

Welsh Government  
Consultation Document

## Draft Additional Learning Needs Code

Proposed subordinate legislation under the Additional Learning Needs and Education Tribunal (Wales) Act 2018

Date of issue: 10 December 2018  
Action required: Responses by 22 March 2019

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

# Draft of the additional learning needs code

## Overview

This consultation seeks the views on the Welsh Government's draft Additional Learning Needs (ALN) Code under the Additional Learning Needs and Education Tribunal (Wales) Act 2018 and proposed related regulations.

## How to respond

Responses to this consultation should be e-mailed/ posted to the address below to arrive by **22 March 2019** at the latest.

## Further information and related documents

- Consultation response form - Consultation on the draft Additional Learning Needs Code
- Draft Education Tribunal for Wales regulations
- Draft Additional Learning Needs Co-ordinator regulations
- Draft revised Social Services and Well-being (Wales) Act 2014 Part 6 Code of Practice (Looked After and Accommodated Children)
- Consultation on the draft Additional Learning Needs Code – Young Person's Version
- Consultation on the draft Additional Learning Needs Code – Easy Read Version

The documents above can be accessed from the Welsh Government website at

<https://beta.gov.wales/draft-additional-learning-needs-code>

**Large print, Braille and alternative language versions of this document and those listed above are available on request.**

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In order to show that the consultation was carried out properly, the Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

You should also be aware of our responsibilities under Freedom of Information legislation. If your details are published as part of the consultation response then these published reports will be retained indefinitely. Any of your data held otherwise by Welsh Government will be kept for no more than three years.

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# **Introduction**

The Additional Learning Needs and Education Tribunal (Wales) Act 2018 ('the 2018 Act'<sup>1</sup>) received royal assent in January 2018.

The 2018 Act makes provision for a new statutory framework for supporting children and young people with additional learning needs ('ALN'). This will replace existing legislation surrounding special education needs ('SEN') and the assessment of children and young people with learning difficulties and/or disabilities ('LD') in post-16 education and training.

The 2018 Act requires the Welsh Ministers to issue a Code on ALN ('the ALN Code') and provides a number of regulation-making powers to Welsh Ministers.

The 2018 Act has three overarching objectives, which the draft ALN Code and proposed regulations are also intended to support. These are:

- A unified legislative framework that supports all children of compulsory school age or below with ALN, and young people with ALN in school or further education;
- An integrated, collaborative process of assessment, planning and monitoring which facilitates early, timely and effective interventions; and
- A fair and transparent system for providing information and advice, and for resolving concerns and appeals.

This consultation seeks views on the draft ALN Code, draft regulations relating to the Education Tribunal for Wales and ALN Co-ordinators, and the policy intent for a number of other proposed regulations.

In addition, it seeks views on proposed revisions to the Social Services and Well-being (Wales) Act 2014 ('the 2014 Act') Part 6 Code of Practice – Looked After and Accommodated Children, that have been primarily made relating to looked after children with ALN.

The 2018 Act requires consultation with the following persons on a draft of the ALN Code:

- (a) each local authority in Wales;
- (b) the governing body of each maintained school in Wales;
- (c) the governing body of each institution in the further education sector in Wales;
- (d) Her Majesty's Chief Inspector of Education and Training in Wales;
- (e) the Children's Commissioner for Wales;
- (f) the Welsh Language Commissioner;
- (g) the relevant committee of the National Assembly for Wales with remit for the education of children and young persons; and
- (h) any other person the Welsh Ministers consider appropriate.

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<sup>1</sup> Throughout the draft ALN Code, we refer to 'the Act' but in the consultation document we refer to 'the 2018 Act' in relation to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 – this is because the consultation document also includes consultation which relates to another Act – the Social Services and Well-being (Wales) Act 2014.

The Welsh Government would also welcome the views of children and young people (for whom a separate consultation document will be made available); parents; practitioners working with children and young people; and any one else with an interest.

## **Structure of the consultation document**

There are five parts to the consultation document:

1. The draft ALN Code;
2. Draft Education Tribunal for Wales regulations;
3. Draft ALN Co-ordinator regulations;
4. Looked after children; and
5. Impact of proposals..

Part 1 of the consultation document relates to the draft ALN Code, and is structured around the chapters of the draft ALN Code (with the exception of Chapter 14 of the draft ALN Code, which is covered in Part 4 of the consultation document).

Part 2 of the consultation document relates to the draft regulations on the constitution and procedures of the Education Tribunal for Wales and case friends for children who lack capacity.

Part 3 of the consultation document relates to the draft regulations on the qualifications, experience and functions of ALN Co-ordinators.

Part 4 of the consultation document relates to looked after children, including

- (a) proposals for regulations about categories of looked after children who would not be treated as looked after for the purposes of the 2018 Act and who are not to have a personal education plan, and requirements for local authorities to appoint a Looked After Children in Education Co-ordinator;
- (b) Chapter 14 of the draft ALN Code – Content of an individual development plan (IDP) for a looked after child; and
- (c) proposed revisions to the 2014 Act Part 6 Code of Practice – Looked After and Accommodated Children.

Part 5 of the consultation document relates to the impact of the proposals for draft regulations, and the implications for the Welsh language.

## **How to respond to the consultation**

Questions are asked in this consultation document that cover a broad range of matters relating to the draft ALN Code and proposed regulations. A separate response form is provided, but for ease of reference, the questions relating to each section of the consultation are included at relevant points throughout the document.

Respondents are reminded that they only need to respond to the questions in the consultation in which they have an interest in or that are relevant to them. The Welsh Government values and appreciates the time spent and the input from all stakeholders and members of the public who submit responses to this consultation.

All responses will be carefully considered by the Welsh Government and will be used to help refine and shape the final Code and regulations.

Terms used in this consultation document which are defined in the draft ALN Code are to have the same meaning as they have in the draft ALN Code, unless otherwise stated (for example, references to schools and FEIs are usually to the governing bodies of them – see paragraph 1.26 of the draft ALN Code).

## The draft ALN Code

In July 2015, the Welsh Government published a first draft of the ALN Code as an appendix to the consultation on the ‘Draft Additional Learning Needs and Education Tribunal (Wales) Bill’ (‘the ALN Bill’). A further working draft was provided to Assembly Members in February 2017 to aid their scrutiny of the ALN Bill.

This draft of the ALN Code has been developed significantly since those previous drafts. It focuses on describing the functions placed on relevant persons<sup>2</sup> by the 2018 Act and those proposed to be in regulations. In addition, the ALN Code itself imposes requirements on local authorities, governing bodies of maintained schools and further education institutions (‘FEIs’) in Wales. It also gives guidance on the exercise of these functions.

## Proposed regulations

The Welsh Government is proposing to exercise powers to make regulations on the following matters, which are dealt with in chapters of the draft ALN Code and/or consultation document as set out in the table below:

Proposed regulations relating to:	Power to make regulations:	Relevant chapter of the draft ALN Code and/or section of the consultation document
Pupil Referral Units – delegating local authority responsibility for governing body duties to management committees	Paragraph 15 of Schedule 1 to the Education Act 1996	Chapter 1 of the draft ALN Code – Introduction
Deciding if an IDP is necessary for a young person not in a maintained school or FEI in Wales	Section 46 of the 2018 Act	Chapter 12 of the draft ALN Code – Duties on local authorities in relation to young people not at a maintained school or FEI
Timescales for NHS bodies' to respond to referrals as to whether there is a relevant treatment or service likely to be of benefit in addressing the ALN of a child or young person	Section 21(10) of the 2018 Act	Chapter 15 of the draft ALN Code – Duties on health bodies and other relevant persons

<sup>2</sup> In the draft ALN Code, “relevant persons” is used to refer to the bodies and individuals required by section 4 of the 2018 Act to have regard to any relevant guidance in the draft ALN Code when exercising their functions under Part 2 of the 2018 Act.

Timescales for compliance with duty to provide information or other help	Section 65(5) of the 2018 Act	Chapter 15 of the draft ALN Code – Duties on health bodies and other relevant persons
Transfers of IDPs	Sections 36(3) and 37 of the 2018 Act	Chapter 20 of the draft ALN Code – Transferring an IDP
Period for making request to local authority for reconsideration of a decision to cease to maintain an IDP	Section 32(1)(b) of the 2018 Act	Chapter 21 of the draft ALN Code – Ceasing to maintain an IDP
Deciding if it is no longer necessary to maintain an IDP for a young person not in a maintained school or FEI in Wales	Section 46 of the 2018 Act	Chapter 21 of the draft ALN Code – Ceasing to maintain an IDP
Children and young people subject to detention orders:  (a) Deciding whether it will be necessary to maintain an IDP for a detained child or young person  (b) Functions that apply where a child or young person is subject to a detention order and detained in hospital under Part 3 of the Mental Health Act 1983	(a) Section 46 of the 2018 Act  (b) Section 45 of the 2018 Act	Chapter 22 of the draft ALN Code – Children and young people subject to detention orders
Additional Learning Needs Co-ordinators	Section 60(4) of the 2018 Act	Chapter 24 of the draft ALN Code – Role of the ALN Co-ordinator
Education Tribunal for Wales - procedures and constitution	Sections 74(1), 75(1), 75(2), 75(4), 76(3), 77(1), 91(6) and 92(2) of the 2018 Act	Chapter 26 of the draft ALN Code – Appeals and applications to the Education Tribunal for Wales;  Part 2 of the consultation document - draft Education Tribunal for Wales regulations
Case friends for children who lack capacity	Section 85(8) of the 2018 Act	Chapter 27 of the draft ALN Code – Case friends for children who lack capacity;

		Part 2 of the consultation document - draft Education Tribunal for Wales regulations
Categories of looked after child:  (a) for whom no personal education plan is to be prepared  (b) not to be treated as looked after for the purposes of the 2018 Act	(a) Section 83(2B) of the 2014 Act  (b) Section 15(2) of the 2018 Act	Part 4 of the consultation document – Looked after children
Requirement for local authorities to appoint Looked after Children in Education (LACE) Co-ordinators	Section 87 of the 2014 Act	Part 4 of the consultation document – Looked after children

Part 5 of the consultation document invites views on the potential impact of the proposed regulations above.

The Welsh Government intends to exercise other regulation-making powers to implement the 2018 Act (for example, the power to make consequential amendments). This consultation document refers to those that are dealt with in the draft ALN Code.

Regulations to be made under section 83 of the 2018 Act (to provide for parents and young people lacking capacity) have not yet been drafted. The Supreme Court decision on Re D (UK SC 2018/006) heard on the 3<sup>rd</sup> and 4<sup>th</sup> of October is still pending. The outcome of this case may have implications for 16 and 17 year olds who lack capacity and the operation of the Mental Capacity Act 2005 in relation to this age group. It is intended to draft and consult on the section 83 regulations when the decision can be considered, as well as any relevant changes to the Mental Capacity Act 2005 which may have been made by the Mental Capacity Act (Amendment) Bill during its passage through Parliament.

## Next steps

It is intended that the final draft of the ALN Code and regulations will be laid before the National Assembly for Wales by the end of 2019, with a view to the provisions of the 2018 Act and regulations commencing from September 2020, with a three year implementation period before they apply in full.

Until such time, local authorities and governing bodies of maintained schools must continue to comply with their existing statutory duties (in particular those in Part 4 of the Education Act 1996 and regulations made under it).

For further information on the implementation of the 2018 Act, please see:  
<https://beta.gov.wales/additional-learning-needs-special-educational-needs>

# **Part 1 of the consultation: The draft ALN Code**

## **Chapter 1 - Introduction**

1.1 Chapter 1 of the draft ALN Code provides a broad overview of who must have regard to the guidance in, and comply with requirements imposed by, the ALN Code and how the ALN Code is to be interpreted.

