision that a governing body or local authority secures for that child or young person under the Act. The section amends the Social Services and Well-being (Wales) Act 2014 to ensure that a local authority's functions under that Act related to recovering contributions from parents of looked after children towards the maintenance of the child, cannot be used for matters which the authority secures under the Act.

Section 50 - Welsh Ministers' duties to secure post-16 education and training

124. The Act amends provisions of the 2000 Act dealing with post-16 learners who have 'learning difficulties'. That Act places functions on the Welsh Ministers relating to: undertaking assessments for post-16 learners with learning difficulties (section 140);

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securing boarding accommodation for post-16 learners in specified circumstances (section 41); and more generally, securing facilities for post-16 education or training (sections 31, 32 and 34), but in doing so, the Welsh Ministers must have regard to the needs of persons with learning difficulties and to learning and skills assessments (section 41).

125. **Section 50** amends the 2000 Act to remove functions related to securing boarding accommodation and undertaking assessments for post-16 learners with learning difficulties, as these matters are superseded by the ALN system provided for in Part 2, which includes duties to determine whether a young person has ALN, to prepare and maintain IDPs and to secure board and lodging for young persons in specified circumstances.
126. **Section 50** also amends the 2000 Act so that the Welsh Ministers, when planning the provision of post-16 education or training, take into account the capacity of the further education workforce to deliver ALP in Welsh and the availability of facilities for assessing whether persons have ALN through the medium of Welsh. It also amends what remains of section 41 to reflect the terminology in this Act. Paragraph 8 of Schedule 1 makes further consequential changes to terminology in the 2000 Act.

Section 51 - Duty to favour education for children at mainstream maintained schools

127. **Section 51** requires that where a child of compulsory school age with ALN should be educated in a school, the local authority must ensure that the child is educated in a mainstream maintained school, unless any of the circumstances set out in subsection (2) apply. These exceptions recognise that it might sometimes be appropriate to educate a child with ALN elsewhere. However, the exception regarding parental wishes does not require the local authority to secure the child's education otherwise than in a mainstream maintained school (subsection (4)). Also, the requirement on the local authority in this subsection does not prevent a child from being educated at an approved non-maintained special school in England or an independent school, if it is not meeting the cost of that education (subsection (5)).

Section 52 - Children with additional learning needs in mainstream maintained schools

128. **Section 52** requires that children with ALN educated in mainstream maintained schools take part in activities alongside their peers who do not have ALN, in so far as that is reasonably practicable and compatible with the matters listed in subsection (2). In particular, the matter in subsection (2)(a) (the child receiving the ALP called for by his or her ALN) is included because the nature of the child's ALN or the ALP they require may be such that they should be, or even must be, educated separately from their peers for at least part of the time. For example, this might mean that a child needs to spend some of the school day allocated to classroom teaching time in a special unit attached to the school which is able to deliver specialist provision for the child's needs, but at other times the child should be able to engage with the other pupils in school activities such as assemblies, breaks, sports days, trips and some classroom activities.

Section 53 - Additional learning provision otherwise than in schools

129. **Section 53** allows a local authority to secure the ALP or any part of it identified in an IDP it maintains for a child to be made elsewhere when it is satisfied that it would be inappropriate for it to be made in a school. For example, certain forms of ALP may involve the use of specialist equipment which cannot be made available in a school setting.

Section 54 - Amendments to registration requirements for independent schools in Wales

130. **Section 54** amends the Education Act 2002 so that the Welsh Ministers must publish a list of the schools included in the register of independent schools in Wales. Furthermore, when independent schools register with the Welsh Ministers, as a result of the amendment in subsection (3) to section 160 of the 2002 Act, they will be required by regulations, to specify the type(s) of ALP they make for pupils with ALN (if any). This information must also be specified in the published register.

Section 55 - Conditions applicable to securing additional learning provision at independent schools

131. Under section 55, a local authority may not place a child or young person at an independent school in Wales unless the school is on the register of independent schools in Wales and the local authority is satisfied that it can make the ALP described in the person's IDP.
132. Similarly, a local authority is prohibited from placing children and young people at independent educational institutions in England (as defined in the Education and Skills Act 2008), unless the institution is included in the register of independent educational institutions in England and the local authority is satisfied that the institution can make the ALP described in the person's IDP.
133. These provisions replace the approval and individual consent provisions in section 347 of the 1996 Act, which are removed by section 58.

