



Education Tribunal for Wales

# Children who lack capacity, and case friends

## About this guide

The aim of this guide is to help you understand issues surrounding a child's capacity, and the role of a case friend in the ALN system.

## Who this guide is for

This guide is for prospective case friends, and anyone wanting to know more about the role of a case friend.

The Publications Register is a list of all guidance and forms. You can find it [on our website](#).

## About ETW

ETW hears and makes decisions on appeals about the additional learning needs of children and young people, and claims of disability discrimination. ETW is independent of government and local authorities, and our decisions are legally binding.

## Language Preference

ETW welcomes receiving correspondence and phone calls in Welsh or English. We will respond in Welsh to any correspondence received in Welsh. Corresponding in Welsh will not lead to a delay in our response.

This document is also available in Welsh. Please contact the Tribunal for a Welsh version of this document. You may also submit forms, documents, and make written representations to ETW in Welsh or English.

## Overriding Objective and Obligation to Co-operate

The Tribunal's main intention is to deal with cases fairly and justly. The Tribunal expect all parties to cooperate with each other, and the Tribunal, to progress the case. This may include exchanging information and documents with other parties, or cooperating with the Tribunal's requests more generally.

## Information resources

- [The Education Tribunal for Wales Regulations 2021](#)
- [The Additional Learning Needs Code for Wales 2021](#)
- [The Additional Learning Needs and Education Tribunal \(Wales\) Act 2018](#)
- [The Additional Learning Needs \(Wales\) Regulations 2021](#)
- [The Equality Act 2010](#)

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# 1. Capacity and the ALN system

## Introduction

A person's capacity refers to their ability to understand information, and communicate an informed decision in relation to that information. If someone does not have capacity, it is usually because of an impairment or disruption of the mind, or the person's young age.

People who lack capacity are often relieved of the responsibility of making important decisions, or taking certain actions. In these circumstances, representatives may be appointed to act in the person's best interests.

The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (the Act) defines what it means for a child to lack capacity within the additional learning needs (ALN) system.

## Children who lack capacity within the ALN system

The Act says that children who do not have the capacity to understand:

- information or documents that must be given to them in relation to their ALN; or
- what it means to use the rights provided to them under the ALN system

do not have capacity for the purposes of the Act. The capacity of children specifically relates to their ability to understand matters relating to the ALN system.

It is important to note that a child's capacity to understand may be due to their age, their ALN, or another reason. Their capacity may change over time, so decisions about their capacity may be reconsidered.

## The definition of a child within the ALN system

In the ALN system, a child is a person not over compulsory school age.

Compulsory school age is decided by the school leaving age. In Wales, you can leave school on the last Friday in June, as long as you turn 16 by the end of that school year's summer holidays.

For example, anyone who turns 16 in the school year ranging 01 September 2021 to 31 August 2022 can leave school on Friday 24 June 2022. Some will be 16, and some will be 15. This is the date they are no longer considered a child in the ALN system. From this date, they are young people.

The guidance for young people, and parents of children, who lack capacity is different. Please see our guidance booklet “Young people, or parents, who lack capacity” (ETW10) [on our website](#) for more information.

## **Duties of local authorities and schools with children who lack capacity**

If a child does not have capacity, certain duties given to schools, local authorities, and the NHS do not have to be carried out. These include:

- the duty to notify or inform a child;
- the duty to give a copy of a plan or a revised plan to a child;
- the duty to inform the child a body (such as a school or local authority) intends to refer a matter to an NHS body, and has given the child an opportunity to discuss whether the referral should be made;
- the duty to review a plan following a request by a child;
- the duty to reconsider following a request by a child; and
- the duty to decide whether a local authority takes over a governing body maintained plan (an individual development plan maintained by a school or other education body) following a request by a child.

However, these duties must still be carried out with parents.

It important to note that the child must still be included when an education body or local authority carries out all other duties in the ALN system. This means that education bodies and local authorities should continue to consider:

- a child’s views, wishes and feelings;
- the importance of a child participating as fully as possible in decisions; and
- the importance of a child being provided with the information and support necessary to enable participation in those decisions.

## **How does a child who lacks capacity exercise their rights?**

If a child does not have capacity, a case friend may be appointed to support the child. They will ensure the child’s wishes are known, and exercise the child’s rights in the child’s best interests. Local authorities and schools must perform the duties listed above with case friends instead of children, if the child lacks capacity.

For more information about case friends, please go to the second chapter of this booklet.