### The meaning of ‘must’, ‘must not’, ‘may’, ‘should’ and ‘should not’ in the ALN Code

1.2 Paragraphs 1.10 -1.16 of the draft ALN Code explain the specific use and meaning of the different terms **must**, **must not**, **may**, **should** and **should not**, as they appear in the draft ALN Code. In particular, “must” and “must not” are used to describe both requirements in the 2018 Act and those that are imposed in the draft ALN Code, with a footnote indicating the source of the requirement. “Should” is used to denote statutory guidance.

**Question 1.** **Is the explanation in paragraphs 1.10 -1.16 of the draft ALN Code of the use and meaning of the different terms must, must not, may, should and should not clear?**

### Timescales

1.3 Various duties described in the draft ALN Code must be completed within a specified period timescale. Paragraphs 1.30 – 1.36 of the draft ALN Code explain how those timescales and the exception to them are to be interpreted. Rather than repeat that explanation on every occasion that the Code imposes or refers to a timescale within which something must be done, it is contained in this chapter (there is a footnote cross-reference to it for each timescale in the draft ALN Code).

1.4 Each of the mandatory timescales that appears in the draft ALN Code has been expressed in the same or a very similar way. This should promote consistency in the way they are understood and applied by different persons and bodies in different situations.

1.5 As explained in paragraph 2.15 of the draft ALN Code, the timescales that are proposed for completing actions need to take account of the wide range of circumstances to which they will apply. In most cases it would be possible and reasonable for the person or body subject to the duty to comply with it within the applicable fixed period. However, in many cases, the person or body should be able to comply earlier. Accordingly, timescale requirements provide that the person or body must act “promptly”. This is to ensure that the new system results in the earlier identification of ALN and interventions which are planned and implemented in a more timely and, consequently, a more effective way.

1.6 Time periods commence on the day after an event has occurred. This has the advantage that the time period will often finish on same day of the week as the event occurred (although this would not always be the case for time periods consisting of school days or term-time days).

1.7 Each timescale requirement for a public body to do something within a fixed period has the same general exception to the requirement to do the thing within that period (this exception is described in paragraphs 1.33 – 1.35 of the draft ALN Code). Again, this should promote consistency in understanding and application.

1.8 In developing the approach to timescales for the ALN system, consideration was given to providing more specific exceptions for each particular timescale, which could be similar to some of the ones in the SEN system for completing assessments or finalising statements.<sup>3</sup> These cover it being impractical for the local authority to comply because of very particular circumstances, including a child failing to keep an appointment during the period or being absent from the authority's area for a particular period or exceptional personal circumstances affecting the child or their parent during the period. However, such an approach could risk the inadvertent exclusion of instances where it was clear that the timescale could not reasonably be met and that an exception should apply. In addition, listing exceptions that apply in certain circumstances may risk those exceptions being applied routinely in those circumstances, even where those circumstances do not necessarily render the completion of a particular action impractical. Given the wider range of circumstances to which the duties in the 2018 Act will apply, it would also have been likely to result in quite long lists of exceptions to try to capture all the possible scenarios. The exceptions could be slightly different according to the duty to be performed. This is likely to be unduly complex and difficult to apply.

1.9 By contrast, having one exception should be much clearer, easier to understand and apply. Also, the general exception seems apt to capture all the particular examples of situations where the person subject to the duty should not have to comply with it. It is intended only to capture cases where compliance is genuinely impractical due to circumstances beyond the control of the person or body to whom the timescale requirement applies.

1.10 Even where the exception to completing the particular action within the fixed period applies, the duty on the public body to complete the action *promptly* continues to apply.

<b>Question 2.</b>	<b>Do you agree with the general approach to the timescales for compliance with duties (that is, to act promptly and in any event within a fixed period), as explained in paragraphs 1.31 – 1.32 of the draft ALN Code?</b>
<b>Question 3.</b>	<b>Is the general exception which applies in the case of timescales, as described in paragraphs 1.33-1.35 of the draft ALN Code, appropriate?</b>

<sup>3</sup> Regulations 12 and 17 of the Education (Special Educational Needs) (Wales) Regulations 2002.

## **Structure of the draft ALN Code**

1.11 The structure of the draft ALN Code is explained and then set out in paragraphs 1.73 – 1.100 of the draft ALN Code. As paragraph 1.73 of the draft ALN Code explains, the principal duties placed on schools, FEIs and local authorities are described in separate chapters according to the circumstances of the child or young person to whom a duty is owed. Although this increases the overall length of the Code, it is intended to assist those bodies in locating and understanding the duties and guidance relevant to them. Other related matters, which are generally more common to all situations are dealt with in their own chapters.

**Question 4. Is the structure of the draft ALN Code and the separation of the chapters appropriate, clear and easy to follow?**

1.12 The Code has been drafted so that it focuses on describing and explaining duties and processes specific to the ALN system. Generally, it does not provide detailed guidance to practitioners on best practice approaches and matters relating to the exercise of professional judgement, and it does not include case studies. Focusing on describing and explaining functions and processes is intended to provide clarity on those matters and promote compliance. Providing more general guidance or best practice/ case studies could risk reducing the Code's clarity, add to its length and lead to it becoming outdated more quickly as practice evolves.

**Question 5. Is the draft ALN Code's focus on describing and explaining the functions and processes appropriate?**

### Pupil referral units (PRUs)

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Pupil Referral Units – delegating local authority responsibility for governing body duties to management committees	Paragraph 15 of Schedule 1 to the Education Act 1996

1.13 Unlike maintained schools, PRUs do not have governing bodies. References in primary legislation to governing bodies in relation to PRUs are read as referring to the local authority.<sup>4</sup> Therefore, in the case of pupils at PRUs, the duties in the 2018 Act placed on governing bodies of schools would be for the local authority to discharge.

1.14 Local authorities have a duty under the Education (Pupil Referral Units) (Management Committees etc) (Wales) Regulations 2014 (the '2014 Regulations'), to establish a management committee for each PRU they maintain and to delegate certain functions to that committee. The Welsh Government proposes to make regulations<sup>5</sup> to requiring a local authority to delegate to the management committee of a PRU it maintains, the functions under the 2018 Act given to governing bodies of PRUs.

<sup>4</sup> Paragraph 1 of schedule 1 to the Education Act 1996.

<sup>5</sup> Under paragraph 15 of Schedule 1 to the Education Act 1996.

1.15 The system established by the 2018 Act is intended to ensure that local authorities are only usually directly responsible for the IDPs of pupils at maintained schools with a need for ALP which is beyond that which it is reasonable to expect a maintained school to deliver. Similarly, decisions on ALN for pupils at maintained schools are generally for the school to make, with local authorities having duties to reconsider them. The Welsh Government proposes that this should also be the case in respect of pupils registered at PRUs.

1.16 Therefore the 2018 Act duties that would be delegated to the management committee of a PRU would include duties to decide, where it is brought to its attention or otherwise appears, if a registered learner has ALN<sup>6</sup>; duties to prepare, maintain, review and cease to maintain plans<sup>7</sup>; duties to take all reasonable steps to secure ALP or help the local authority do so<sup>8</sup>; and a duty to designate an ALNCo<sup>9</sup>.

1.17 Local authorities would then have reconsideration duties in relation to management committees' decisions on ALN and IDPs they maintain, (rather than reconsidering their own decisions and the IDPs they maintain).<sup>10</sup>

1.18 Local authorities would also still retain their functions under the 2018 Act which relate to pupils of maintained schools i.e. the functions they have as local authority, rather than those they would have by virtue of their responsibility for the functions of a governing body of a PRU (see Chapter 9 of the draft ALN Code for more information on this).

1.19 In the light of this intention, paragraphs 1.56 – 1.57 of the draft ALN Code refer to the duties and responsibilities of PRUs in relation to the ALN Code and 2018 Act as being the same as those placed on maintained schools.

**Question 6.** **Do you agree with the proposal to use regulations to delegate functions from a local authority to a Management Committee of a PRU?**

## **Chapter 2 - Principles of the Code**

1.20 Chapter 2 of the draft ALN Code sets out the general principles underpinning the ALN system, which are reflected in the draft ALN Code and the 2018 Act: a rights-based approach; early identification, intervention and effective transition planning; collaboration; inclusive education; and a bilingual system.

**Question 7.** **Are the principles set out in Chapter 2 of the draft ALN Code the right ones?**

<sup>6</sup> Section 11 of the 2018 Act (see Chapter 9 of the draft ALN Code)

<sup>7</sup> Sections 12, 23 and 31 of the 2018 Act (see Chapters 9, 15 and 20 of the draft ALN Code)

<sup>8</sup> Section 47 of the 2018 Act (see Chapter 9 of the draft ALN Code)

<sup>9</sup> Section 60 of the 2018 Act (see Chapter 24 of the draft ALN Code)

<sup>10</sup> See Chapter 17 of the draft ALN Code for information about local authority reconsiderations of decisions by maintained schools about whether a child or young person has ALN, the reconsideration of an IDP maintained by a governing body, and taking over responsibility for an IDP maintained by a governing body.

## **Chapter 3 - Involving and supporting children, their parents and young people**

1.21 Chapter 3 of the draft ALN Code explains the duties on persons exercising functions under Part 2 of the 2018 Act in relation to a child or young person to involve and support the child and their parent or the young person when exercising those functions.

**Question 8.** **Is the explanation of the duties relating to involving and supporting children, their parents and young people provided in Chapter 3 of the draft ALN Code appropriate?**

## **Chapter 4 - Duties on local authorities and NHS bodies to have regard to the UNCRC and the UNCRPD**

1.22 Chapter 4 of the draft ALN Code sets out the duties on local authorities and NHS bodies to have due regard to the United Nations Convention on the Rights of the Child (UNCRC) and United Nations Convention on the Rights of Persons with Disabilities (UNCRDP) when exercising their functions under the 2018 Act. It provides guidance on actions local authorities and NHS bodies might consider taking when discharging these duties.

1.23 The 2018 Act allows the Code to make provision setting out what is required to discharge the duties to have due regard and those duties are to be interpreted in accordance with any such provision in the Code.<sup>11</sup> On this, the draft ALN Code provides that those bodies must have due regard to those Conventions when planning the exercise of functions relating to a child or young person under the 2018 Act and gives examples of such activities. It goes on to explain what is meant by having due regard.

**Question 9.** **Is Chapter 4 of the draft ALN Code clear about what is expected of local authorities and NHS bodies when discharging their duties to have due regard to the UNCRC and UNCRPD?**

## **Chapter 5 - Duty to keep additional learning provision (ALP) under review**

1.24 Chapter 5 of the draft ALN Code sets out the duties on local authorities in relation to keeping ALP under review. It provides advice and guidance on what local authorities should or must consider when carrying out their duties.

1.25 The guidance set out in this chapter is provided in the context of local authorities' wider strategic responsibilities including, for example, under:

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<sup>11</sup> Sections 7(4) and 8(4) of the 2018 Act.

- the Schools Standards and Organisation (Wales) Act 2013, in relation to Welsh in Education Strategic Plans;
- the 2014 Act, in relation to jointly assessing population needs in an area; and
- the Well-being of Future Generations (Wales) Act 2015, in relation to strengthening joint working across all public services.

1.26 The intention of providing the guidance in this context is to minimise unnecessary bureaucracy and bring practices together in a helpful and logical way. This should contribute to effective planning and commissioning of provision to meet the needs of children and young people with ALN.

**Question 10.** **Is the guidance provided in Chapter 5 of the draft ALN Code in relation to the duties to keep ALP under review appropriate?**

## **Chapter 6 - Advice and information**

1.27 Chapter 6 of the draft ALN Code provides guidance on local authorities' duties to make arrangements to provide advice and information about ALN and the ALN system. It includes guidance on the role of external service providers and on the content, accessibility and publication of the advice and information to be made available by local authorities.

