

The Additional Learning Needs and Education Tribunal (Wales) Act 2018: An update

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Two key events have taken place in the last week in relation to The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“**the 2018 Act**”): the publication of a commencement order and the publication of the Additional Learning Needs Co-ordinator (Wales) Regulations. This article considers both documents, concluding that, based on the limited information available they do not help clarify the confusion amongst practitioners as to the details of the forthcoming special needs regime in Welsh schools.

On 29 October 2020, the Minister for Education made an Order, snappily entitled ‘The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Commencement No.1) Order 2020 (“**the Commencement Order**”).

The Commencement Order provided that the following provisions of the 2018 Act were to come into force on 2 November 2020:

- Section 5 (the procedure for making a Code of Practice, including the consultation obligations)
- Section 15 (key terms)
- Section 37 (Regulations about transfer of Individual Development Plans)
- Section 39 (Meaning of “detained person” and other key terms)
- Section 45 (Detention under Part 3 of the Mental Health Act 1983)
- Section 46 (Regulations about deciding whether an Individual Development Plan is necessary)
- Section 67 (Regulations about the provision of goods or services)
- Section 74 (Regulations about appeals and applications)
- Section 82 (Regulations about disclosure and use of information)

When jointly read, the bringing into force of the above provisions effectively gives the Welsh Ministers the authority to make a variety of Regulations in respect of the implementation of the 2018 Act. The most anticipated ones will be: the Code of Practice which, whilst Statutory Guidance as opposed to a Regulation, should offer some meat to the bones of the 2018 Act itself; the section 37 Regulations regarding transfers of Individual Development Plans which should, hopefully, result in the sector knowing the transition process for the new regime; and the Regulations about appeals.

Also of note is that the Commencement Order provides that sections 56(1)&(4)-(6), 61 and 62 of the 2018 Act come into force on 4 January 2021. This gives rise to various actions that need to take place.

Pursuant to section 56(1), (4)-(6), the Welsh Ministers are required to “*establish and maintain a list of independent special post 16 institutions in Wales and England*” however, institutions may only be entered onto the list upon application by the proprietor of the institution and, pursuant to s56(5), Regulations will be forthcoming on the various requirements that must be met for institutions to be included on the list. Quite how this will work in practice therefore remains to be seen. It is likely in my view that the reference to “*establish*” suggests that a list itself is not required to be maintained as of 4 January 2021 and therefore, whilst steps may be taken to publicise how schools can be registered on the list, it is probably going to be some time until a full list is maintained. This is not problematic as the impact of the list is unlikely to be more than nominal; in my view it will play an almost identical role to the list maintained by the Secretary of State for Education of s41 approved independent special schools which has a limited impact on day to day functioning.

The bringing into force of sections 60 - 62 puts into place obligations onto various public bodies to designate new roles:

- Local Health Boards - a Designated Education Clinical Lead Officer
- Local authorities - an Early Years Additional Learning Needs Lead Officer
- Schools - an Additional Learning Needs Co-ordinator (“**the ALNCo**”)

No real information has been provided as to the first two roles, however, the role of the ALNCo brings us onto the second event that has taken place recently, namely, that the Minister for Education has now laid before the Senedd a copy of the Additional Learning Needs Co-ordinator (Wales) Regulations 2020 (“**the 2020 Regulations**”) made under section 60 of the 2018 Act. They will come into force on 4 January 2021.

The 2020 Regulations set out the qualifications and experience required of the person appointed as the ALNCo for a school.

The criteria to be met for an ALNCo is that, if the appointing institution is a school, the person must be either a qualified school teacher (registered with the Education Workforce Council (“**the EWC**”) as a school teacher) or were, immediately before 4 January 2021, a Special Educational Needs Co-ordinator (“**SENCo**”). In respect of an ALNCo in a further education college, the person must be a further education teacher, registered with the EWC as such.