## **What other support is available?**

Children must always have access to independent advocates, regardless of their capacity.

Advocates have a detailed knowledge of the ALN system, and they offer advice, assistance, and information to children, their parents, and case friends. They are independent of local authorities and government.

Local authorities must refer children, their parents, and case friends to independent advocacy services if they request it. The service is completely free.

## **How is a child's capacity assessed?**

In most cases, the teachers in the school which the child attends will know whether or not a child has capacity because they work with the child on a daily basis. NHS bodies and local authorities can also assess a child's capacity, as can other professionals who know the child. Their evidence could be a statement that gives an informed opinion of the child's level of capacity.

If a child or parent disagrees with a school's decision about a child's capacity, they should ask their local authority to review the school's decision.

## **Who has the final say on a child's capacity?**

The Tribunal has the final say on a child's capacity. Local authorities review the decisions of schools, and the Tribunal reviews the decisions of local authorities.

If a child or their parent does not agree with a local authority's decision on a child's capacity, they can apply to the tribunal for a declaration that the child does or does not have capacity. The Tribunal will review the local authority's decision and issue a declaration. The Tribunal may rely on the evidence of professionals who know the child, but they may also require expert evidence to support their declaration.

The Tribunal may also wish to confirm a child's capacity of their own accord. If a child brings a case in their own name, the Tribunal may wish to check the child's capacity to ensure they can participate, and have access to a fair hearing.

## **What is a declaration of capacity?**

A declaration of capacity is a decision by the Tribunal about whether a child has capacity to understand the ALN system and their rights. It may declare a child does or does not have capacity.

Children or their parents can apply to the Tribunal for a declaration of capacity at any time, regardless of whether they intend to bring an appeal or claim to the Tribunal.

Case friends help children who lack capacity to exercise their rights in all aspects of the ALN system. This means they may apply to become a case friend regardless of whether they also wish to appeal or submit a claim to the Tribunal. An application to be a case friend must evidence the child's lack of capacity.

## How do I apply to the Tribunal for a declaration of capacity?

Applications for a declaration of capacity must be made in writing to the tribunal.

You can fill in our capacity declaration application form, or use the checklist below to make an application in writing. Every application must contain the information in the checklist.

The name and address of the person seeking the declaration and, if available, their telephone number and e-mail address.	
The applicant's relationship to the child.	
The name and date of birth of the child.	
<p>The names and addresses of all persons who:</p> <ul style="list-style-type: none"> <li>• have parental responsibility for the child; or</li> <li>• share parental responsibility for the child; or</li> <li>• have care of the child.</li> </ul> <p>If the names and addresses of such persons are not provided, please explain why you are not able to provide them.</p>	
The name and address of the child's school, and the relevant local authority.	
A copy of the governing body's and local authority's decisions about the child's capacity.	
The reason or reasons for making the application.	
<p>All supporting evidence of the child's capacity, or lack of capacity.</p> <p>Please remember, this is specifically the capacity to understand information and documents about the ALN system, and what it means to exercise rights within the system.</p>	
<p>The declaration you wish the Tribunal to issue.</p> <p>This will either be that the child referred to does or does not have capacity.</p>	
The applicant's signature.	

If you send an application by email, you must attach an electronic signature, or sign your application by hand and send a scanned electronic copy.	
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The Tribunal will notify anyone with parental responsibilities or care of the child, the school, and the local authority when the declaration is issued.



## 2. Case friends

### Introduction

If a child does not have capacity, a case friend may be appointed to support the child, make decisions in their best interest, and exercise their rights. Children who lack capacity may still wish to exercise their rights, and case friends can act on their behalf, with special attention to the child's views, wishes and feelings.

Case friends are only available to children who do not have capacity. If a child has capacity, independent advocates are available to support them.

Case friends are particularly important when a child who lacks capacity needs to bring an appeal in their own name, for example, when they do not have a parent who is willing or able to pursue dispute resolution or bring a case to the Tribunal for the child.

### What is the role of a case friend?

Case friends:

- help the child to understand and navigate the ALN system;
- listen to the child's opinions and wishes;
- ensure their opinions and wishes are considered in decisions affecting them;
- receive correspondence and notifications from the school, local authority, or Tribunal;
- make certain decisions on the child's behalf;
- represent or support the child in disagreement resolution;
- represent or support the child at other meetings; and
- exercise the child's right to appeal to the tribunal.

### Who can be a case friend?

A case friend will be somebody who:

- knows the child well;
- understands the child's needs; and
- wants to represent the wishes and views of the child.