**Question 11.** **Is the guidance provided in Chapter 6 of the draft ALN Code in relation to making arrangements to provide advice and information about ALN and the ALN system appropriate?**

## **Chapter 7 - The definition of ALN and ALP, identifying ALN and deciding upon the ALP required**

1.28 Chapter 7 of the draft ALN Code is relevant to all maintained schools, FEIs and local authorities when taking decisions about ALN. It sets out the meaning of ALN and ALP and provides guidance in respect of identifying ALN and the ALP to meet ALN.

1.29 Paragraphs 7.4 – 7.32 of the draft ALN Code explain the definition of ALN.

**Question 12.** **Is this explanation of the definition of ALN provided in paragraphs 7.4 – 7.32 of the draft ALN Code clear?**

1.30 Paragraphs 7.33 – 7.69 of the draft ALN Code describe the evidence on which decisions about ALN and ALP should be based, the sources from which this evidence might be collated, and the way in which it should be considered.

**Question 13.** **Does Chapter 7 of the draft ALN Code provide a clear and comprehensive explanation of the evidence on**

**which decisions about ALN and ALP should be based, the sources from which this evidence might be collated, and the way in which it should be considered?**

## **Chapters 8 to 12 – Duties on schools, FEIs and local authorities**

### Early Years ALN Lead Officer

1.31 Chapter 8 of the draft ALN Code provides guidance on a local authority's duty to designate an officer to have responsibility for co-ordinating the local authority's functions under the 2018 Act in relation to children under compulsory school age who are not attending maintained schools. This officer is known as the Early Years ALN Lead Officer ('the Early Years ALNLO').

1.32 Our objectives are that the role is a strategic one (see paragraph 8.42 of the draft ALN Code) and that Early Years ALNLOs have the appropriate experience and expertise to meet the expectations of the role, which are set out in paragraphs 8.40 – 8.41 of the draft ALN Code.

**Question 14. Is the guidance on the role, experience and expertise of the Early Years ALNLO set out in paragraphs 8.40 - 8.47 of the draft ALN Code appropriate for achieving the objectives (that the role is strategic and such officers have the appropriate experience and expertise to meet the expectations of the role)?**

### Duties on schools, FEIs and local authorities

1.33 Chapters 8 to 12 of the draft ALN Code deal with the duties that apply to schools, FEIs and local authorities in relation to decisions about whether a child or young person has ALN, the preparation and maintaining of IDPs and the securing of ALP. Each chapter deals with a different category of child and/or young person, according to their age and education setting. The chapters have been divided up in this manner in order to enable schools and FEIs to identify quickly the duties that are specific to them or in the case of a local authority, the duties that apply in the circumstances of a particular case. For example, if a school needs to understand its duties in relation to a pupil who may have ALN, Chapter 9 of the draft ALN Code would provide the necessary information about this. Similarly, if a local authority wishes to understand its duties in relation to a young person who is not currently receiving education but who may have ALN, the duties that apply would be found in Chapter 12 of the draft ALN Code.

1.34 Within Chapters 8 to 12 of the draft ALN Code, the duties to decide whether a child or young person has ALN, to prepare an IDP and to maintain an IDP for that person, and, in the case of a young person not at a maintained school or FEI, to decide whether it is necessary to prepare and maintain an IDP, are described in the order in which they would normally apply.

**Question 15. Is the structure and content of Chapters 8 to 12 of the draft ALN Code clear?**

1.35 Chapters 8 to 11 of the draft ALN Code set out timescales within which schools, FEIs and local authorities are required to make a decision on whether a child or young person has ALN and either give notification of a decision that they do not or if the decision is that they have ALN, prepare the IDP and give a copy of it. In Chapter 12 of the draft ALN Code, an equivalent timescale is set, but where the decision is that the young person has ALN, the local authority must also decide whether it is necessary to prepare and maintain an IDP and if it decides that it is not necessary, notify that decision. The proposed timescales for the completion of these actions are:

- in the case of schools, 35 school days<sup>12</sup>;
- in the case of FEIs, 35 FEI term time days (an FEI term time day being a day on which the FEI is due to meet for the purpose of teaching students, provided that day is within a time period in which the FEI delivers the majority of its full-time courses);
- in the case of a local authority duty to reconsider a school's decision under section 26 of the 2018 Act, 7 weeks;
- in all other local authority cases, 12 weeks.

1.36 Timescales for schools and FEIs are described in terms of school or FEI term time days rather than weeks, to reflect the fact that these institutions are closed at weekends and during holiday periods. This is not true in the same way for local authorities, which do not have fixed holiday periods during which they are closed. While local authorities may be closed on public holidays, the 12 week period proposed for them should be sufficient to allow for such instances without the need to provide a specific exception for this.

1.37 Timescales generally (unless otherwise stated) start from the point at which the responsible body's duty in the Act commences. For example, the point at which it is brought to the attention of or otherwise appears to a school, FEI or local authority that a child or young person may have ALN would be the starting point for the timescale set for the completion of the duty to decide whether that is the case. Likewise, the timescale for a local authority's reconsideration under section 26 of the 2018 Act starts from the local authority receiving the request for reconsideration.

1.38 In the case of referrals to a local authority (for example, the referral by a school to a local authority of the case of a child or young person where the school believes that it would not be reasonable for it to secure the ALP called for) consideration was given to making the starting point for the timescale the point at which the first body's duty commences. While this would mean that the IDP, if subsequently required, would have to be put in place more quickly, it would mean that local authorities would have less time to make decisions in what are likely to

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<sup>12</sup> These are days on which at that school there is a school session, or in the case of a PRU, days on which the PRU meets.

be more complex cases. It could also cause difficulties in some cases where the period immediately before the referral involved school or FEI holidays (in effect reducing the local authority's time to address the matter). Therefore the draft Code provides for the timescale to run from the referral. Although this might mean that it takes longer for an IDP to be put in place for learners whose case is not referred at the outset, there is statutory guidance (at paragraphs 9.41 – 9.43 of the draft ALN Code) aimed at ensuring referrals are made promptly so as to minimise the scope for delay. Further, where the local authority makes a decision or prepares an IDP following a referral, the child, their parent or young person, would then have appeal rights in respect of it (whereas in the case of a school decision, there would first have to be a reconsideration by the local authority).

1.39 Finally, where a local authority directs a school to prepare an IDP, the school is bound by the timescale which applied to the local authority (see paragraphs 9.96 – 9.98).

1.40 The 35 day deadline for schools and FEIs takes into account the steps necessary to complete the preparation of an IDP. There are three basic steps:

- A) Notify that a decision needs to be made;
- B) Gather evidence, which will usually include holding a meeting with the child, their parent or the young person and; and
- C) Prepare and issue an IDP or give notice that the child or young person does not have ALN

1.41 In many of these cases, the school/FEI alone will be capable of identifying and meeting the full extent of the child or young person's needs. Where external input would be useful but is not critical, the school/FEI would be expected to seek the input so as to prepare an IDP within the deadline, but if this is not possible, to prepare the IDP by the deadline on the basis of the information that is available. The school/FEI can then review and revise the IDP on the basis of any information that is subsequently received.

1.42 In a small number of cases (such as where needs are particularly complex or low incidence), the 35 day period for a school/FEI decision may not be enough to get all the necessary external input – but these are the cases that are likely to be referred to the local authority.

1.43 Generally, putting together a plan would be more time consuming than deciding that one is not needed. However, if the duty to decide whether a child or young person has ALN is triggered, but it is subsequently decided that they do not have ALN, the considerations are likely to be quite finely balanced and may require quite careful and lengthy deliberation. With that in mind, we consider it appropriate to set the deadline at 35 days for both outcomes. The duty to take the decision promptly would still apply for cases that do not require such lengthy consideration.

1.44 The 7 week timescale for a local authority's duty to reconsider a school's decision under section 26 of the 2018 Act reflects the fact that a decision has already been taken (by the school), so all the information pertinent to the reconsideration would normally have already been gathered and therefore be available.

1.45 The 12 week timescale for local authorities would usually provide them with more time to make decisions and take actions than a school or FEI would have in relation to the same decisions or actions. This extended timescale reflects the fact that these children and young people would necessarily be more likely to have severe or complex needs, the extent and nature of which would require time to determine. In particular, external input from other agencies, or internal input from professionals, such educational psychologists, would either be more likely or essential.

1.46 By comparison, the timescales provided under the SEN system are longer. Local authorities have six weeks after a referral in which to decide whether to carry out a statutory assessment, a further 10 weeks to carry out a statutory assessment and decide whether to issue a statement, two weeks in which to issue a proposed statement or notify that one won't be issued, and finally 8 weeks to finalise a statement. In total, the process can take up to 26 weeks. The proposed timescales for IDPs would mean that generally children and young people would receive statutory plans and the provision set out in them, more quickly than is currently the case and should help ensure that no child or young person with ALN goes for much longer than a whole school term without an IDP being put in place (a school term normally lasting about 13 weeks).

**Question 16. Are the timescales for decisions by schools, FEIs and local authorities on ALN and preparing an IDP as set out in Chapters 8-12 appropriate?**

Deciding whether it is ‘necessary’ for a local authority to prepare and maintain an IDP for a young person not at a maintained school or FEI

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Deciding if an IDP is necessary for a young person not in a maintained school or FEI in Wales	Section 46 of the 2018 Act

1.47 In the case of young people who have ALN but are not at a school or FEI, local authorities are required under section 14(1)(c)(ii) of the 2018 Act to decide in accordance with regulations to be made under section 46 of the 2018 Act whether it is necessary to prepare and maintain an IDP for the young person to meet his or her reasonable needs for education and training.

1.48 The entitlements under the 2018 Act cover learners up to the age of 25. However, the 2018 Act does not give young persons with ALN a right to education up to that age. Rather, it is about providing access to further education or training on an equitable basis to persons who do not have ALN. Therefore not all young persons with ALN should automatically be entitled to an IDP.

1.49 It is intended that the regulations will set out matters that are relevant when a local authority is considering what, if any, reasonable needs for education or training the young person has. The intention is that they focus on identifying whether there is a realistic prospect of the young person achieving a desired objective within a reasonable period of time by undertaking a course of education or training.

1.50 The draft ALN Code also addresses related matters that should be considered, for instance when determining what is a reasonable period within which the young person might be expected to achieve the desired objective by undertaking a course of education or training (see paragraph 12.27 of the draft ALN Code).

1.51 The regulations will also deal with when it is necessary for the local authority to prepare and maintain an IDP for a young person who has a reasonable need for education or training. In cases where a young person could undertake education or training at an FEI or maintained school in Wales and the school or FEI would reasonably be able to meet the young person's needs, then it would not be necessary for the local authority to prepare and maintain one. Rather, the policy intention is that it would be necessary for a local authority to prepare and maintain an IDP only where:

- a young person's reasonable needs for ALP can only be met by a specialist placement or with board and lodging, for example a placement at an independent special post-16 institution
- a young person with high level/ complex ALN could attend an FEI or maintained school in Wales but only with an IDP maintained by a local authority because it would not be reasonable for the FEI to secure all of the ALP; and
- a young person attends (or is to attend) a maintained school or Academy or FEI in England and their ALN are such that the ALP they need would not be fully met by those institutions.

1.52 Paragraphs 12.22 – 12.51 of the draft ALN Code reflect what we intend to provide for in the regulations and cover related matters and process.

**Question 17.** **Are the proposed requirements and guidance in paragraphs 12.22 – 12.51 of the draft ALN Code on when it is necessary for a local authority to maintain an IDP for a young person not at a school or FEI in Wales appropriate?**

## Chapter 13 - Content of an IDP

1.53 Chapter 13 of the draft ALN Code deals with the mandatory content of IDPs, including the mandatory standard form for an IDP (in relation to children who are not looked after and to young people), and provides guidance on that content and the form.

