

EDUCATION (WALES) MEASURE 2009

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes are for the Education (Wales) Measure 2009 which was passed by the National Assembly for Wales on 3 November 2009 and approved by Her Majesty in Council on 9 December 2009. They have been prepared by the Department for Children, Education, Lifelong Learning and Skills of the Welsh Assembly Government to assist the reader. The Explanatory Notes should be read in conjunction with the Measure but are not part of it. They are not, and are not meant to be, a comprehensive description of the Measure. So where a section or part of a section does not seem to require any explanation or comment, none is given.
2. The Measure gives children and young people the right to make an appeal in respect of special educational needs to the Special Educational Needs Tribunal for Wales (“the Tribunal”) and gives them a right to make a claim in respect of disability discrimination in schools to the Tribunal.
3. The Measure makes changes to current legislation relating to the school curriculum which flow from the implementation of the foundation phase (3 to 7 year-olds) of the National Curriculum for Wales. The first key stage is removed from the National Curriculum for Wales and the “foundation stage” is re-named the “foundation phase”.
4. The Measure also makes changes to legislation relating to students’ local curriculum entitlement (16-18 age group).

COMMENTARY ON SECTIONS

Part 1 – Education Appeals and Claims by Children

Special educational needs appeals

Sections 1- 8 insert new provisions into the Education Act 1996

Section 1 – Right of a child to appeal to the Tribunal in respect of special educational needs (inserting a new section 332ZA into the Education Act 1996)>

5. Subsection (1) of the new section 332ZA specifies existing grounds on which a parent of a child with SEN may appeal to the Tribunal.
6. Subsection (2) provides that a child may appeal to the Tribunal in relation to the existing grounds on which the child’s parent may appeal.
7. Subsection (3) permits a parent and child to appeal at the same time whether on the same or on different grounds.
8. Subsection (4) provides that the exercise of rights granted under this section is subject to any provisions made by regulations under sections 332ZC and 336(1) of the Education Act 1996.

Section 2 – Notice and service of documents on a child (inserting a new section 332ZB into the Education Act 1996)

9. Subsection (1) of the new section 332ZB specifies various circumstances when a Local Education Authority must give notice to, or serve a document on, a parent of a child.
10. Subsection (2) places a duty on a Local Education Authority to give notice to, or serve a document on, the child as well as the parent.
11. Subsection (3) requires that any provision which applies to notices given to or documents served on a parent will apply equally to notices or documents served on a child.

Section 3 – Case Friends (inserting a new section 332ZC into the Education Act 1996)

12. Subsection (1) of the new section 332ZC allows regulations to be made by the Welsh Ministers that provide for a child to have a person (known as a “case friend”) to make representations on behalf of the child to avoid or resolve disputes with the Local Education Authority, or to exercise a child’s right of appeal on behalf of the child.
13. Subsection (2) sets out the duties of a case friend when making representations or making an appeal on behalf of a child.
14. Subsection (3) provides that regulations made by the Welsh Ministers under this section may (among other things) confer functions on the Tribunal and set up procedures in relation to case friends. Regulations may also make provision about the appointment or removal of a case friend, specify circumstances in which a person may or may not act as a case friend, specify circumstances in which a child must have a case friend, and specify requirements in respect of a case friend’s conduct.

Section 4 - Advice and information (amending section 332A and inserting a new section 332AA into the Education Act 1996)

15. Section 332A of the Education Act 1996 is amended so that it applies to England only.
16. A new section 332AA is inserted into the Education Act 1996.
17. Subsection (1) of the new section places a duty on Local Education Authorities in Wales to arrange for any child in their area with SEN, and any parent or case friend of such child, to be provided with appropriate advice and information about matters relating to the child’s SEN.
18. Subsection (2) requires Local Education Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide advice and information to children, their parents or case friends.
19. Subsection (3) requires Local Education Authorities to comply with any regulations made by the Welsh Ministers that relate to advice and information arrangements.
20. Subsection (4) places a duty on Local Education Authorities to make children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that advice and information services are available.