Section 56 - List of independent special post-16 institutions

134. **Section 56** requires the Welsh Ministers to establish and maintain a published list of independent special post-16 institutions (defined in subsection (6)) in Wales and England. Proprietors of such institutions (which are specially organised to provide education and training for persons over compulsory school age with ALN) may apply to the Welsh Ministers to be placed on the list. Local authorities may not exercise their functions under Part 2 to place children and young people at such institutions which are not on the list, unless an exemption set out in regulations applies (subsection (3)). The application requirements, and matters related to the list, including rights of appeal against decisions to refuse to list, or to remove, an institution, must be provided for by regulations made by the Welsh Ministers (subsection (5)).

Section 57 - Abolition of approval of non-maintained special schools in Wales

135. **Section 57** amends the 1996 Act to remove the power of the Welsh Ministers to approve non-maintained special schools in Wales. New schools that are not maintained will have to register as independent schools under the Education Act 2002.

Section 58 - Abolition of approval of independent schools in Wales

136. **Section 58** repeals section 347 of the 1996 Act (approval of independent schools as suitable for admission of children with statements of ALN). Sections 54 and 55 provide for matters related to registration requirements for independent schools and conditions for a local authority securing education for a child or young person with ALN at an independent school.

Section 59 - Additional learning provision outside England and Wales

137. **Section 59** allows a local authority to arrange for a child or young person with ALN to attend an institution outside England and Wales, where that institution is organised to make the ALP described in their IDP.

Additional learning needs co-ordinating officers

Section 60 - Additional learning needs co-ordinator

138. **Section 60** requires governing bodies of maintained schools (which includes maintained nursery schools and pupil referral units) except special schools and governing bodies of FEIs to designate a person (or persons) as the additional learning needs co-ordinator (ALNCO) to be responsible for co-ordinating ALP for pupils and students with ALN. It also allows regulations to confer functions on ALNCOs relating to provision for pupils or students with ALN. The ALNCO of an FEI does not have these functions in relation to enrolled students in so far as they are undertaking higher education provided by the FEI (subsection (5) and section 86). Regulations may also require governing bodies to ensure that ALNCOs have qualifications or experience (or both) as prescribed in the regulations.

Section 61 - Designated education clinical lead officer

139. **Section 61** places a duty on Local Health Boards to designate an officer to be responsible for co-ordinating the Board's functions in relation to children and young people with ALN. The officer must be suitably qualified and experienced in the provision of health care for children and young people with ALN and be either a registered medical practitioner, a registered nurse or other health professional.

Section 62 – Early years additional learning needs lead officer

140. **Section 62** places a duty on local authorities to designate an officer with responsibility for co-ordinating the authority's functions under Part 2 in relation to children under compulsory school age, who have or may have ALN, and are not in a maintained nursery or school.

Miscellaneous functions

Section 63 - Duty to keep additional learning provision under review

141. **Section 63** places a duty on local authorities to keep under review the arrangements that they and the governing bodies of maintained schools in their area make for children and young people with ALN. This includes considering the extent to which the arrangements are sufficient to meet the ALN of the children and young people for whom they are responsible. As part of their considerations, local authorities must have regard to the ALP that may reasonably be arranged by other bodies (such as health bodies). It also requires local authorities to consider the sufficiency of ALP in Welsh and the size and capability of the workforce available. If a local authority considers that the arrangements are not sufficient in any way, it must take all reasonable steps to remedy the matter. Local authorities must consult any persons that they consider appropriate in order to inform the consideration and review, and at times which they consider appropriate.

Section 64 - Duty of health bodies to notify parents etc.

142. This section relates to situations in which a health body in Wales or England of a type listed in subsection (2) is exercising any of its functions in relation to a child who is under compulsory school age and for whom a local authority in Wales is responsible. If the health body forms the opinion that the child has (or probably has) ALN, the health body must bring its opinion to the attention of the local authority in Wales responsible for the child (or if the child is looked after, the authority that looks after the child), if the health body is satisfied that doing so would be in the best interests of the child.
143. Before doing so, the health body must inform the child's parent of its opinion and its duty to inform the appropriate local authority. This safeguard is to ensure that the parent has an opportunity to discuss the opinion with an officer of the health body, before the

health body brings its opinion to the attention of the appropriate local authority and the discussion may also help inform the health body's assessment of the best interests of the child.