1.54 The ALN Code must include one or more standard forms and impose a requirement to use the appropriate standard form.<sup>13</sup> The reasons for having a standard form are set out in paragraph 13.4 of the draft ALN Code (essentially to improve consistency and make the ALN system more efficient, including when plans are transferred). All IDPs will be required to have the same numbered

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<sup>13</sup> Section 4(6)(c) of the Act.

sections and sub-sections and for these to be in the same order. Beyond that there is flexibility for bodies maintaining IDPs to add their own style (e.g. to add extra sections, logos, use different fonts etc).

1.55 Having a standard form can also assist children, their parents and case friends, and young people understand the system and their rights under it. To this end, the draft ALN Code provides that sections in relation to which there are appeal rights, should be identified in some way to make this clear.

1.56 We consider that having as few standard forms as possible is likely to deliver the most benefits. It means that for some children and young people, some of the sections may not need to be completed, for example, there are sub-sections which just relate to young persons and section 2D is only relevant for local authority maintained IDPs. However, as children go on to become young persons and an IDP maintained by a school may be transferred to a local authority, having one form whether it is for a child or young person or maintained by a school, FEI or local authority, is, in our view, the most efficient approach. However, there is a separate standard form for looked after children, the reasons for which are dealt with below. Although it is a separate form, it is generally aligned to that for other children and young persons (for example, the numbering of sections is the same).

1.57 The mandatory content for IDPs reflects that which is provided for by the 2018 Act - including a description of a person's ALN and the ALP which the person's learning difficulty or disability calls for, and other matters (as indicated in the chapter) in relation to which appeals can be made.

1.58 The proposed mandatory content also includes elements which are required by the ALN Code, in order to provide information relevant to the preparation and maintenance of the IDP, and to promote and facilitate a person centred approach to the development of the IDP. The mandatory elements required by the ALN Code, that are additional to those elements required by the Act (see Annex A and Chapter 13 of the draft ALN Code for the details of what is to go in each section) are:

- Section IA: Basic biographical information about the child or young person and contact details
- Section 1B: Responsibility for the IDP
- Section 1C: One-page profile
- Section 2B.2) details of any disapplications or modifications of the National Curriculum
- Section 3A: Record of information used to develop the IDP
- Section 3B: Timeline of key events
- Section 3C: Transition

1.59 The form included at Annex A of the draft ALN Code reflects the mandatory headings and content set out in Chapter 13. Detailed guidance on its completion is included in Chapter 13 of the draft ALN Code. Paragraph 13.7 of the draft ALN Code notes that form's style and the presentation of the information inserted into the sections and sub-sections, may be adapted to suit local preferences or those of the child or young. Paragraph 13.8 of the draft ALN Code notes that the body preparing or revising an IDP may include further sections should it consider it appropriate to do so.

<b>Question 18</b>	<b>Are the elements of the mandatory content of an IDP which are required by the ALN Code, appropriate?</b>
<b>Question 19.</b>	<b>Is the proposed mandatory standard form for an IDP (included at Annex A of the draft ALN Code) appropriate?</b>
<b>Question 20.</b>	<b>Is the guidance in Chapter 13 of the draft ALN Code clear?</b>

## Transport

1.60 Paragraphs 13.74 – 13.76 of the draft ALN Code deal with transport matters related to the preparation of an IDP.

1.61 The functions relating to transport provision for learners are set out in the Learner Travel (Wales) Measure 2008 ('the Measure'). Section 15(1) of the Measure provides that in exercising their functions under the Measure, local authorities, schools and FEIs must have regard to guidance given by the Welsh Ministers – this is currently set out in the *Learner Travel Statutory Provision and Operational Guidance 2014* ('the Guidance').

1.62 The Cabinet Secretary for Education has committed the Welsh Government to revise the Guidance in light of the 2018 Act and this work is underway as part of a wider refresh of the Guidance, which will be consulted on formally in due course. The revised guidance will be published in advance of implementation of the 2018 Act.

1.63 We are proposing to set out in the Guidance the matters that a local authority must have regard to when deciding to use its discretionary power to provide transport to learners as follows.

1.64 Section 6 of the Measure gives local authorities the power to make travel arrangements to facilitate the attendance of any learner (including those who are ordinarily resident in the local authority's area) at a place where that person receives education or training.

1.65 A local authority may use this power to provide free or assisted travel, if it thinks the provision is appropriate to facilitate the transport of a learner to a place in which that learner receives education or training.

1.66 Section 2 of the Measure requires local authorities to assess the learner travel needs in their area every year (for learners up to the age of 19, and those who are over 19 but began a course of education or training before attaining that age and continue to attend that course). In doing so, local authorities must have regard in particular to the matters listed below.

- (a) the needs of learners who are disabled persons,
- (b) the needs of learners with learning difficulties,

- (c) the needs of learners who are children looked after, or formerly looked after, by a local authority,
- (d) the age of learners, and
- (e) the nature of the routes which learners could reasonably be expected to take to the relevant places where they receive education or training.

1.67 We intend to expressly reference these matters in the Guidance as factors a local authority may also wish to consider when determining whether to exercise their power to make travel arrangements under section 6 for any learners who are ordinarily resident in their area.

1.68 We would also like to amend the Guidance to expressly include learners not of compulsory school age who are disabled persons or who have learning difficulties in the list of examples of when discretionary transport provision might be made.

**Question 21. Is the guidance on transport in paragraphs 13.74 - 13.76 of the draft ALN Code appropriate?**

## **Chapter 14 – Content of an IDP for a looked after child**

1.69 For information and the consultation question about Chapter 14 of the draft ALN Code, please see Part 4 of the consultation document on looked after children.

## **Chapter 15 – Duties on health bodies and other relevant persons**

1.70 Chapter 15 of the draft ALN Code sets out the duties imposed on health bodies and other relevant persons under the 2018 Act. It also gives guidance on the role of the designated education clinical lead officer (DECLO) in local health boards and how health bodies can support the identification and treatment of children and young people with ALN.

### Statutory requests by local authorities to relevant persons for information or other help

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Timescales for compliance with duty to provide information or other help	Section 65(5) of the 2018 Act

1.71 Paragraphs 15.6 – 15.15 of the draft ALN Code deal with the duty on relevant persons to comply with requests for information or other help.

1.72 There is a power to prescribe in regulations a period within which a relevant person must comply with such a request for information or other help. The

regulations may also include exceptions to the requirement to comply within that period.

1.73 It is proposed to exercise this power to require a relevant person to comply with a request promptly and in any event within the period of 6 weeks from the person receiving the request (that period beginning on the day after the request is received – see paragraph 1.6 of the consultation document, above). We consider that a 6 week period should generally give sufficient time for more complex requests to be dealt with and is appropriate in the context of the timescales proposed for decisions on whether a person has ALN, and preparing and reviewing an IDP (see paragraphs 1.3 to 1.10 of the consultation document, above). It also reflects existing arrangements under the SEN system for a health authority to provide medical advice to a local authority for the purpose of making an assessment.<sup>14</sup> However, placing the duty on all relevant persons rather than only health bodies to provide advice to a local authority reflects the need for multi-agency partnership when supporting children and young people with ALN. As some requests may be capable of being dealt with really quickly, we consider it appropriate that there is the requirement to comply with the request promptly so that relevant persons do not unnecessarily delay compliance until the end of the 6 weeks.

1.74 It is also proposed to provide for the following exceptions to the duty to comply within that 6 week period:

- if the request does not relate to the exercise of a function in relation to a particular child or young person. This is because requests for information or other help might not relate to a particular individual and if not, might not be as urgent. Paragraph 15.13 of the draft ALN Code contains examples of possible requests;
- if it is impractical for the relevant person to comply with the request within that period due to circumstances beyond its control (see paragraphs 1.7 to 1.10 of the consultation document, above, about this exception).

1.75 In both those situations, there would still be a requirement to comply promptly with the request.

1.76 The guidance given in paragraph 15.14 of the draft ALN Code is aimed at helping relevant persons comply with their duties in relation to such requests.

**Question 22. Is the proposed timescale and exceptions for relevant persons to comply with a local authority request for information or other help (under section 65 of the 2018 Act) appropriate?**

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<sup>14</sup> Regulation 12(8) of the Education (Special Educational Needs) (Wales) Regulations 2002.

## ALP to be secured by NHS bodies

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Timescales for NHS bodies' to respond to referral as to whether there is a relevant treatment or service likely to be of benefit in addressing the ALN of a child or young person	Section 21(10) of the 2018 Act

1.77 Chapter 15 of the draft ALN Code also deals with referrals to NHS bodies about whether there is a relevant treatment or service likely to be of benefit in addressing a child or young person's ALN. The Welsh Ministers must, in regulations, set a period within which the NHS body must inform the referring body or the body that maintains an IDP for the child or young person of the outcome of its consideration. The Welsh Ministers can also provide for exceptions in the regulations.

1.78 We propose to require an NHS body to comply with this duty promptly, and in any event within the period of six weeks from receiving the request.

1.79 We have included 'promptly' to ensure there are no undue delays in the reply, and so that the six week timescale is not used as a target date in which to send the response, if it can be sent sooner. The timescales of 6 weeks is equivalent to the existing deadline currently set for health authorities to respond to a request for medical advice from a local authority for the purpose of making an assessment under the SEN system.<sup>15</sup> The requirement is also the same as that proposed for compliance with local authority requests to relevant persons for information or other help (see paragraphs 1.71 to 1.76 of the consultation document, above).

1.80 We also propose to provide for an exception where it is impractical for the NHS body to comply within the 6 week period due to circumstances beyond its control (see paragraph 1.74).

1.81 Although 6 weeks may be challenging in some cases, we consider that the proposed 6 week period together with the proposed exception is also appropriate in the context of the other timescales proposed for making decisions on ALN and preparing and reviewing an IDP (see paragraphs 1.7 to 1.10 of the consultation document, above).

**Question 23.** **Is the proposed period and exception within which an NHS body must inform others of the outcome of a referral to it (under section 20 of the 2018 Act) to identify whether there is a relevant treatment or service, appropriate?**

<sup>15</sup> Regulation 12(8) of the Education (Special Educational Needs) (Wales) Regulations 2002.

## The Designated Education Clinical Lead Officer (“DECLO”)

1.82 Paragraphs 15.37 – 15.53 of the draft ALN Code are relevant to Local Health Boards and give guidance on the role of the designated education clinical lead officer (“DECLO”).

1.83 Our objectives are that the role is a strategic one and that DECLOs have an appropriate degree of relevant experience and expertise in order to be able to co-ordinate the health board’s functions in relation to children and young people with ALN.

**Question 24.** **Is the guidance on the role, experience and expertise of the DECLO set out in paragraphs 15.37 – 15.53 of the draft ALN Code appropriate for achieving the objectives (that the role is strategic and such officers have appropriate experience and expertise)?**

## **Chapter 16 - Review and revision of IDPs**

1.84 Chapter 16 of the draft ALN Code deals with the review and revision of IDPs, including when an IDP must and should be reviewed.