Section 5 - Resolution of disputes (amending section 332B and inserting a new section 332BA into the Education Act 1996)

21. Section 332B of the Education Act 1996 is amended so that it applies to England only.
22. A new section 332BA is inserted into the Education Act 1996.
23. Subsection (1) of the new section places a duty on Local Education Authorities in Wales to make arrangements to provide independent dispute resolution services to avoid or

resolve disagreements between the Local Education Authority and a child and the Local Education Authority and a parent of a child.

24. Subsection (2) obliges Local Education Authorities to make arrangements to provide independent dispute resolution services with a view to avoiding or resolving disputes between a child and the proprietor of a school and a parent and the proprietor of a school.
25. Subsection (3) requires Local Education Authorities to make arrangements that provide for the appointment of an independent person to help avoid or resolve disputes.
26. Subsection (4) requires Local Education Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide dispute resolution services.
27. Subsection (5) requires Local Education Authorities to comply with any provision made in regulations by the Welsh Ministers that relate to dispute resolution services.
28. Subsection (6) places a duty on Local Education Authorities to make children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that dispute resolution services are available.
29. Subsection (7) requires Local Education Authorities to notify children, parents and case friends for children in their area that participation in dispute resolution arrangements will not affect a parent or a child's entitlement to appeal to the Tribunal.

Section 6 - Independent advocacy services (inserting a new section 332BB into the Education Act 1996)

30. Subsection (1) of the new section 332BB places a duty on Local Education Authorities in Wales to arrange for an independent advocacy service to be available in their area, and for a child or a case friend for a child to be referred to the service should they request it.
31. Subsection (2) defines "independent advocacy services" as services intended to provide advice and assistance to a child who is considering whether to appeal to the Tribunal, who has made or intends to make an appeal, or who is taking part in or intending to take part in dispute resolution arrangements.
32. Subsection (3) requires Local Education Authorities when making advocacy services arrangements, to have regard to the principle that the advocacy service must be independent of any person who is the subject of an appeal or involved in investigating or adjudicating on the appeal.
33. Subsection (4) requires Local Education Authorities to comply with any regulations made by the Welsh Ministers that relate to advocacy services arrangements.
34. Subsection (5) places a duty on Local Education Authorities to make children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that independent advocacy services are available.
35. Subsection (6) allows a Local Education Authority to make arrangements that provide for payment to be made to, or in relation to, a person who provides independent advocacy services to a child or case friend.
36. Subsection (7) requires Local Education Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide independent advocacy services to children or case friends.

Section 7 - Tribunal procedure

37. This section amends section 336 of the Education Act 1996 which gives the Welsh Ministers the power to make regulations about Tribunal proceedings.

38. Subsection (3) adds additional paragraphs to section 336(2) to enable the Welsh Ministers to postpone proceedings in certain circumstances and to add or substitute parties in appeal proceedings.

Section 8 - Procedure for making regulations (amending section 569 of the Education Act 1996 and inserting a new section 569(2A) and (2B) into that Act)

39. This section amends section 569 of the Education Act 1996 which makes provision in relation to regulations.
40. Subsection (2) amends section 569(1) of the Education Act 1996 to specify that any power of the Welsh Ministers to make regulations must be exercised by statutory instrument.
41. Subsection (4) inserts new subsections (2A) and (2B). Subsection (2A) prescribes that regulations made under sections 332ZC, 332AA, 332BA, 332BB and 336 will be subject to the negative resolution procedure. Subsection (2B) is a signpost to the effect of paragraphs 33 to 35 of Schedule 11 to the Government of Wales Act 2006, which deal with the Assembly procedures that apply to subordinate legislation made under powers in the Education Act 1996 and other Acts that were transferred to the Welsh Ministers by the 2006 Act.

