



Education Tribunal for Wales

Young people, or parents of children,
who lack capacity

About this guide

The aim of this guide is to help you understand issues surrounding young people or parents of children who lack capacity in the ALN system.

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 Mental Capacity Act 2005](#)
- [The Equality Act 2010](#)

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.

Young people, or parents of children, who lack capacity within the ALN system

The definition for young people, and parents of children 'lacking capacity' in the additional learning needs (ALN) system has the same meaning as 'lacking capacity' in the Mental Capacity Act 2005. It means a person who lacks the capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.

This may be because of an impairment of, or a disturbance in the functioning of, the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary.

A lack of capacity cannot be established merely by reference to a person's age or appearance. It also cannot be decided by reference to a person's condition, or an aspect of their behaviour, which might lead others to make unjustified assumptions about their capacity.

The definition of capacity for children (people of compulsory school age and below) is different. Please see our guidance booklet "Children who lack capacity, and case friends – ETW9" for this information.

Definition of young people in the ALN system

Any reference to a young person in the ALN system means a person over compulsory school age, but under 25.

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, if the first day of the next school year is 01 September 2022, everyone who turns 16 years of age between 01 September 2021 and 31 August 2022 (the school year) will be classed as a young person on Friday 24 June 2022. Some people will be 16 years of age, and some will be 15.

How is capacity assessed?

A young person or parent who lacks capacity will usually have already been identified as lacking capacity. The assessment may have been carried out by NHS, or education professionals in the case of a young person.

The Mental Capacity Act 2005 and its Code of Practice set out the law and provide guidance on how to assess whether someone has the capacity to make a decision, including when professionals should be involved in the assessment.

The Mental Capacity Act 2005 sets out five key principles:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision.
4. An act done, or decision made, for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

How does a young person, or the parent of a child, who lacks capacity exercise their rights?

If a young person, or the parent of a child, lacks capacity, certain representatives are able to exercise their rights on their behalf.

For example, a representative, on behalf of a young person or parent who lacks capacity:

- can request the local authority responsible for the child or young person to reconsider decisions made about whether the child or young person has ALN;
- can take forward an appeal to the Education Tribunal;
- will receive information, documents and notifications of decisions, including a copy of an IDP;
- can engage in the arrangements made by a local authority for the avoidance and resolution of disagreements; and
- can request independent advocacy services. Where such a request has been made, the local authority must refer a representative of a young person to an independent advocacy service.

These representatives are:

- **a deputy**, appointed by the Court of Protection to make decision on behalf of the parent or young person. Deputies are bound by the terms of the order of appointment, issued by the Court of Protection;
- **a donee of lasting power of attorney (LPA)**, appointed by the parent or young person to make decisions on behalf of the parent or young person, which includes giving them the authority to make decisions in circumstances where the person no longer has capacity;
- **an attorney with an enduring power of attorney (EPA)**; or
- **the young person's parent**, where the young person does not have a representative listed above.

What does not change when a young person or a parent of a child lacks capacity?

Whether a young person, or a parent of a child, has capacity or not, they can still make significant contributions when decisions are being made about their or their child's ALN.

The general duty to have regard to the following still applies:

- the views, wishes and feelings of the young person or parent;
- the importance of them participating as fully as possible in decisions; and
- the importance of them being provided with the information and support necessary to enable participation in those decisions.

What support is available to representatives?

The rights of young people and parents of children to receive information about ALN, or referrals to independent advocacy services, are transferred to their representatives if it is decided that they do not have capacity. Local authorities and education institutions will fulfil these duties with representatives if requested.

Advocates have a detailed knowledge of the ALN system, and they offer advice, assistance, and information to children, their parents, and representatives of those who lack capacity. They are independent of local authorities and government. The service is completely free.

Where can I find further information about representatives for young people and parents who lack capacity?

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

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 1.59 – 1.69: Exercise of rights by representatives for parents and young people who lack capacity and the interpretation of requirements imposed by the Code
- Chapter 4: Involving and supporting children, their parents and young people
- Chapter 6: Advice and information about ALN and the ALN system
- Chapter 31: Representatives for young people, and parents of children, lacking mental capacity
- Chapter 32: Avoiding and resolving disagreements and independent advocacy services

The Additional Learning Needs (Wales) Regulations 2021

Part 4: Parents and young people lacking capacity

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

- Section 69: Independent advocacy services
- Section 83: Parents and young people lacking capacity

Mental Capacity Act 2005