**Question 25.** **Is the content and structure of Chapter 16 of the draft ALN Code clear?**

1.85 A school, FEI or local authority required to maintain an IDP for a child or young person must review the IDP if a request to do so is made by the child, the child’s parent or the young person, unless it considers a review to be unnecessary. Paragraphs 16.18 – 16.19 of the draft ALN Code require such reviews to be completed promptly and in any event within a fixed timescale, subject to the exception. The 35 day timescale in the case of schools and FEIs mirrors the timescale for these bodies in relation to the initial preparation of an IDP and reflects the fact that the conduct of a review will often require the same steps (e.g. notifications, arranging and holding a meeting, revision of the IDP etc.) and could potentially involve a similar amount of work as the IDP’s initial preparation. The 7 week timescale set in the case of local authorities is shorter than the 12 week timescale set in relation to a local authority’s initial preparation of an IDP because although the children and young people in question are still likely to be those with severe and/or complex needs, there would be less need for specialist advice in relation to a review when compared to the initial preparation of an IDP.

1.86 The draft ALN Code also imposes a requirement to conduct a review following a request for a review by an NHS body within the same time periods (i.e. promptly, but in any event within 35 school or term-time days for a school or FEI maintained IDP and 7 weeks for a local authority one, subject to the exception) – see paragraph 16.25 of the draft ALN Code.

1.87 We consider that it is appropriate to impose deadlines for completing reviews triggered by a child, their parent or young person or an NHS body with a

view to ensuring that such reviews are conducted in a timely manner, and therefore, in the case of a request by a child, their parent or young person, the right to review is effective.

<b>Question 26.</b>	<b>Is the proposed period and exception for completing reviews in response to a request from a child, their parent, a young person or an NHS body (set out in paragraph 16.18 of the draft ALN Code) appropriate?</b>
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## **Chapter 17 – Local authority reconsiderations and taking over responsibility for an IDP**

1.88 Chapter 17 of the draft ALN Code deals with a local authority's duties in relation to the reconsideration of a school's decision about whether a pupil has ALN, the reconsideration of an IDP maintained by a school for a pupil, and taking over responsibility for an IDP maintained by a school or FEI for a pupil or student.

<b>Question 27.</b>	<b>Is the content and structure of Chapter 17 of the draft ALN Code clear?</b>
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1.89 Where a school maintains an IDP for a pupil, the child, child's parent or young person may request that the local authority responsible for the child or young person, or in the case of a child or young person who is in the area of a local authority in England, the local authority in Wales that maintains the school, reconsiders the IDP, with a view to it being revised. Paragraph 17.20 of the draft ALN Code sets a 7 week timescale within which such reconsiderations are required to be completed.

1.90 This seems to be the minimum period of time that can reasonably be set as a deadline for reconsideration which results in a revised IDP, taking into account the fact that the local authority will need to obtain the necessary evidence information and representations from the school review that evidence, possibly meet with the child, their parent or the young person, reach a conclusion regarding the plan, and potentially prepare and issue a revised plan. It is similar to the timescale that schools have for preparing an IDP. It is less than the 12 week period in respect of a local authority preparing an IDP, but that longer period would not be appropriate given that these cases are generally likely to involve lower level or less complex needs and given that the local authority's role is one of reconsideration.

1.91 It is also the same period as for a local authority reconsideration of a school decision as to whether a pupil has ALN (see paragraph 1.44 of the consultation document, above).

<b>Question 28.</b>	<b>Is the proposed period and exception for a local authority reconsidering a school IDP (set out in paragraph 17.20 of the draft ALN Code) appropriate?</b>
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## **Chapter 18 - Meetings about ALN and IDPs**

1.92 Chapter 18 of the draft ALN Code sets out guidance and good practice principles for meetings about ALN and IDPs. There are general principles that should be followed for all meetings and some processes that relate specifically to IDP review meetings or meetings to decide whether a child or young person has ALN or not.

**Question 29.** **Are the principles and the guidance provided in Chapter 18 of the draft ALN Code on meetings about ALN and IDPs appropriate?**

## **Chapter 19 – Planning for and supporting transition**

1.93 Chapter 19 of the draft ALN Code sets out the arrangements that should be put in place to ensure effective transitions for children and young people with ALN between various phases of education, settings or services, including the use of IDP reviews to plan arrangements to support a smooth transition.

**Question 30.** **Is the guidance in Chapter 19 of the draft ALN Code on supporting children and young people to make effective transitions appropriate?**

## **Chapter 20 - Transferring an IDP**

1.94 Chapter 20 of the draft ALN Code deals with the transfer of IDPs from one maintained school, FEI or local authority to another of those bodies, including the role of Welsh Ministers in determining whether IDPs should be transferred from a local authority to an FEI.

**Question 31.** **Is the content and structure of Chapter 20 of the draft ALN Code clear?**

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Transfers of IDPs	Section 36(3) of the 2018 Act Section 37 of the 2018 Act

1.95 Regulations to be made under sections 36(3) and 37 of the 2018 Act will set out the processes in connection with requests to transfer an IDP from a local authority to an FEI, referrals to the Welsh Ministers about the same matter, and determinations in these cases by the Welsh Ministers. Paragraphs 20.12 to 20.17 of the draft ALN Code describe the requirements that are intended to be included in the regulations, including the period from the making of a request to a local authority being able to refer the matter to the Welsh Ministers. The period proposed for this is 20 term time days. The intention is to strike a balance between giving the FEI long enough to consider the matter properly and resolve any issues with the local authority, whilst also ensuring that the matter is dealt with promptly and without undue delay or uncertainty.

1.96 It is also proposed to provide a deadline for the local authority to refer the matter to the Welsh Ministers, where an FEI has not agreed to the request to take

over responsibility for the IDP. We consider that this is preferable to the alternative of no such deadline because if a referral is to be made to the Welsh Ministers, we think it should relate to a recent request to an FEI not one which may have been made some time ago and where the circumstances of the case may have changed considerably. It is also the intention that regulations to be made under section 37 make further provision in relation to the transfers of duties set out in section 35 of the 2018 Act (and described in paragraphs 20.6 – 20.11 of the draft ALN Code). These requirements are described in paragraphs 20.18 to 20.21 of the draft ALN Code.

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| <b>Question 32.</b> | <b>Are the requirements that are intended to be included in regulations in relation to requests to transfer an IDP to an FEI (as described in paragraphs 20.12 - 20.17 of the draft ALN Code) appropriate?</b> |
| <b>Question 33.</b> | <b>Are the arrangements that are intended to be included in regulations in relation to all other transfers (as described in paragraphs 20.18– 20.21 of the draft ALN Code) appropriate?</b>                    |

## **Chapter 21 - Ceasing to maintain an IDP**

1.97 Chapter 21 of the draft ALN Code describes the various circumstances in which duties to maintain an IDP cease and the steps to be taken before and after it is decided that a child or young person no longer has ALN.

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| <b>Question 34.</b> | <b>Is the content and structure of Chapter 21 of the draft ALN Code clear?</b> |
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<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Deciding if it is no longer necessary to maintain an IDP for a young person not in a maintained school or FEI in Wales	Section 46 of the 2018 Act

1.98 Paragraphs 21.10 - 21.17 of the draft ALN Code set out the steps to be taken before and after it is decided that it is no longer necessary to maintain an IDP for a young person and how that decision is to be reached. This reflects what we intend to provide for in the regulations to be made under section 46 of the 2018 Act.

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Period for making request to local authority for reconsideration of a decision to cease to maintain an IDP	Section 32(1)(b) of the 2018 Act

1.99 It is proposed to provide for a 4 week period (see paragraph 21.18 of the draft ALN Code) within which a child, their parent or a young person may request that a local authority reconsiders a school's decision to cease to maintain an IDP for a registered pupil. This would be 4 weeks from the school giving the notification

of its decision that the pupil no longer has ALN (with the 4 week period starting on the day after the day on which the notification is given). This period of time is proposed on the basis that it provides a reasonable period of time in which to make a request for a reconsideration, taking into account the fact that the child, their parent or the young person will have already been involved in the review which informed the decision to cease to maintain the IDP. We would not wish to unduly delay a decision to cease to maintain an IDP where one is no longer required.

**Question 35. Is the period of time for making a reconsideration request (described at paragraph 21.18 of the draft ALN Code), appropriate?**

## **Chapter 22 - Children and young people subject to detention orders**

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Children and young people subject to detention orders:  (a) Deciding whether it will be necessary to maintain an IDP for a detained child or young person  (b) Functions that apply where a child or young person is subject to a detention order and detained in hospital under Part 3 of the Mental Health Act 1983	(a) Section 46 of the 2018 Act  (b) Section 45 of the 2018 Act

1.100 Chapter 22 of the draft ALN Code deals with the position for children and young people who are subject to a detention order, in particular those detained in relevant youth accommodation and those subject to a detention order and detained in a hospital under Part 3 of the Mental Health Act 1983. It deals with the child or young person's right to a decision on ALN, to ALP, their rights to appeal, and explains what happens to an IDP whilst they are detained.

**Question 36. Is the content and structure of Chapter 22 of the draft ALN Code clear?**

1.101 Where a detained person does not have an IDP and their home authority (if in Wales) decides that the person has ALN, section 40(2)(b) of the Act requires the home authority to decide in accordance with regulations under section 46 of the Act whether it will be necessary for an IDP to be maintained for the detained person when he or she is released from detention to meet their reasonable needs for education or training.

1.102 Paragraphs 22.15 – 22.17 of the draft ALN Code reflect what we intend to provide for in these regulations. Essentially this will mean that a local authority will need to prepare an IDP for a detained child or young person to be maintained upon their release unless one of the exceptions in 22.15 (a) and (b) applies (that it is likely the person will have attained the age of 25 before release; if the detained

person is a young person, it is unlikely that he or she will have reasonable needs for education or training when released).

1.103 Under the Act, an IDP is always necessary for a child with ALN (who is in the area of a local authority in Wales). An IDP is necessary for a young person (in the area of a local authority in Wales) if that person is at a maintained school in Wales, enrolled as a student at an FEI in Wales or otherwise, has reasonable needs for education or training (which falls to be determined in accordance with regulations – see chapter 12 of the draft Code and the associated questions in this consultation document) and, in all those cases, provided that the young person consents to having one. The proposals for the regulations on when it will be necessary for an IDP to be maintained for a detained person on release reflect this.

1.104 Where the detained person is a child, the proposals assume that the person will have reasonable needs for education or training upon release provided they are not likely to have attained the age of 25.<sup>16</sup> This is because it would not be appropriate to consider whether they would have reasonable needs for education or training prior to them becoming a young person because the circumstances affecting that question may be different once they are a young person (for example, a detained child may not desire to undertake post-16 education or training, but when they become a young person, this may change).

**Question 37.** **Are the proposals for the regulations in relation to deciding whether it will be necessary to maintain an IDP for a detained child or young person upon their release, appropriate?**

1.105 Section 45 of the 2018 Act gives the Welsh Ministers a regulation power to apply (with or without modification) powers or duties under the 2018 Act to children or young people who are subject to a detention order and are detained in hospital under Part 3 of the Mental Health Act 1983 where those powers and duties do not otherwise apply. It is proposed that the regulations will provide for the position to be as set out in paragraphs 22.45 – 22.73 of the draft ALN Code. Essentially, this is to provide for local authorities to have duties to decide upon whether a person without an IDP has ALN and if so to prepare and maintain an IDP for the child or young person (in the case of young people, provided that they have reasonable needs for education or training and consent) whilst they are detained in the hospital. If the person had an IDP being kept or maintained prior to the detention in hospital, the local authority would have a duty to maintain it (though in the case of a young person, it should consider in a review whether it is necessary to continue to maintain it). The local authority responsible for the duties depends upon the situation.

**Question 38.** **Are the proposals for the regulations in relation to children or young people who are subject to a detention order and detained in hospital under Part 3 of the Mental Health Act 1983 (as described in paragraphs 22.45 – 22.73 of the draft ALN Code) appropriate?**

<sup>16</sup> Under the Act, a person aged 25 or over does not have rights to decisions on whether they have ALN, nor the right to an IDP, except that the duty to prepare and maintain an IDP for a person when they reach the age of 25 continues until the end of the academic year they are in (section 34 of the Act).