To fulfil the eligibility criteria for being a case friend, a person must:

- act fairly and competently;
- have no interest opposed to that of the child;
- ensure that all steps and decisions they take are for the benefit of the child; and
- take account of the child's views, so far as possible.

A case friend will often be a relative or a close family friend of the child. However, a case friend could be anyone that fulfils the criteria above, and is not on the children's barred list.

An enhanced DBS check with barred list information must accompany a case friend application form unless the person applying to be a case friend is a close family member. Close family members include:

- parents and step-parents;
- brothers and step-brothers;
- sisters and step-sisters;
- half-brothers and half-sisters;
- grandparents;
- uncles and aunts; and
- nephews or nieces.

For children who are looked after by a local authority, or another body, the child's foster carer or social worker could act as the child's case friend.

Independent advocates and parents can apply to be a child's case friend.

## How do I apply to be a case friend?

A person wishing to act as a case friend must apply to the Tribunal in writing. Only the Tribunal can appoint someone as a case friend.

They must also send a copy of their application to:

- the parties to any cases open with the Tribunal;
- the child's parent; and
- the child's school and local authority.

You can fill in our case friend application form, or apply in writing using the checklist below to make sure you include all necessary information. Every application must contain the information in this checklist. Please contact the Tribunal if you need any assistance.

The name and address of the person who wishes to act as the child's case friend and, if available, the person's telephone number and e-mail address.	
The name and date of birth of the child.	
The name and address of the child's school and the relevant local authority.	
The person's relationship or connection to the child.	

<p>A declaration of suitability confirming that the person satisfies the conditions and requirements of being a case friend, and the eligibility criteria of being able to:</p> <ul style="list-style-type: none"> <li>• act fairly and competently;</li> <li>• have no interest opposed to that of the child;</li> <li>• ensure that all steps and decisions they take are for the benefit of the child; and</li> <li>• take account of the child’s views, so far as possible.</li> </ul> <p>This can take the form of a letter or written statement confirming the person’s suitability, and explaining why they are a good candidate.</p>	
<p>Supporting evidence to the declaration of suitability.</p>	
<p>An enhanced disclosure certificate issued by the Disclosure and Barring Service.</p> <p>You do not need to evidence this if you are a close family member, as detailed in “Who can be a case friend?” above.</p>	
<p>Supporting evidence of the child’s lack of capacity within the meaning of the ALN system.</p> <p>This could take the form of:</p> <ul style="list-style-type: none"> <li>• confirmation from the governing body of the school;</li> <li>• confirmation from the local authority;</li> <li>• a declaration of capacity from the Tribunal; or</li> <li>• the opinion of a relevant expert.</li> </ul>	
<p>The views of the child’s parent about the person’s wish to act as the case friend; or</p> <p>an explanation of why the person does not know the parent’s views.</p>	
<p>The signature of the person applying to be the child’s case friend.</p> <p>If you send an application by email, you must attach an electronic signature, or sign your application by hand and send a scanned electronic copy.</p>	

## **What will the Tribunal do with the enhanced disclosure certificate?**

Under Chapter 47, section 3(2)(a) of the Safeguarding Vulnerable Groups Act 2006, a person is barred from regulated activity relating to children if the person's name is included in the list in Part 1 of Schedule 3 to that Act ("the children's barred list").

If you want to act as a case friend and you are not a close relative of the child as described above, you must attach an enhanced disclosure certificate issued by the Criminal Records Bureau to your completed case friend application form.

The Tribunal will make a record of the disclosure certificate's number, start date, and expiry date. Certificates will then be returned by recorded delivery.

## **What does the law say about the removal of case friends?**

The Tribunal can remove a case friend where it finds that:

- the person no longer meets the requirements and eligibility criteria
- there is another good reason for removing the case friend.

Anyone may ask the Tribunal to remove a child's case friend if they have a good reason. Any application asking the Tribunal to remove a case friend must be supported by evidence.

The Tribunal must inform the following whenever a case friend is removed:

- the person who has been removed as the case friend;
- the child's parent; and
- the child's school and local authority.

If an appeal or claim case is being processed when the case friend is removed, the case may be paused until another case friend is found. The Tribunal must inform parties of the removal of case friends, and the name and address of any new case friends appointed.