Disability Discrimination Claims

Sections 9 - 16 insert new provisions into the Disability Discrimination Act 1995

Section 9 - Right of a child to make a disability discrimination claim (inserting a new section 28IA into the Disability Discrimination Act 1995 – Jurisdiction and Powers of the Tribunal)

42. The new section 28IA gives disabled children the right to make a claim to the Tribunal themselves, and allows the Tribunal to consider and adjudicate on a claim made by a child.
43. Subsection (1) of the new section specifies the grounds on which a disabled child may make a claim to the Tribunal.
44. Subsection (2) provides that the child's right to make a claim does not extend to a claim that relates to admission or permanent exclusion decisions against a school maintained by the Local Education Authority.
45. Subsection (3) permits a child to make a claim at the same time as the child's parent whether on the same or on different grounds.
46. Subsection (4) allows the Tribunal to make an order in relation to a claim made by a child.
47. Subsection (5) allows the Tribunal to make an order to prevent or alleviate discrimination, but this does not include a power for the Tribunal to order payment by way of compensation.
48. Subsection (6) provides that the exercise of rights granted under this section is subject to any provisions made by regulations under sections 28IB and 28J of the Disability Discrimination Act 1995.

Section 10 – Case friends (inserting a new section 28IB into the Disability Discrimination Act 1995)

49. Subsection (1) of the new section 28IB allows regulations to be made by the Welsh Ministers that provide for a disabled child to have a person to make representations on behalf of the child to avoid or resolve disputes with the body responsible for a school, or to exercise the child's right to make a claim to the Tribunal.

50. Subsection (2) specifies that a person who makes representations or makes a claim on behalf of a child is to be known as a “case friend”
51. Subsection (3) sets out the criteria that a case friend must satisfy when making representations or making a claim on behalf of a child.
52. Subsection (4) provides that regulations made by the Welsh Ministers under this section may confer functions on the Tribunal and set up procedures in relation to case friends. Regulations may also make provision about the appointment or removal of a case friend, specify the circumstances in which a person may or may not act as a case friend, specify circumstances in which a child must have a case friend, and specify requirements in respect of a case friend’s conduct.
53. Subsection (5) defines a “disabled child” for the purposes of the new provisions in this Measure

Section 11 - Advice and information (inserting a new section 28IC – Disability Discrimination Act 1995)

54. Subsection (1) of the new section 28IC places a duty on Local Education Authorities in Wales to arrange for any disabled child in their area and for any case friend for such child, to be given advice and information on matters relating to disability discrimination in schools.
55. Subsection (2) requires Local Education Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide advice and information to disabled children (or case friends).
56. Subsection (3) requires Local Education Authorities to comply with any provision made in regulations by the Welsh Ministers that relate to advice and information arrangements.
57. Subsection (4) places a duty on Local Education Authorities to make disabled children, parents of disabled children, head teachers and proprietors of schools in their area and such other persons as they consider appropriate, aware that advice and information services are available.

Section 12 - Resolution of disputes (inserting a new section 28ID – Disability Discrimination Act 1995)

58. Subsection (1) of the new section 28ID places a duty on Local Education Authorities in Wales to make arrangements to provide dispute resolution services to avoid or resolve disagreements between a disabled child and the body responsible for a school.
59. Subsection (2) requires Local Education Authorities to make arrangements that provide for the appointment of an independent person to help avoid or resolve disputes.
60. Subsection (3) requires Local Education Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide dispute resolution services.
61. Subsection (4) requires Local Education Authorities to comply with any provision made in regulations by the Welsh Ministers that relate to dispute resolution services.
62. Subsection (5) places a duty on Local Education Authorities to make disabled children, parents of disabled children, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that dispute resolution services are available.
63. Subsection (6) requires Local Education Authorities to notify disabled children, parents of disabled children and case friends for disabled children in their area that participation

in dispute resolution arrangements will not affect the entitlement of any person to make a claim to the Tribunal.