144. This section also places a duty on the health body to inform the parent about any voluntary organisations which it considers are likely to be able to provide the parent with advice or assistance in connection with any ALN that the child may have.

Section 65 - Duties to provide information and other help

145. **Section 65** provides that when local authorities request information or other help from certain persons in order to exercise their functions under Part 2, those requests are complied with, except in the circumstances set out in subsection (2). The persons who are subject to this duty are listed in sub-section (4) and are all public bodies or other persons exercising public functions.
146. Such a person can decline to comply with the request for help or information if they consider that it is incompatible with their own duties or would have an adverse effect on the exercise of their functions (subsection (2)). However, if the person does not comply with such a request for help or information, they must provide their reasons for refusing the request to the local authority in writing (subsection (3)).
147. Subsection (5) allows for regulations to set out a period within which the person must comply with a request, and for exceptions to apply to the requirement to comply within this period.

Section 66 - Right of local authority to access premises of schools and other institutions

148. **Section 66** ensures that a local authority that maintains an IDP for a child or young person has a right to access any place at the premises of the school or other institution in Wales or England where education or training is provided for that child or young person. This right of access only applies where it is necessary for the local authority to exercise its functions under this Part, and it must be at a reasonable time.
149. The institutions that a local authority has a right to access are listed in subsection (3).

Section 67 - Provision of goods or services in relation to additional learning provision

150. **Section 67** gives the Welsh Ministers powers to make for regulations to provide for local authorities to supply goods and services to persons providing ALP or exercising functions under this Part. This may include regulations about terms and conditions for the supply of such goods and services.

Chapter 4 – Avoiding and Resolving Disagreements

Local authority arrangements

Section 68 - Arrangements for the avoidance and resolution of disagreements

151. **Section 68** requires local authorities to make arrangements for both avoiding and resolving the following
- a. disagreements between local authorities or governing bodies on the one hand, and children, their parents and young people on the other in relation to functions under the Act (subsection (1)); and
 - b. disagreements between proprietors (as defined in section 579(1) of the 1996 Act and section 99(1)) of various types of school and other institutions in Wales or England (see the list in subsection (7)) on the one hand and on the other hand,

children, their parents and young people about the ALP made for children or young people.

152. This requirement includes providing access to help from an independent person to resolve a disagreement. Under section 9 local authorities must take reasonable steps to make the arrangements known to various people, including children and their parents, young people and governing bodies in their area. Local authorities must also promote their use (section 68(4)). The code may impose further requirements on local authorities in respect of the arrangements under section 4(5). Local authorities are also under a duty to inform children, their parents and young people that these arrangements do not affect their rights to appeal to the Tribunal (subsection (5)). Subsection (8) provides that local authorities' arrangements under this section will also apply to children they look after, but are not in their area.

Section 69 - Independent advocacy services

153. **Section 69** requires local authorities to make arrangements for independent advocacy services providing advice and assistance to a child, a young person or a case friend (see section 85) who is making, intending to make, or considering making, an appeal to the Tribunal or taking part in, or intending to take part in, arrangements for the resolution of disagreements made under section 68. There is also a duty to refer such children, young people and case friends (where the local authority is responsible for the particular child or young person - see section 85) to the advocacy service provider. A local authority is responsible for a child or young person if the person is in the authority's area (see section 99(4)) and by virtue of section 68(8), local authorities' arrangements under this section will also apply to children it looks after, but who are not in its area. This allows such looked after children to access the advocacy arrangements of the local authority that looks after them, or those of the local authority in whose area they are.
154. Local authorities must have regard to the principle that the independent advocacy service arrangements should be independent of any person who is the subject of appeal or involved in the appeal (subsection (3)).
155. Local authorities are also required, under section 9, to take reasonable steps to ensure that various people, including children (and their parents), young people and governing bodies in their area, are made aware of these arrangements.