### 3. Guidance for case friends

#### What rights can case friends exercise?

Local authorities and schools must carry out certain duties for children. These include:

- the duty to notify or inform (assessment outcomes, ceasing to maintain an IDP, etc)
- the duty to give a copy of a plan or a revised plan;
- the duty to inform the child a body (such as a school or local authority) intends to refer a matter to an NHS body, and has given an opportunity to discuss whether the referral should be made;
- the duty to review a plan following a request;
- the duty to reconsider following a request; and
- the duty to decide whether a local authority takes over a governing body maintained plan (an individual development plan maintained by a school or other education body) following a request.

If a child lacks capacity, their school or local authority no longer need to carry out these duties for children, but they must continue to do so with parents.

If a child lacks capacity, but a case friend is appointed, their school or local authority must carry out these duties with case friends and parents.

For example, if a school intends to refer a matter to the NHS, the school must tell the case friend that they intend to do so. They would also have to give the case friend an opportunity to discuss the referral with the school.

Case friends can exercise all of the rights the child would have if the child had capacity.

Examples include:

- the right to receive certain correspondence from the school or local authority
- the right to request certain aspects of the IDP are reconsidered;
- the right to request a review of an IDP by a local authority;
- the right to request a local authority takes over an IDP maintained by a school;
- the right to discuss any intended referrals to an NHS body;
- the right to make an appeal or claim to the Tribunal;
- the right to withdraw their own appeal or claim; and
- the right to apply for a declaration of capacity

Any decision a case friend takes should be for the benefit of the child, and should take account of the child's views, so far as possible. Case friends should have no other interest other than the child in any decision they make.

Case friends should encourage the child's participation in decision making as fully as possible, as should the child's school, and the body responsible for their education. When appropriate, and possible, children and/or their case friends should attend

meetings about a child's ALN. This would achieve the principles of person centred practice, which schools should be following.

## **What help can case friends have?**

Local authorities must provide information and advice to case friends about:

- additional learning needs; and
- disability discrimination in schools.

Information and advice can include matters such as:

- disagreement resolution services and how to access the service; and
- independent advocacy services and how to access the service.

The local authority will be able to put case friends in touch with independent advocacy services who will be able to help with the appeal or claim. Advocates have a detailed knowledge of the ALN system, and they offer advice, assistance, and information to children, their parents, and case friends. They are independent of local authorities and government. Their service is completely free.

Legal aid funding may be available to a child. If it is, an application for legal aid would need to be made. The law society or a local citizen's advice bureau can provide the names of solicitors who run the legal aid scheme. The case friend may then be able to have a meeting with a solicitor to ask advice about preparing an appeal or claim on behalf of the child.

## **Is the process for making an appeal or claim different for case friends?**

No. The process for making an appeal or claim is the same as that for children and parents. In all cases an appeal or claim application must be completed and submitted to the Tribunal. Please see our "Appeal guidance" booklet (ETW2) for more information.

If a case friend makes an application to the Tribunal, they will be expected to prepare case statements, and attend the Tribunal. The case is their case, as it would be for children and parents with rights to apply to the Tribunal, but they are acting in the best interests of the child.

Case friends must however complete and return the *Case friend application form* (ETW13) and be appointed by the Tribunal before they are able to exercise any rights. You can download the form from [our website](#), or contact us if you would like a copy sent by post.

## **Does a case friend need the consent of the child’s parent to make an appeal or claim?**

No, a case friend does not need parental consent to make an appeal or claim.

We do ask case friends to let us know the views of the child and the child’s parent about the appeal or claim. Equally, where the parent has made an appeal or claim, they will need to let us have the views of the child on the appeal or claim.

## **Where can I find further information about being a case friend?**

For more information about case friends, we suggest referring to the following documents. We have noted the sections that are of particular use to case friends, but all of the information in the documents is relevant and useful to case friends.

There are links to these documents at the top of this guidance booklet, under “Information resources”.

### ***The Additional Learning Needs Code for Wales 2021***

- Paragraphs 1.52 – 1.58
- Chapter 4: Involving and supporting children, their parents and young people
- Chapter 6: Advice and information about ALN and the ALN system
- Chapter 30: Case friends for children who lack capacity
- Chapter 32: Avoiding and resolving disagreements and independent advocacy services

### ***The Education Tribunal for Wales Regulations 2021***

- Sections 59 – 64: Children who lack capacity and case friends.

### ***The Additional Learning Needs and Education Tribunal (Wales) Act 2018***

- Section 69: Independent advocacy services
- Section 84: Capacity of children
- Section 85: Case friends for children who lack capacity