Section 13 - Independent advocacy services (inserting a new section 28IE – Disability Discrimination Act 1995)

64. Subsection (1) of the new section 28IE places a duty on Local Education Authorities to arrange for an independent advocacy service to be available in their area, and for a disabled child or a case friend for a disabled child to be referred to the service should they request it.
65. Subsection (2) defines “independent advocacy services” as services intended to provide advice and assistance to a disabled child who is considering whether to make a claim to the Tribunal, who has made or intends to make a claim, or who is taking part in or intending to take part in dispute resolution arrangements.
66. Subsection (3) requires Local Education Authorities when making advocacy services arrangements, to have regard to the principle that the advocacy service must be independent of any person who is the subject of a claim or involved in investigating or adjudicating on the claim.
67. Subsection (4) requires Local Education Authorities to comply with any regulations made by the Welsh Ministers that relate to advocacy service arrangements.
68. Subsection (5) places a duty on Local Education Authorities to make disabled children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that independent advocacy services are available.
69. Subsection (6) allows a Local Education Authority to make arrangements that provide for payment to be made to, or in relation to, a person who provides independent advocacy services to a disabled child or case friend.
70. Subsection (7) requires Local Education Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide independent advocacy services to children or case friends.

Section 14 - Tribunal procedure

71. This section amends section 28J of the Disability Discrimination Act 1995 by removing the Secretary of State’s power to make regulations governing Tribunal proceedings on disability discrimination claims, and conferring those powers on the Welsh Ministers.
72. Subsection (3) adds an additional paragraph into section 28J(2) to enable the Welsh Ministers to add or substitute parties in Tribunal proceedings.

Section 15 - Role of the Welsh Ministers

73. This section amends the roles of the Secretary of State and the Welsh Ministers under section 28M of the Disability Discrimination Act 1995.
74. Subsection (2) inserts a new subsection (1A). The provision enables the Welsh Ministers to issue directions to a Local Education Authority where the Local Education Authority acts or proposes to act unreasonably in the discharge of its disability discrimination duties imposed by this Measure, or where it has failed to discharge those duties.
75. Subsection (3) amends section 28M(4) so that the Welsh Ministers may issue directions to a Local Education Authority under new subsection (1A) even if the performance of the Local Education Authority’s duty is contingent upon the opinion of the Local Education Authority.

76. Subsection (5) inserts new subsections (6A) and (6B). These provisions, when read together with subsection (4), remove the Secretary of State's direction giving function with regard to non compliance with the Tribunal's order and confer that function on the Welsh Ministers.
77. Subsection (6) amends section 28M(7) so that directions given by the Welsh Ministers under new subsection (1A) may be varied or revoked and enforced on the application of the Welsh Ministers by an order of the court.

Section 16 - Procedures for making regulations

78. This section amends section 67 of the Disability Discrimination Act 1995 by inserting a new subsection (5B) which provides that regulations made under sections 28IB, 28IC, 28ID, 28IE or 28J are subject to the negative resolution procedure.

Section 17 - Piloting the rights of a child to appeal or make a claim

79. Subsection (1) makes provision allowing regulations to be made by the Welsh Ministers to pilot the rights given to a child under this Measure for a period of up to 40 months.
80. Subsection (2) specifies that regulations made under subsection (1) may make provision for the:
- rights conferred on a child by this Measure in relation to special educational needs to apply only to children for whom specified local education authorities are responsible;
 - duties imposed on a local education authority by this Measure in relation to special educational needs to apply only to specified local education authorities;
 - rights conferred on a person by this Measure in relation to disability discrimination to apply only to a body responsible for a school in specified areas; and
 - duties imposed on a local education authority by this Measure in relation to disability discrimination to apply only to specified local education authorities.
81. Subsection (2) also allows for regulations to make provision for reports, or other information on the operation of the pilot, to be provided to the Welsh Ministers.
82. Subsection (3) requires the Welsh Ministers to publish and lay a report on how the pilot was implemented and on how effective the pilot was in promoting the well-being of children.
83. Subsection (4) allows the Welsh Ministers to lay a report under subsection (3) before the end of the pilot period specified in regulations under subsection (1) provided 12 months of the pilot period have elapsed.
84. Subsection (5) requires the Welsh Ministers to lay a copy of the report under subsection (3) before the National Assembly for Wales within 30 months of the regulations under subsection (1) coming into force.