1.106 Chapter 22 also sets timescales within which a home local authority or a relevant local authority must make decisions about ALN and the need for an IDP, prepare any IDP and give notification of those decisions or a copy of an IDP for a child or young person subject to a detention order. The proposed requirements are that these things must be done “promptly”.

1.107 Unlike other proposed timescale requirements to be imposed by the draft ALN Code in relation to similar duties in the Act, we do not propose to require that these things be done in any event within a fixed period (such as 12 weeks), subject to the exception (about compliance being impractical due to circumstances beyond the authority’s control).<sup>17</sup>

1.108 This is because, in the case of the detention situations dealt with in chapter 22, there will frequently be additional complications affecting how quickly a local authority can perform its duties. For example, access to the child or young person is generally likely to be more difficult because the person is in secure accommodation and which might be located some way away from the authority. There may also be other important matters concerning the child or young person to be dealt with at that time, such as a detained person responding to a criminal charge against them or the person receiving treatment for their mental health. It is therefore more difficult to determine a fixed period within which it would usually be possible and reasonable for a local authority in most cases to complete the exercise of these functions.

1.109 In developing this proposal, consideration was given to providing for a fixed period, such as 12 weeks (which is the period for local authorities to perform similar duties in other situations) as the exception would be available in cases where compliance within the fixed period were impractical due to circumstances beyond an authority’s control. However, there could be cases where the exception would not apply but it nevertheless might not be appropriate for an authority to comply with its duties within that fixed period. For example, if a criminal charge were expected to be determined shortly, although the home authority could take a decision on whether an IDP were necessary or prepare an IDP before then, it might be in a better position to do so knowing the outcome of the criminal proceedings. Similarly, in the case of a young person detained in hospital under Part 3 of the Mental Health Act 1983, if there is a prospect of more certainty as to the length of a young person’s detention or the outcome of a treatment shortly, it might be better to take a decision on whether an IDP is necessary or to prepare any IDP when these things are known.

1.110 Consideration was also given to having a longer fixed period for compliance and/or an additional exception. However, there is no obvious longer fixed period, given the potentially wide range of circumstances which could occur and any exception could risk not capturing the right cases. We consider it more appropriate and straightforward for the requirement simply to be for the local authority to act “promptly” in all the cases covered by Chapter 22. This would still require the local authority to proceed quickly with the matter, whilst giving flexibility for cases where complying within a fixed period, subject to the exception, might not be appropriate.

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<sup>17</sup> Paragraphs 1.3 – 1.10 above explain the general approach taken towards setting timescales in the draft Code for compliance with duties.

In the case of detained persons, the need to proceed quickly is explained in paragraph 22.36 of the draft Code.

<b>Question 39.</b>	<b>Are the timescale requirements to act “promptly” in relation to decisions about ALN and preparing IDPs for children and young people subject to detention orders (as set out in Chapter 22) appropriate, rather than also having a requirement to comply within a fixed period subject to an exception or exceptions?</b>
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## **Chapter 23 - Children and young people in specific circumstances**

1.111 Chapter 23 of the draft ALN Code deals with children and young people in particular circumstances namely:

- children and young people who are in the area of a local authority in England and registered as pupils at a maintained school in Wales or enrolled as students at an FEI in Wales;
- children receiving EOTAS other than at a PRU;
- children who attend a PRU;
- children and young people in EOTAS because of healthcare needs;
- children receiving education other than in a maintained school in Wales or EOTAS; and
- children of Service personnel.

<b>Question 40.</b>	<b>Is the guidance in Chapter 23 of the draft ALN Code on children and young people in specific circumstances appropriate?</b>
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## **Chapter 24 - Role of the Additional Learning Needs Co-ordinator (ALNCo)**

1.112 Chapter 24 of the draft ALN Code sets out key information for interested parties about the role of the ALNCo. This includes general responsibilities and expectations of ALNCos and considerations, where appropriate, about whether an individual has the requisite experience to carry out the role. The chapter also makes reference to legal requirements to be an ALNCo.

1.113 The full set of requirements in respect of qualifications and experience one must hold to be an ALNCo, and the functions required in undertaken the role, are set out in the draft Additional Learning Needs Co-ordinators (Wales) Regulations 2018 (“*the draft ALNCos regulations*”).

1.114 As the information provided in this chapter partly replicates the provisions included in the draft ALNCos regulations, the rationale for these provisions and related consultation questions are set out in Part 3 of this consultation document along with the draft ALNCo regulations. It is recommended, therefore, that

respondents refer to Part 3 of the consultation document when considering this chapter.

**Question 41. Is the information set out in Chapter 24 of the draft ALN Code about the role and responsibilities of the ALNCo appropriate?**

## **Chapter 25 - Avoiding and resolving disagreements**

1.115 Chapter 25 of the draft ALN Code sets out guidance and requirements relating to the duties on local authorities to make arrangements to avoid and resolve disagreements and for the provision of independent advocacy services.

1.116 It makes a number of mandatory requirements in relation to the arrangements for avoiding and resolving disagreements which must cover the way that schools, FEIs and local authorities undertake their duties under the 2018 Act and the way that ALP is made and delivered, including if it is felt that the ALP is not being delivered in a suitable manner or to a suitable quality.

**Question 42. Are the requirements imposed in Chapter 25 of the draft ALN Code on local authorities in respect of arrangements to avoid and resolve disagreements appropriate?**

1.117 Chapter 25 of the draft ALN Code sets out a number of mandatory requirements, imposed by the Code, in relation to a local authority's duties to provide independent advocacy services. In developing this section of the draft ALN Code, consideration has been given to the proposed new Independent Professional Advocacy National Standards and Outcomes Framework for Children and Young People.

**Question 43. Are the requirements imposed in Chapter 25 of the draft ALN Code on local authorities in respect of the provision of independent advocacy services appropriate?**

## **Chapter 26 - Appeals and applications to the Tribunal**

1.118 Chapter 26 of the draft ALN Code provides key information about appeals made to the Education Tribunal for Wales ('the Tribunal'), including:

- matters about which appeals can be made;
- decisions that can be taken by the Tribunal;
- timescales relating to the appeals process and compliance with orders;
- the Tribunal's powers in relation to NHS bodies; and
- reviews of and appeals against decisions of the Tribunal.

1.119 The full set of procedures to be followed in proceedings before the Tribunal are set out in the draft Education Tribunal for Wales Regulations ('the draft

regulations'), which will be made under the 2018 Act. This includes the initiation of an appeal and the proceedings that follow. In addition, the Tribunal provides on its website advice and guidance on the appeals process and the procedures to be followed – this advice and guidance will be updated to reflect the ALN system and expanded remit of the Tribunal in due course.

1.120 The intention of this chapter, therefore, is to provide what is considered to be the key information that local authorities, FEIs and NHS bodies will wish to be aware of regarding appeals. In particular, this chapter sets out the relevant timescales that local authorities should be aware of. The purpose of including such information in the ALN Code is to make the information accessible to local authorities, FEIs and NHS bodies in one document.

1.121 This chapter describes the provisions included in the draft regulations on the Education Tribunal for Wales. The rationale for these provisions (including timescales) and related consultation questions are set out in Part 2 of this consultation document on the draft regulations. It is recommended, therefore, that respondents refer to this Part 2 of the consultation document when considering this chapter.

**Question 44.** **Is the information about appeals and the appeals process set out in Chapter 26 of the draft ALN Code appropriate?**

## **Chapter 27 - Case friends for children who lack capacity**

1.122 Chapter 27 of the draft ALN Code explains how a child who lacks capacity as defined in the 2018 Act can use a case friend to act on their behalf when exercising certain rights. It also provides information on the role of a case friend, and how they are appointed and removed by the Tribunal.

1.123 This chapter describes the provisions included in the draft regulations about case friends. The rationale for these provisions and related consultation questions are set out in Part 2 of this consultation document on the draft regulations. It is recommended, therefore, that respondents refer to this Part 2 of the consultation document when considering this chapter.

**Question 45.** **Is the information about case friends, including the duties on the Tribunal to appoint and remove case friends, clearly explained in the Chapter 27 of the draft ALN Code?**

## **Any other comments**

**Question 46.** **Please provide any other comments that you would like to make on the draft ALN Code. Where your comments relate to a specific chapter or paragraph within the draft ALN Code, please indicate this in your response.**



## **Part 2 of the consultation: Draft Education Tribunal for Wales regulations**

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Education Tribunal for Wales procedures and constitution	Section 74(1), 75(1), 75(2), 75(4), 76(3), 77, 91(6) and 92(2) of the 2018 Act
Case friends for children who lack capacity	Section 85(8) of the 2018 Act

### **Introduction**

2.1 The 2018 Act renames the Special Educational Needs Tribunal for Wales ('SENTW') the Education Tribunal for Wales ('the Education Tribunal'). The Education Tribunal's remit is also extended to hear ALN appeals against governing bodies of further education institutions (FEIs) as well as against local authorities. It can:

- make orders to local authorities and FEIs in relation to ALN appeals;
- make recommendations to NHS bodies in relation to ALN appeals; and
- appoint 'case friends' for children who lack capacity.

2.2 The remit of the Education Tribunal also includes hearing claims relating to disability discrimination against schools, under the Equality Act 2010<sup>18</sup>.

2.3 The 2018 Act<sup>19</sup> enables the Welsh Ministers to make regulations about:

- the provision of and procedure for appeals to the Education Tribunal under part 2 of the 2018 Act;
- the timescale for making a report to the Education Tribunal in response to recommendations to NHS bodies in relation to their functions under the Act;
- compliance with orders made by the Education Tribunal;
- parents and young people who lack capacity;
- case friends for children who lack capacity; and
- the constitution of the Education Tribunal.

2.4 The draft Education Tribunal for Wales Regulations 2019 ('the draft Tribunal regulations'), which are published for consultation, deal with the matters listed above, with the exception of parents and young people who lack capacity (see 'Proposed regulations' section of this consultation document introduction for an explanation).

2.5 The Special Education Needs Tribunal for Wales Regulations 2012 ('the 2012 regulations') currently set out the process and procedures to be followed in SENTW proceedings. The 2012 regulations will be replaced with regulations relating to the Education Tribunal in due course.

<sup>18</sup> Powers conferred under section 207(4) and Schedule 17, paragraphs 6A, 6(1), (2), (3), (4), (5) and (7) of the Equality Act 2010. This retains the current system whereby SENTW hears disability discrimination claims in respect of schools.

<sup>19</sup> Powers conferred under sections 70 (4), 74, 75, 76(3), 77, 83(2), 85(8), 91(6), 92(2) of the Act.

2.6 Information and advice about appeals processes and procedures, including about children who lack capacity and applications for case friends, is provided in the draft ALN Code (see Chapters 26 and 27 of the draft ALN Code). Respondents to this consultation may wish to consider the content of those Code chapters to provide context when responding to the consultation questions on these draft Tribunal regulations.

## What we are proposing

2.7 Two of the main objectives of the 2018 Act are to create a system that leads to early, timely and effective interventions for children and young people with ALN, and which provides for fair and transparent processes for the resolution of concerns and appeals.

2.8 The draft Education Tribunal regulations aim to:

- provide clear and effective processes and procedures relating to appeals and claims, which avoid unnecessarily delays in resolution; and
- provide for a tribunal that is able to deal with cases proportionately, fairly and justly, and make well-informed decisions.