Appeals and applications to the Tribunal

Section 70 - Appeal and application rights

156. **Section 70** provides children, parents of children and young people with rights of appeal to the Tribunal against decisions of governing bodies of FEIs and decisions of local authorities and in relation to IDPs prepared or maintained by such a body or authority or revised by an authority under section 27(6). It does not allow for appeals to be brought against actions of governing bodies of maintained schools, but their actions can be referred to local authorities for reconsideration (see sections 26, 27 and 32) and there are appeal rights against the authorities' actions in reconsidering matters (as set out in subsection (2)).
157. Subsection (2) sets out the matters against which a child, child's parent or young person may appeal to the Tribunal, for example about a decision that a child or young person has or does not have ALN.
158. By virtue of section 85, in particular circumstances, case friends can be appointed on behalf of a child who does not have sufficient understanding and intelligence to understand some of the matters covered by this Act and they can exercise specific rights of the child under the Act, including the right to bring an appeal under section 70(2). The child's lack of understanding could be because of their young age, or for other

reasons, such as a learning disability. Section 84 provides for who determines whether a child lacks understanding.

159. This section also enables a child or a child's parent to apply to the Tribunal for a declaration that the child either does or does not have the capacity (level of understanding necessary) to make decisions or understand information in relation to their ALN (subsection (3)).

Section 71 - Decisions on appeals and applications under section 70

160. **Section 71** sets out the orders or other decisions that the Tribunal may make on an appeal under section 70(2) (Appeal and application rights). It also provides for the Tribunal, on an application under section 70(3) as to whether or not a child has capacity, to make a declaration upon the matter.

Section 72 - Appeal rights: detained persons

161. **Section 72** lists the matters against which a detained person (whether a child or young person) and a detained child's parent may appeal to the Tribunal. These are broadly equivalent in substance to the appeal rights for children and young persons who are not detained (section 70), but reflect the different duties owed to detained persons.

Section 73 - Decisions on appeals under section 72

162. **Section 73** sets out the orders or other decisions that the Education Tribunal for Wales may make on an appeal under 72 (Appeal rights: detained persons).

Section 74 - Regulations about appeals and applications

163. This section enables the Welsh Ministers to make regulations containing further provision about appeals and applications to the Tribunal under Part 2, including, for example, about other matters relating to an IDP against which appeals may be brought, about making and determining appeals or applications, conferring further powers on the Tribunal on determining an appeal or application, and unopposed appeals or applications.

Section 75 - Regulations about procedure

164. This section enables the Welsh Ministers to make regulations about the initiation of an appeal or application under Part 2 and the proceedings of the Tribunal on such an appeal or application. Subsection (2) lists provisions which may be included in the regulations and subsection (3) provides that proceedings before the Tribunal must be held in private, except in circumstances prescribed in regulations.

Section 76 – NHS Bodies: evidence and Tribunal recommendations

165. **Section 76** provides that the Tribunal may exercise its functions to: require an NHS body to give evidence about the exercise of the body's functions; and make recommendations to an NHS body about the exercise of the body's functions, in both cases in relation to an appeal under Part 2. It also requires the NHS body to which a recommendation has been made, to report to the Tribunal, within any period prescribed in regulations, on either: the actions it has taken or proposes to take in response to the recommendation; or if it has not and does not intend to take any action, why that is.
166. 'NHS body' is defined in section 99(1) as a Local Health Board or an NHS trust (see also the power in section 99(8)).

Section 77 - Compliance with orders

167. Under this section if the Tribunal makes an order under Part 2 (e.g. requiring a local authority to revise an IDP), the governing body or the local authority concerned must

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comply with the order before the end of the period (if any) prescribed in regulations, beginning with the date on which it is made. Subsection (2) requires the body or authority concerned to report to the Tribunal on compliance with the order within the 14 day period starting on the day after the date by which it must have complied with the order (under subsection (1)).

Section 78 – Power to share documents and other information with the Welsh Ministers

168. This section gives the Tribunal power to share with the Welsh Ministers information about compliance with a Tribunal order or recommendation made under Part 2. However, this does not necessarily mean that it can share all information in any particular instance, as it will depend upon all the circumstances, whether it would be compatible with rights under the European Convention on Human Rights and would be subject to any other restrictions in law (for example under legislation on data protection).
169. This may assist the Welsh Ministers in monitoring the operation of the system provided for in the Act and inform consideration of whether to take action under other powers (e.g. under Part 2 of the School Standards and Organisation (Wales) Act 2013) in response to apparent non-compliance.