Section 18 - Power to make provision about appeals and claims by a child

85. This section provides the Welsh Ministers with a power to make provision by order about the matters being piloted. This includes a power to add, remove or modify rights, to amend or repeal provisions of Part 4 of the Education Act 1996 and Part 4 of the Disability Discrimination Act 1995, and to make consequential amendments and repeals to provisions of those Acts. The purpose of the power is to enable the Welsh Ministers to make further provision about the rights of children to make appeals and claims in the light of information gathered during the pilot phase. The power will also allow the Welsh Ministers to modify the rights in order to address any issues that only become apparent after the Measure is rolled out generally across Wales, subject to a

24 month time limit for the use of the order making power which starts from the end of the pilot phase.

86. Subsection (3) states that the power to make an order under this section cannot be exercised before the pilot report required by section 17(3) is laid before the National Assembly for Wales, or after 24 months from the last day of the pilot period specified in regulations under subsection 17(1).

Section 19 - Interpretation of sections 17 and 18

87. This section defines the terms used in sections 17 and 18.

Section 20 - Powers on repeal and re-enactment of the Disability

Discrimination Act 1995

88. This section applies if Part 4 of the Disability Discrimination Act 1995 is repealed and re-enacted with or without modification. The section gives the Welsh Ministers the power to make an order to amend current or future legislation that repeals and re-enacts the Disability Discrimination Act 1995 and provides that an order may be made before the legislation that repeals and re-enacts the Disability Discrimination Act 1995 is commenced.
89. Subsection (3) provides that an order made by the Welsh Ministers may make provision corresponding to the disability discrimination provisions in the Measure. This will enable the provisions in section 9 to 16 of the Measure to be retained in new equality legislation.

Part 2 – Miscellaneous and General

Amendments to Part 7 of the Education Act 2002

Section 21 - Foundation phase

90. This section substitutes “foundation phase” for “foundation stage” in all occurrences within the Education Act 2002. It also removes all references to the “first key stage” within that Act.

Amendments to the Learning and Skills Act 2000

Section 22 –Local curriculum entitlements for students aged 16 to 18

91. This section amends section 33(F)(1)(a) of the Learning and Skills Act 2000 to provide clarity in instances where a learner does not attend the school determined by the head teacher during key stage 4. It also amends section 33N(1) of the Learning and Skills Act 2000 to allow a head teacher to make a decision on students’ entitlement after the start of the academic year.

General

Section 23 – Minor and consequential amendments

92. This section gives effect to the Schedule which contains minor and consequential amendments.

Section 24 – Orders and regulations

93. Subsection (1) provides that any power of the Welsh Ministers to make regulations under the Measure is exercisable by statutory instrument.
94. Subsection (2) specifies that any power of the Welsh Ministers to make an order or regulations under the Measure includes a power to make different requirements for

different areas, to make provision generally or for specific cases, and to make incidental, supplementary, transitory, transitional or savings provisions

95. Subsection (3) provides that regulations that allow for the rights given to a child under this Measure to be piloted are subject to the negative resolution procedure.
96. Subsection (4) requires that any order exercising the powers given to the Welsh Ministers by section 18 or 20 must be laid before and approved by resolution of the National Assembly for Wales.

Section 25 – Orders made under section 18: procedure

97. This section sets out the procedure for orders made under section 18 of the Measure. It requires the Welsh Ministers, when making an order under section 18, to consult interested persons affected by the proposals, have regard to the findings in the pilot report and consider any representation made by the National Assembly for Wales.

Section 26 - Commencement

98. This section sets out the arrangements for commencement of the Measure in relation to sections 24, 25, 26, 27 and paragraphs 10 to 12 of the Schedule. All other remaining provisions of the Measure come into force when commenced by the Welsh Ministers by order.

Section 27 – Short title

99. This section establishes the Measure’s title as the ‘Education (Wales) Measure 2009

RECORD OF PROCEEDINGS IN NATIONAL ASSEMBLY FOR WALES

The following table sets out the dates for each stage of the Measure’s passage through the National Assembly for Wales.

Introduced	27 April 2009
Stage 1 – Debate	14 July 2009
Stage 2 Scrutiny Committee – consideration of amendments	1 October 2009
Stage 3 Debate	3 November 2009
Stage 4 Debate	3 November 2009
Royal Approval in Council	9 December 2009