2.9 This part of the consultation document seeks views on draft Education Tribunal regulations.

**Question 47.** **Overall, do the draft Education Tribunal regulations provide clear processes and procedures relating to appeals and claims to the Education Tribunal?**

**Question 48.** **Overall, will the processes and procedures outlined in the draft Education Tribunal regulations enable the Education Tribunal to deal with cases fairly and justly?**

### Raising awareness of local authority disagreement resolution arrangements (see draft regulation 8)

2.10 Where a disagreement arises, local authority disagreement resolution arrangements should lead to quicker resolution of concerns than having to go through the full tribunal process, save significant time and money, and minimise disruption to the child's or young person's learning. As such, the draft Education Tribunal regulations (draft regulation 8) requires the President or tribunal panel, where appropriate, to bring to the attention of the parties the availability of alternative procedures for the resolution of disagreements. This strengthens the equivalent provision set out in the 2012 regulations<sup>20</sup>, which provides the President or tribunal panel with a power (rather than a duty) to bring to the attention of the parties any alternative procedure for the resolution of disagreements.

### Case statement process (see regulations 12-15 and 19-21 of the draft Education Tribunal regulations)

<sup>20</sup> Regulation 8(1) of the 2012 regulations

2.11 The case statement consists of document(s) submitted to the Education Tribunal following the commencement of an appeal or claim. A case statement sets out the matters contained in draft regulation 20 (in respect of the appellant or claimant) and 21 in respect of the respondent. The “respondent” is the term used in the regulations for a defendant to an appeal or a claim.

2.12 The time periods for submitting case statements are provided for in draft regulation 19.

2.13 Under the current SEN system an appeal must be received by SENTW no later than the first working day after the expiry of 2 months beginning with the date when written notice of the local authority's decision was given (regulation 12 of the 2012 regulations refers). The appellant's case statement must be received by SENTW within 30 days from the date on which the appeal is filed (regulation 19 of the 2012 regulations refers). The same case statement period also applies to the respondent local authority at the same time, meaning that the respondent does not see the appellant's case statement until after they have provided their own case statement and evidence (the case statement period also applies in relations to disability discrimination claims).

2.14 The Welsh Government considers that it would be logical for the case statement process to be sequential and therefore differ from the current SENTW process. The process prescribed by the draft Education Tribunal regulations provides for the respondent (i.e. local authorities or FEIs in the case of ALN appeals; or schools in respect of disability discrimination claims) to see and therefore respond to the appellant's or claimant's case statement when they submit their own case statement. The draft Education Tribunal regulations (draft regulations 19(4) and (5) therefore stipulate that the respondent must submit their case statement within 4 weeks of being served a copy of the appellant's or claimant's case statement by the Education Tribunal.

2.15 This would give respondents the opportunity to consider, understand and respond to the case made against them and enable them to prepare a focussed response to the appellant's or claimant's case statement. This will allow all parties and the Tribunal to clearly identify the areas in dispute (or indeed areas of agreement). It may also provide an opportunity for the respondents to consider alternative dispute resolution or settlement, which may prevent the need for tribunal proceedings continuing to a final hearing. This sequential approach is broadly in line with litigation in other courts.

2.16 The Welsh Government is proposing that the process would be as follows (see regulations 12-15 to 19-21 of the draft Education Tribunal regulations):

- If a child, their parent or young person wishes to make an appeal against a local authority or FEI under the 2018 Act, the appeal must be submitted to the Education Tribunal within 8 weeks of that decision being made (draft regulation 12(1)<sup>21</sup>). The appellant must also provide

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<sup>21</sup> In relation to disability discrimination claims, the period in which a claim would be required to be received by the Education Tribunal would continue to be the same as it currently is for the SENTW; that is, no later than the first working day after the end of the period stated in paragraph 4(1) of Schedule 17 to the 2010 Act. Under regulation 19(2) of the draft Education Tribunal regulations, a claimant must provide their case statement within 8 weeks of making the initial claim.

their full case statement within this 8 week period (draft regulation 19(1)). It would be up to the appellant to decide whether to submit the case statement at the same time as the initial appeal application, or at a later point during the 8 week timescale.

- When an initial application is made, regardless of whether or not the appellant or claimant provides the full case statement at the same time, the Education Tribunal must send a copy of the application to the defendant (draft regulation 15(2)(a)). (This would be sent at the same time as the Education Tribunal sends the appellant or claimant an acknowledgement of receipt of their application and a notice stating the timescale for submitting their case statement and evidence.)
- When the Education Tribunal receives the full case statement (which may or may not be submitted by the appellant or claimant at same time as the initial application), it must serve a copy of the case statement on the defendant (draft regulation 15(2)(a)). The defendant will have 4 weeks from the date of receipt of the appellant's or claimant's case statement to review the case and respond to the case statement (draft regulations 19(4) and (5)).

2.17 This process means that an appellant will have 8 weeks to make an appeal and submit their case statement. Under the 2012 regulations, the appellant would have 2 months to make the appeal and 30 days to submit their case statement<sup>22</sup>. The process set out in the draft Education Tribunal regulations builds those 4 weeks into the existing timescales to avoid unnecessarily lengthening the process overall.

2.18 If an appellant or claimant wishes to respond to a matter raised in the defendant's case statement, they may apply for a direction to allow them to provide supplementary statements (see draft regulations 20(3) and 31).

2.19 The Welsh Government believes these provisions will support the Education Tribunal's overriding objective to deal with cases fairly, justly and timely, and will keep the focus on the key issues of contention. This should help to avoid delays in reaching a resolution.

**Question 49.** **Is the proposed case statement process (regulations 12-15 and 19-21 of the draft Education Tribunal regulations) appropriate?**

**Question 50.** **Are the proposed timescales for each party in the case statement process (regulations 12-15 and 19-21 of the draft Education Tribunal regulations) reasonable?**

Recommendations to NHS bodies (see regulation 65 of the draft Education Tribunal regulations)

<sup>22</sup> The use of 'weeks' rather than 'months' for timescale requirements in the draft Education Tribunal regulations aligns with approach to timescales in respect of duties on local authorities prescribed by the draft ALN Code.

2.20 In relation to an appeal made under Part 2 of the Act, the Education Tribunal may:

- require an NHS body to provide evidence about the exercise of its functions under the 2018 Act; and
- make recommendations to an NHS body about the exercise of its functions under the 2018 Act.

2.21 If the Education Tribunal makes a recommendation to an NHS body, that body must report to the Education Tribunal stating:

- the action the NHS body has taken or proposes to take in response to the Education Tribunal's recommendation; or
- why the body has not taken and does not propose to take any action in response to the recommendation.

2.22 The Welsh Government proposes that the timescale for the NHS to make a report is before the end of 6 weeks beginning on the date on which the recommendation is made by the Education Tribunal (draft regulation 65(1)). This 6 week timescale is consistent with the period within which requests from a local authority for help from an NHS body (and other relevant persons) must be met (paragraph 1.73 of this consultation document refers).

**Question 51. Is the 6 week timescale within which NHS bodies must report to the Education Tribunal in response to a recommendation (regulation 65 of the draft Education Tribunal regulations) appropriate?**

Compliance with orders (see regulation 60 of the draft Education Tribunal regulations)

2.23 Timescales for compliance with orders set out in draft regulation 60 differ to those included in regulation 61 of the 2012 regulations. The timescales included in the draft Education Tribunal regulations have been developed in the context of proposed timescales relating other relevant duties on local authorities to be prescribed by the ALN Code (see paragraphs 1.35 – 1.46 of this consultation document). The draft Education Tribunal regulations also include specific timescales for compliance with orders in relation to detained persons, which relate to new provisions set out in the 2018 Act (see draft regulations 60(3), (4) and (5)).

**Question 52. Are the timescales relating to compliance with Education Tribunal orders appropriate?**

Extensions to timescales (see regulation 66 of the draft Education Tribunal regulations)

2.24 There are no exceptions to these timescales set out in the draft Education Tribunal regulations. However the draft Education Tribunal regulations do provide for any party to an appeal or claim to apply to the Education Tribunal for an extension to any timescale relating to the appeals or claims process, setting out its reasons for requesting an extension. The Education Tribunal may also extend a timescale at its discretion if it considers it fair and just to do so (regulation 66 refers).

**Question 53. Is the approach to extensions to timescales**

**(regulation 66 of the draft Education Tribunal regulations) appropriate?**

Case friends (see draft Education Tribunal regulations 61 to 64)

2.25 The 2012 regulations include a part on case friends for children who lack capacity. Under section 85 the 2018 Act, the Welsh Government proposes that the draft Education Tribunal regulations on case friends will replicate many of the existing regulations, although there are some minor changes.

2.26 If the President of the Tribunal finds a child lacks capacity during appeal proceedings, the case will not be allowed to continue until the child has a case friend to represent them. This ensures that the rights of the child under the Act are properly exercised and reflects current practice by the SENTW.

2.27 Case friends will, under the ALN system, be able to be used prior to making an appeal to the Education Tribunal, meaning they can be used to take part in arrangements for avoiding and resolving disagreements at a much earlier stage. They will also be able to be used more generally to represent and support the child, even before a disagreement occurs.

2.28 Draft regulation 62(5) sets out a list of family members exempt from providing an enhanced DBS check with barred list information when applying to the Education Tribunal to be a child's case friend.

**Question 54. Are the proposed regulations relating to case friends (draft Education Tribunal regulations 61 to 64) appropriate?**

## **Part 3 of the consultation: Draft ALNCo regulations**

### **Introduction**

<b>Proposed regulations to be made</b>	<b>Power to make regulations</b>
Additional Learning Needs Co-ordinators	Section 60(4) of the 2018 Act

3.1 Section 60 of the 2018 Act requires maintained schools<sup>23</sup> and FEIs in Wales to designate a person, or more than one person, to have responsibility for co-ordinating ALP for children and young people with ALN at their school or FEI. It further requires that these persons are to be known as Additional Learning Needs Co-ordinators (ALNCos).

- 3.2 Regulations made under section 60 of the 2018 Act may:
- (a) require governing bodies of maintained schools and FEIs in Wales to ensure that ALNCos have prescribed qualifications or prescribed experience (or both);
  - (b) confer functions on ALNCos in relation to provision for pupils or students (as the case may be) with ALN.

3.3 The ALNCo role will replace the existing non-statutory Special Education Needs Co-ordinator (SENCo) role which exists in most maintained schools in Wales and similar non-statutory roles that are undertaken in FEIs in Wales.

### **What we are proposing**

3.4 The intention is to use the regulation making power under section 60 of the 2018 Act to ensure that the ALNCo role is undertaken in a consistent and effective way in every school and FEI in Wales, and supports the delivery of the ALN system and the overarching objectives of the 2018 Act.

3.5 The draft Additional Learning Needs Co-ordinator (Wales) Regulations 2019 provide for the following:

#### Prescribed qualification – maintained schools

3.6 The Welsh Government wants the ALNCo role to have a strong focus on leadership. Generally teachers would be best placed to deliver this aspect of the role as they are likely to have better access to senior management within schools and will have more scope to influence a whole school approach to ALN. However, the Welsh Government is aware that a small proportion of existing SENCos are not teachers and recognises that many of these SENCOs are well established in their school and are delivering the role effectively. Taking into account these two factors, the draft regulations propose that ALNCos, in maintained schools, must be either:

- (a) a school teacher as recognised in Wales (registered with the Education Workforce Council); or

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<sup>23</sup> A community, foundation or voluntary school, a maintained nursery school, or a pupil referral unit

- (b) a person that had responsibility for ensuring the co-ordination of provision for pupils who were identified as having special educational needs, under Part 4 of the Education Act 1996, within the school immediately prior to the coming into force of the regulations.

#### Prescribed qualification - FEIs

3.7 The Welsh Government is aware that there is no legal requirement to hold a specific level of qualification to teach in an FEI. However, most persons in an FEI fulfilling functions equivalent to those of SENCos in schools currently hold a post graduate certificate of education (PGCE) or equivalent. To provide for equivalence and consistency between the ALNCo role in schools and in FEIs the draft regulations require an ALNCo, in an FEI, be a further education teacher as recognised in Wales (registered with the EWC).

