



Additional Learning Needs and Education Tribunal (Wales) Act 2018

2018 anaw 2

PART 2

ADDITIONAL LEARNING NEEDS

CHAPTER 5

GENERAL

Capacity

83 Parents and young people lacking capacity

- (1) The Welsh Ministers must make regulations for the purpose of giving effect to this Part in a case where a parent of a child, or a young person, lacks capacity at the relevant time.
- (2) Regulations under subsection (1) may include provision applying any enactment with modifications, including (for example) provision for—
 - (a) references to a child's parent to be interpreted as references to, or as including references to, a representative of the parent;
 - (b) references to a young person to be interpreted as references to, or as including references to, a representative of the young person, the young person's parent, or a representative of the young person's parent;
 - (c) modifications to have effect despite section 27(1)(g) of the [Mental Capacity Act 2005 \(c. 9\)](#) (which does not permit decisions on discharging parental responsibilities in matters not relating to a child's property to be made on a person's behalf).

- (3) In subsection (1) “the relevant time” means the time at which, under the enactment in question, something is required or permitted to be done by or in relation to the parent or young person.
- (4) The reference in subsection (1) to lacking capacity is to lacking capacity within the meaning of the Mental Capacity Act 2005.
- (5) “Representative”, in relation to a parent or young person, means—
- (a) a deputy appointed by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005 to make decisions on the parent’s or young person’s behalf in relation to matters within this Part;
 - (b) the donee of a lasting power of attorney (within the meaning of section 9 of that Act) appointed by the parent or young person to make decisions on his or her behalf in relation to matters within this Part;
 - (c) an attorney in whom an enduring power of attorney (within the meaning of Schedule 4 to that Act) created by the parent or young person is vested, where the power of attorney is registered in accordance with paragraphs 4 and 13 of that Schedule or an application for registration of the power of attorney has been made.

84 Capacity of children

- (1) Subsections (2) to (7) apply to—
- (a) the duty to notify or inform a child under section 11(4), 13(3), 18(3), 22(2), 23(10), 24(9), 27(4), 28(4), 28(7), 31(7), 31(8), 31(9), 32(3), 40(4) or 42(6);
 - (b) the duty to give a copy of a plan or a revised plan to a child under section 22(1), 23(11), 24(10) or 40(5);
 - (c) the conditions in paragraphs (a) and (b) of section 20(3) as they apply to a child;
 - (d) the duty to review a plan following a request by a child under section 23(8) or 24 (7) ;
 - (e) the duty to reconsider following a request by a child under section 26(1), 27(1) or 32(1)(b);
 - (f) the duty to decide following a request by a child under section 28(1).
- (2) The condition or duty does not apply if the governing body, local authority or NHS body (as the case may be) considers that the child does not have the capacity to understand the subject matter, unless subsection (3) applies.
- (3) This subsection applies if—
- (a) in the case of a decision by a governing body of a maintained school, the local authority responsible for the child informs the governing body that it considers that the child does have the capacity to understand the subject matter,
 - (b) a case friend has been appointed for the child under section 85 by order of the Education Tribunal for Wales, subject to provision in or under that section, or
 - (c) a declaration is made by the Education Tribunal for Wales under section 71(2) that the child does have the capacity to understand the subject matter.
- (4) The condition or duty does not apply to a governing body of a maintained school if the local authority responsible for the child informs the governing body that the authority considers that the child does not have the capacity to understand the subject matter.

- (5) Subsection (6) applies where—
- (a) a governing body of a maintained school considers that a child either does or does not have the capacity to understand the subject matter relating to the exercise of a function to which this section applies, and
 - (b) the child or the child’s parent requests the local authority responsible for the child to reconsider the matter.
- (6) The local authority must decide whether the child has the capacity to understand the subject matter.
- (7) The condition or duty does not apply if the Education Tribunal for Wales declares under section 71(2) that the child does not have the capacity to understand.
- (8) In this section “the capacity to understand the subject matter” means the capacity to understand—
- (a) information or documents that must be given to a child under this Part, or
 - (b) what it means to exercise the rights conferred on a child by this Part.

85 Case friends for children who lack capacity

- (1) This section applies to a child who lacks the capacity to understand—
- (a) information or documents that must be given to a child under this Part, or
 - (b) what it means to exercise the rights conferred on a child by this Part.
- (2) The Education Tribunal for Wales may by order—
- (a) appoint a person to be a case friend for a child to whom this section applies, or
 - (b) remove the person from being a case friend for the child,
- on the application of any person or on its own initiative, subject to provision in regulations under subsection (8).
- (3) A case friend appointed for a child under this section may—
- (a) represent and support the child, and
 - (b) take decisions and act on behalf of the child,
- in respect of matters arising under or by virtue of this Part, subject to provision in regulations under subsection (8).
- (4) Where a person is appointed to be a case friend by order of the Tribunal under this section, the rights of a child under the provisions in subsection (5) are to be exercised by the case friend on behalf of the child and the provisions are to be interpreted accordingly.
- (5) The provisions are—
- (a) sections 11(4), 13(3), 18(3), 22(2), 23(10), 24(9), 27(4), 28(4), 28(7), 31(7), 31(8), 31(9), 32(3), 40(4) and 42(6) (duties to notify or inform);
 - (b) sections 22(1), 23(11), 24(10) and 40(5) (duties to give a copy of a plan or a revised plan);
 - (c) section 20(3) (duty to inform and give an opportunity to discuss);
 - (d) sections 23(8) and 24 (7) (duty to review a plan following a request);
 - (e) sections 26(1), 27(1) and 32(1)(b) (duties to reconsider following a request);
 - (f) section 28(1) (duty to decide following a request);
 - (g) section 70(2) (right of appeal);

Status: This is the original version (as it was originally enacted).

- (h) section 72 (right of appeal: detained persons).
- (6) A case friend appointed under this section must—
- (a) act fairly and competently,
 - (b) not have any interest adverse to that of the child,
 - (c) ensure that all steps and decisions taken by the case friend are for the benefit of the child, and
 - (d) take account of the child’s views, so far as possible.
- (7) In deciding whether to appoint a person to be a case friend, or to remove a person from being a case friend, the Tribunal must have regard, in particular, to whether the person is likely to comply (in the case of appointment) or has complied (in the case of removal) with the duty in subsection (6).
- (8) Regulations may make further provision about case friends, including (among other things) provision—
- (a) conferring functions on the Education Tribunal for Wales;
 - (b) conferring functions on case friends;
 - (c) for procedures in relation to case friends;
 - (d) specifying the circumstances in which a person may or may not act as a case friend;
 - (e) specifying the circumstances in which a child must have a case friend;
 - (f) specifying requirements in respect of the conduct of case friends;
 - (g) applying any enactment with or without modifications for the purpose of enabling a case friend to make decisions or act on behalf of a child in respect of matters arising under or by virtue of this Part.