Section 79 - Offence

170. This section provides that those who fail, without reasonable excuse, to comply with a requirement (imposed by regulations under section 74 or 75) related to the disclosure or inspection of documents or to attend the tribunal to give evidence and produce documents, is guilty of an offence punishable by a fine not exceeding level 3 on the standard scale.

Section 80 - Allowances for attendance at the Education Tribunal for Wales

171. This section provides a power for Welsh Ministers to pay allowances in relation to attendance at the Tribunal.

Section 81 - Appeals from the Education Tribunal for Wales to the Upper Tribunal

172. **Section 81** allows a party to any proceedings about ALN before the Education Tribunal for Wales to appeal (with permission – see subsection (2)) to the Upper Tribunal on any point of law arising from a decision made by the Education Tribunal for Wales in those proceedings.
173. Section 12 of the Tribunals, Courts and Enforcement Act 2007 sets out what the Upper Tribunal can do where it finds that a decision involved an error of law in an appeal under section 11 of that Act: it may set aside the decision and if so, section 11 sets out the further options as to how to proceed. In effect section 81(3) applies this to appeals to the Upper Tribunal from the Education Tribunal under section 81.

Chapter 5 – General

Section 82 - Regulations about disclosure and use of information

174. **Section 82** allows for regulations about how information may be used and disclosed for the purposes of Part 2 or other purposes connected with the education of a child or young person. This can include regulations about additional persons who must receive copies of IDPs, and cases when copies of plans must be provided without the consent of the child, the child's parent or young person.

Section 83 - Parents and young people lacking capacity

175. **Section 83** requires regulations to be made to enable parents and young people who are lacking mental capacity at a time when they have a right to something under Part 2 (e.g. to receive a notification or to make an appeal), to be represented by an appropriate person. In this section, reference to lacking capacity refers to the definition in the Mental Capacity Act 2005.

Section 84 - Capacity of children

176. **Section 84** provides for circumstances where a child does not have sufficient understanding and intelligence to understand documents provided under Part 2, or what it means to exercise the rights under that Part. This could be due to their young age, or for other reasons, such as a learning difficulty. Where a governing body, local authority, or NHS body considers that a child does not have the ability to understand, and/or where the Tribunal has made a declaration to that effect, duties under the Act to provide the child with information or notify them of decisions do not apply unless a case friend has been appointed for the child by the Tribunal or the Tribunal has declared that the child does have capacity. (See section 85(4) and (5) for the effect of the appointment of a case friend for a child on the exercise of that child's rights under Part 2).
177. On the same basis, this section disapplies duties to review or reconsider decisions or IDPs or to decide whether to take over an IDP following a request from a child who is considered to lack the capacity to understand.
178. Where a governing body of a maintained school considers that a child does or does not have the capacity to understand, subsection (6) enables the child or child's parent to request that the local authority responsible for the child reconsiders the matter. The local authority must then decide the matter. Whether or not such a request is made, if a local authority takes a different view to the governing body on the capacity of a particular child, it is the local authority's view that prevails, provided the authority has informed the governing body of its view (subsection (2) together with subsection (3)(a) and subsection (4)). Additionally, a declaration can be sought from the Tribunal that a child does or does not have capacity to understand (see section 71(2)).

Section 85 - Case friends for children who lack capacity

179. **Section 85** provides for a "case friend" to be appointed (or removed) by order of the Tribunal, where the child lacks the capacity to conduct appeals, make decisions in respect of rights conferred by the Act, or understand information or documents which are sent to them.
180. A case friend is able to represent and support the child, take decisions on their behalf and exercise the child's rights under the Act. The case friend must, amongst other things, act fairly and competently and for the benefit of the child (subsection (6)).
181. Regulations made under this section will allow the Welsh Ministers to provide further details on how case friends might be used to support the rights of children. Having a case friend will allow children who, for example, may not receive assistance from their parent to bring an appeal or exercise other rights under the Act.

