

# **ADDITIONAL LEARNING NEEDS AND EDUCATION TRIBUNAL (WALES) ACT 2018**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS OF THE ACT**

#### **Part 2 – Additional Learning Needs**

##### ***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 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 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.