#### Functions of ALNCos

3.8 The Welsh Government wants to ensure that that the co-ordination of provision for children and young people with ALN in schools and FEIs is undertaken in a consistent and effective way. To that end, the draft regulations list the tasks that are fundamental to the making of consistent and effective provision for children and young people with ALN and makes ALNCos in schools and FEIs responsible for either carrying out those tasks themselves or ensuring they are carried out by others.

**Question 55.** **Are the prescribed qualifications to be an ALNCo set out in the draft ALNCo regulations appropriate?**

**Question 56.** **Do you agree with the tasks that ALNCos must carry out or arrange to carry out as set out in the draft ALNCo regulations?**

## **Part 4 of the consultation: Looked after children**

### **Introduction**

4.1 For the purposes of the 2018 Act, a child is looked after by a local authority if he or she is not over compulsory school age and is looked after by a local authority for the purposes of Part 6 of the 2014 Act, and is not a detained person<sup>24</sup>.

4.2 The 2018 Act and the 2014 Act (as amended) change the legal duties placed on local authorities in terms of support for looked after children with ALN. The position under these Acts is explained in both the draft ALN Code and draft revised 2014 Act Part 6 Code of Practice (Looked After and Accommodated Children) ('the Part 6 Code'), both of which are the subject of this consultation.

4.3 Part 4 of this consultation covers the following:

- (a) proposals for regulations about categories of looked after children who would not be treated as looked after for the purposes of the 2018 Act and who are not to have a personal education plan, and requirements for local authorities to appoint a Looked After Children in Education Co-ordinator;
- (b) Chapter 14 of the draft ALN Code – Content of an IDP for a looked after child; and
- (c) proposed revisions to the Part 6 Code.

4.4 Under the 2018 Act, the duty to decide whether a looked after child has ALN and to prepare, maintain and review an IDP is placed upon the local authority that looks after the child. This differs from the standard ALN arrangements where the responsibility rests with the maintained school attended by the child, or the local authority in whose area the child is.

4.5 Section 16 of the 2018 Act amends section 83 of the 2014 Act to provide that:

- (a) a care and support plan for a child looked after for the purposes of the 2014 Act must include a record of the arrangements made to meet the child's needs in relation to education and training, to be known as a 'personal education plan' ('PEP'); and
- (b) any IDP maintained for a child looked after for the purposes of the 2018 Act must be incorporated within their PEP.

4.6 These amendments ensure that where a looked after child (within the meaning which applies for the purpose of the 2018 Act) has ALN, they have a single education plan that covers all of their education needs in a holistic way. In turn, this should facilitate more holistic planning for meeting the needs of the looked after child.

4.7 Currently a PEP is required for most looked after children, but by virtue of the Care Planning, Placement and Case Review (Wales) Regulations 2015, rather than by the 2018 Act itself.

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<sup>24</sup> Section 15(1) of the 2018 Act.

## (a) Proposed regulations to be made

Proposed regulations to be made	Power to make regulations
Categories of looked after child:  (a) for whom no PEP is to be prepared  (b) not to be treated as looked after for the purposes of the 2018 Act	(a) Section 83(2B) of the 2014 Act (as amended by the 2018 Act)  (b) Section 15(2) of the 2018 Act
Requirement for a local authority to appoint a Looked after Children in Education (LACE) Co-ordinator	Section 87 of the 2014 Act

4.8 It is intended to exercise the power to prescribe exceptions to the requirement for a PEP so as to preserve the current position, i.e the following would be prescribed as the categories for whom no PEP is to be prepared:

- those placed for adoption<sup>25</sup>;
- those that are looked after for short breaks<sup>26</sup>; and
- those that are looked after only by reason of being remanded to youth detention accommodation.<sup>27</sup>

4.9 As these categories of looked after child do not have a PEP, it is not appropriate for them to be treated as looked after for the purposes of the 2018 Act (there is no PEP into which any IDP could be incorporated). Therefore it is intended to prescribe<sup>28</sup> that looked after children who are placed for adoption and those that are looked after for short breaks as children who are not looked after for the purposes of the 2018 Act. (Those children looked after under the 2014 Act by reason only of being remanded to youth detention accommodation will not be a prescribed exception under these regulations, because they are already excluded for the purposes of the 2018 Act by section 15(1)(b) of the 2018 Act.)

4.10 Paragraph 1.23 of the draft ALN Code sets out the additional categories of looked after child that would not be treated as looked after children for the purposes of the 2018 Act and the ALN Code. As a result, they would not come within the specific duties in the 2018 Act (and related provisions of the ALN Code) in respect of looked after children. In particular, sections 18 and 19, which require the local authority that looks after a child to make decisions about ALN.

4.11 In addition, the Welsh Government proposes to amend the Care Planning, Placement and Case Review (Wales) Regulations 2015, made under the 2014 Act,

<sup>25</sup> Unless the child falls within regulation 56 (children on remand and children who are detained) of the Care Planning, Placement and Case Review (Wales) Regulations 2015: regulation 3 of those regulations provides that they do not apply to children placed for adoption unless they fall within regulation 56.

<sup>26</sup> There is no requirement for this category of looked after child to have a PEP by virtue of regulation 62 of the Care Planning, Placement and Case Review (Wales) Regulations 2015.

<sup>27</sup> There is no requirement for this category of looked after child to have a PEP by virtue of regulation 57 of the Care Planning, Placement and Case Review (Wales) Regulations 2015.

<sup>28</sup> Through regulations made under s15(2) of the 2018 Act

to expressly require a local authority to appoint a Looked after Children in Education (LACE) Co-ordinator. The LACE Co-ordinator has a key role in overseeing the education of all looked after children, not just those that have ALN, and working collaboratively to ensure full and rounded educational support is provided to those children.

4.12 In terms of looked after children with ALN, is it expected that the LACE Co-ordinator will oversee and co-ordinate the multi-agency approach necessary to make decisions about whether a looked after child has ALN and, if so, put in place an IDP which will be incorporated in the PEP. The LACE Co-ordinator, working with schools and other education and social care professionals, will be key in ensuring the effective operation of the ALN arrangements for looked after children, guidance on which is set out in the draft ALN code.

4.13 Given the particular vulnerabilities of looked after children and, in general terms, the lower educational outcomes and attainment levels achieved by this group, the Welsh Government is clear on the continuing need to focus on and prioritise the educational support provided to looked after children. The role of the LACE Co-ordinator is an important part of this wider support structure. Historically, the LACE Co-ordinator role was a statutory role; we want to reinstate this by amending the Care Planning, Placement and Case Review (Wales) Regulations 2015.

**Question 57.      Do you agree that the Looked after Children in Education (LACE) Co-ordinator should be a statutory role?**

## **(b) Chapter 14 of the draft ALN Code – Content of an IDP for a looked after child**

4.14 Chapter 14 of the draft ALN Code deals with the mandatory content of IDPs for looked after children, including the mandatory standard form for an IDP for a looked after child.

4.15 As set out in paragraph 14.2 of the draft ALN Code, an IDP for a looked after child must be incorporated into the child's PEP, guidance on which can be found in the proposed revised Part 6 Code. The mandatory content of an IDP for a looked after child has been proposed in the light of the potential overlap with likely content of a PEP.

4.16 As with the mandatory content for IDPs for other children and young people, the mandatory content of an IDP for a child who is looked after contains elements that reflect what is required by the 2018 Act and other elements that are required by the Code. The elements required by the Code are:

- Section 2B.2) ALP to be provided - details of any disapplications or modifications of the National Curriculum;
- Section 3A: Record of information used to develop the IDP; and
- Section 3B.1) Significant events or information relevant to understanding the child or young person's ALN and planning the necessary ALP.

4.17 For ease of reference, the same numbering is used for sections and sub-sections of the IDP for a looked after child as the numbering of equivalent sections and sub-sections of an IDP for a child who is not looked after (as set out in Chapter 13 of the draft ALN Code).

**Question 58.** **Do you agree that there should be a separate standard form for looked after children and is the proposed standard form, together with the guidance and requirements related to it, appropriate?**

### **(c) Proposed revisions to the Part 6 Code**

4.18 We propose to revise the Part 6 Code, issued under the 2014 Act, to explain the interaction of the ALN system with the general arrangements for supporting looked after children. This consultation relates only to the draft revisions to the Part 6 Code of Practice and not the rest of that Code. Those revisions are the ones that relate to the new arrangements for supporting looked after children with ALN and the statutory role of LACE Co-ordinators and are clearly highlighted in blue text within the draft revised Part 6 code.

4.19 The draft revisions explain, for example, how an IDP is to be incorporated into a PEP as part of the wider Part 6 care and support plan, how these plans are to be reviewed and the importance of services and professionals collaborating to ensure comprehensive and rounded support for looked after children. The draft revised Part 6 code does not mandate a template for a PEP, rather it sets out information that must be included where a looked after child's IDP must be incorporated within the PEP.

4.20 There is no intention to change the content or the approach to the development of a PEP under the 2014 Act. However changes have been made to the Part 6 code to explain the integration of IDPs into PEPs for looked after children with ALN and the mandatory content of PEPs for these cases.

4.21 The draft revisions to the Part 6 Code refer to the importance of the role of LACE Co-ordinators. As set out in paragraphs 4.11 – 4.13 of the consultation document, above, it is proposed that LACE Co-ordinators will be designated by the responsible local authority to co-ordinate PEPs and to address the educational needs of looked after children and care leavers within the area of the responsible local authority.

**Question 59.** **Do the draft revisions to the Part 6 Code provide a clear explanation of the duties on local authorities in relation to their social services functions for looked after children with ALN and what these duties mean in practice?**

**Question 60.** **Overall, do you agree with the approach taken in the draft revised Part 6 Code to explaining the legislative changes, including the integration of personal**

**education plans (PEPs) and IDPs and the mandatory content of PEPs? Are the requirements and expectations and what these mean in practice clearly explained?**

- Question 61.** **Do the changes that have been made to the Part 6 code clearly explain the role of the LACE Co-ordinator in overseeing the ALN arrangements for looked after children and what this means in practice?**

## **Part 5 of the consultation: Impact of proposals**

### **Impact of proposed regulations**

5.1 The Explanatory Memorandum for the 2018 Act, published by the Welsh Government in January 2018<sup>29</sup> includes a Regulatory Impact Assessment which provides detailed costings and discusses the impacts associated with functions being placed on relevant bodies under the Act.

5.2 Throughout the consultation on the draft Code and proposals for regulations under the 2018 Act, the Welsh Government will engage with stakeholders and practitioners to gauge the potential impact the proposals may have on relevant bodies; as well as learners with ALN and their families.

5.3 The consultation provides an opportunity for stakeholders to bring to the attention of the Welsh Ministers any potential impacts there may be in relation to the proposed regulations and the Code.

**Question 62.      What impacts do you think there will be as a result of the proposed regulations?**

### **Impact on the Welsh language**

5.4 We would like to know your views on the impact that the proposals in the draft ALN Code and proposed regulations, as set out in the consultation document above, might have on the Welsh language, specifically on:

- i) opportunities for people to use Welsh; and
- ii) treating the Welsh language no less favourably than the English language.

**Question 63.      What impact do you think the proposals in the draft ALN Code and proposed regulations would have on the Welsh language?**

**Question 64.      How do you think the proposals in the draft ALN Code and proposed regulations could be formulated or changed so as to have:**

- i) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language?;
- ii) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language?

<sup>29</sup> <https://beta.gov.wales/sites/default/files/publications/2018-04/additional-learning-needs-and-education-tribunal-wales-act-2018-explanatory-memorandum.pdf>