Potentially of most concern to institutions is the actual functions of the role of the ALNCo. These are prescribed within the 2020 Regulations and are vast and vague. In full, the functions of the ALNCo are as set out below:

- Identifying a pupil’s additional learning needs and co-ordinating the making of additional learning provision that meets those needs
- Securing relevant services that will support a pupil’s additional learning provision as required
- Keeping records of decisions about additional learning needs and individual development plans
- Promoting a pupil with additional learning needs’ inclusion in the school and access to the school’s curriculum, facilities and extra-curricular activities
- Monitoring the effectiveness of any additional learning provision made
- Advising school teachers at the school about differentiated teaching methods appropriate for the individual pupils with additional learning needs
- Supervising and training school learning support workers who work with pupils with additional learning needs
- Contributing to in-service training for school teachers at the school to assist the ALNCo in carrying out the above tasks

These obligations are mirrored in the further education sector.

Whilst it may simply be poor drafting, in my view, the functions as drafted are worryingly vague and appear to delegate obligations once owed by local authorities onto schools. For instance, take obligation number one above.

The identification of a pupil's additional learning needs. This presumes that the ALNCo (or another member of the school) have identified that a pupil is struggling in school. In order to identify a pupil's additional learning needs, the ALNCo will need to have regard to section 2 of the 2018 Act and ask him/herself a number of questions:

- (i) Whether the pupil has a significantly greater difficulty in learning than the others of the same age, or
- (ii) Whether they have a physical or mental impairment that has a substantial and long term adverse effect on the child's ability to make use of facilities for education and training of a kind generally available to others of the same age in mainstream school.

These are not traditionally questions that would be answered by educators. More likely, such questions would be considered and answered by a local authority in considering whether or not to undertake a statutory assessment of the relevant child. Moreover, the ALNCo is forced to now grapple with questions of law, as they are obliged to consider whether the relevant pupil has a disability within the meaning of section 6 of the Equality Act 2010, something traditionally a question for lawyers or medical professionals, not educators. Moreover, if a ALNCo determines that a child does have additional learning needs, they have to coordinate the making of additional learning provision. There is no clarity provided on what is meant by the term "*co-ordinate*" and therefore it could mean one of a number of things: Are ALNCos simply required to make contact with whoever is to identify what provision is to be made? are they expected to secure the provision? What responsibility are ALNCos taking on personally?

Unfortunately, the 2020 Regulations do not require the person designated as ALNCo to have undergone any specialist training and therefore, on a first reading, it is entirely unclear how an ALNCo is going to meet these obligations.

The second obligation is equally concerning for the same reason. The securing of additional learning provision (and before that special educational provision) has, since the Education Act 1996, been a function of the state. No guidance is provided on how far an ALNCo (and their employing institutions) has to go in securing provision which, whilst taking up time, will also likely take up valuable financial resource.

I won't go through every individual obligation to persuade the reader that the 2020 Regulations are potentially setting up the system for failure, there is no need. When looked at jointly, the first and second obligations themselves clearly demonstrate a continuation of

the picture painted throughout the implementation of the new special educational needs regime in Wales, namely, that there is a real risk that the transition is going to cause real problems institutionally and, consequently, for the vulnerable children who have done nothing wrong at all.

On a more positive note I am hopeful that January 2021 will help clear some of my concerns up. The new ALNCoS will have from January until September 2021 to get on top of the new regime. Their hard work, combined with the documentation soon to be published by the Welsh Government, will hopefully dilute the emerging picture, and bring to the fore positive change.

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Matthew Wyard is a public law barrister with a focus on the education sector. He is the only specialist education barrister living and working in Wales. This is reflected in the recent Legal 500 in which Matthew is the only barrister ranked for Welsh education law.

"[...] 3PB's presence in this region comes in the form Matthew Wyard, who joined from SinclairsLaw in February 2020. He specialises in public law challenges in the education sector, civil claims against education institutions and special educational needs appeals."

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