Higher education courses provided by further education institutions

Section 86 – Students at further education institutions undertaking higher education courses

182. Various functions of local authorities and governing bodies of FEIs in Part 2 relate to young people who are enrolled as students at an FEI. Section 86 provides that an enrolled student undertaking a course of higher education provided by the FEI, is not to be treated as an enrolled student of the FEI for the purposes of Part 2. However

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if an enrolled student is being provided by the FEI with both higher education and education (defined in section 99 to exclude higher education) or training, the student is only a higher education student in relation to the higher education and not for the other education or training (subsection (4)).

183. The effect is that functions of local authorities and governing bodies of FEIs which relate to enrolled students do not apply to students to the extent that they are higher education students. For example, a governing body of an FEI is not under the duty to decide (in section 11) whether a student for whom it is only providing higher education has ALN. A course of higher education is a course of any description mentioned in Schedule 6 to the Education Reform Act 1988.

Section 87 - Application of reconsideration provisions to pupils and students resident in England

184. This section applies, with modifications, specific local authority functions under the Act to children or young people who are in the area of a local authority in England but attend a maintained school in Wales. The Act gives local authorities functions to reconsider decisions of, and plans maintained by, governing bodies of maintained schools, in respect of pupils in its area (see, for example, section 26). Appeal rights lie against those local authority decisions, rather than those of the governing body (see section 70). However, registered pupils at the school may be in the area of a local authority in England. In order to ensure that such English resident learners can challenge decisions of schools in relation to ALN, this section applies with modifications the sections which link to local authorities reconsidering school governing body decisions.
185. Accordingly, it is the local authority maintaining the school in Wales attended by the English resident child or young person that is responsible for reconsidering decisions about ALN (in accordance with section 26), reconsidering governing body IDPs (in accordance with section 27), and reconsidering governing body decisions to cease to maintain IDPs (in accordance with section 32). There are some differences in the application of these provisions regarding what the maintaining local authority may do, which reflect that there is a local authority in England with responsibilities under the Children and Families Act 2014 in relation to special educational needs. For example, the local authority may only direct the governing body to maintain, or prepare and maintain an IDP – it cannot itself maintain or take over responsibility for the IDP. In addition, the local authority is not required to prepare an IDP or direct a governing body to do so where it has requested the relevant English local authority to conduct an assessment of the child or young person's needs under section 36 of the Children and Families Act 2014 or where an Education, Health and Care Plan (EHC Plan) is maintained for the child or young person under that Act. A local authority's arrangements for avoiding and resolving disputes and independent advocacy services must also be available to such pupils and also to young people in the area of a local authority in England who are enrolled as students at an FEI in the area of the local authority in Wales (subsection (4)).

Section 88 - Giving notice etc. under this Part

186. Where Part 2 requires or authorises a governing body or local authority to give a document to or notify a person, it may be done by the methods of delivery listed in this section. Electronic delivery can only take place where the person has indicated that they wish to receive notifications or documents electronically and has provided a suitable address.

Section 89 - Review of additional learning provision in Welsh

187. **Section 89** requires the Welsh Ministers to arrange reviews and reports on the sufficiency of additional learning provision in Welsh. The first report must be published before 1 September in the fifth year following the commencement by order of any

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provision of Part 2, and thereafter before 1 September in the fifth year following the last year in which a report was required to be published.

Section 90 - Power to amend duties to secure additional learning provision in Welsh

188. **Section 90** provides the Welsh Ministers with a power to make regulations which remove the words “take all reasonable steps to” from those provisions of the Act (listed in subsection (1)) which relate to securing ALP in Welsh or provide that in those provisions, the words “take all reasonable steps to” no longer apply in relation to certain prescribed bodies or for a prescribed purpose, or for a prescribed purpose in relation to a prescribed body. The effect of removing the words is that the duty concerned changes from being a duty to take all reasonable steps to secure that ALP is provided to a person in Welsh to a duty to secure that it is provided in Welsh.
189. **Section 90** also provides the Welsh Ministers with the power to omit section 89 (i.e. the duty to arrange reviews of the sufficiency of Welsh language ALP) if the words “take all reasonable steps” are removed from all the provisions listed in subsection (2). This section links to section 89 because the outcome of the reviews will be a relevant consideration in the decision to exercise this regulation making power.