

Legislation Committee No.3

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Response to the consultation on the proposed Education (Wales) Measure

Introduction

The Welsh Local Government Association (WLGA) represents the 22 local authorities in Wales, and the three national park authorities, the three fire and rescue authorities, and four police authorities are associate members.

It seeks to provide representation to local authorities within an emerging policy framework that satisfies the key priorities of our members and delivers a broad range of services that add value to Welsh Local Government and the communities they serve.

The WLGA welcomes the opportunity to give evidence to the Committee regarding the Proposed Education (Wales) Measure. This response has been written in partnership with the Association of the Directors of Education in Wales (ADEW). The Measure, if passed, would place a number of duties on local authorities in Wales within the area of appeals and claims to the Special Educational Needs Tribunal for Wales. Before addressing the questions posed by the Committee in relation to the Measure, it is important to stress that local authorities in Wales are fully committed to supporting the participation of all children and young people in policy and processes that impact on their lives. Local authorities and the Welsh Assembly Government (WAG) base policy firmly in the UN Convention on the Rights of the Child and this proposal, to hear the voice of children and young people, fits with this principle. Local authorities, through the work of the Children and Young People's Partnerships are working more closely than ever with children and young people to develop policies in keeping with the view and experiences of children and young people.

Questions

Is there a need for legislation to be made to allow children the right to make appeals and claims to the Special Needs Tribunal for Wales and if so, why?

Given what has been outlined above in relation to the principles of the participation of children and young people, it should be taken into account that this legislation could have significant implications for home-school and home-local authority relationships and could have the potential for causing tensions within families that are involved in the process. In principle this Measure makes sense but it should be considered that this legislation could be seen as a source of tension between parents and children and young people and with the local authority.

At a practical level a statemented child, if statemented due to their cognitive needs, is unlikely to be judged competent in judicial terms. There is clearly a need for an ad litem service or similar to provide an on objective third party's view of what the individual's views are and how reality-grounded they may be. The implications of this need would be for the extension of the Tribunal's role and the development of an ad litem service or similar which would need to be provided by a new party to the system. This would have a significant impact on costs in order to properly build this into the system. Although, it is difficult at this stage to make an accurate assessment, the volume of appeals may be substantial.

In terms of the timing of the legislation, WAG is currently commissioning 2 year pilots to trial a more inclusive, responsive, cost effective, learner-focussed approach to identifying and meeting statutory needs, as it is widely recognised that the system could be significantly improved. As part of this pilot work WAG could introduce a new formal element to the process, where the individual learner's views are formally sought and reported upon as part of the needs identification process. This would then be at the front end of the process and the appeal could be made on the grounds that the individual's views were not taken into account. If this were adopted as an approach then there would need to be significant investment in training advocates to be able to elicit preferences and choices from young people, a significant proportion of which have communication difficulties.

It would seem appropriate to build this process into the existing pilot studies in order to test its efficacy and then deliver one coherent piece of legislation that could work in a consistent way. The risk is that the legislation drafted now does not fit with the proposed changes in the overall approach to identifying and meeting statutory needs that will emerge within 2 years.

Are the sections of the proposed measure appropriate in terms of reforming legislation relating to Special Educational Needs appeals? If not, how does the proposed Measure need to change?

In considering this question, consultees may wish to consider, in particular, the nature of the provisions in the proposed Measure that:

local authorities must inform children of their right to appeal (section 4)

Given the differing and sometimes complex nature of additional learning needs that children and young people experience, it is challenging to imagine how this might be done in a consistent way that can be objectively defended under judicial challenge.

Again, there is a case for trialling an approach to doing this and gathering objective evidence as to how it can be properly delivered. Without a clear evidence base to work from, there is a risk of unintended consequences from this legislation. It is important that the full implications of this Measure are assessed in order to avoid any distress and anguish that could be caused if as its full implications were not properly understood.

b) local authorities must make arrangements for partnership and disagreement resolution services and inform children about their rights to access them (sections 5 and 12)

There is a good parent partnership service delivered by SNAP Cymru, however the experience of providing a disagreement resolution service in Wales has proven problematic. The jointly commissioned service provided by 21 local authorities lapsed simply because of lack of uptake by parents. This is another issue that could be tested in the 2 year pilot studies

Given that SNAP is now the parents' service provider then the service for children may need to be commissioned from a new provider in order to secure confidence regarding independence, for all stakeholders. It would be difficult to conceive how one parent's representative could find themselves facing a colleague from the same service who is acting as the child's representative.

Local authorities must provide access to independent advocacy services for children. Advocates will be expected to assist children in resolution processes, appeal/claim case preparation and support or represent them at hearings (Section 6 & 13);

This is consistent with the case being made for change; however this is likely to require significant funding given that all local authorities are facing a marked budgetary shortfall and significant staff reductions. There is also insufficient recognition regarding the current role of the Children and Young People's Partnerships (CYPP) and their role in the provision of advocacy for children and young people. In terms of funding for contractual arrangement for the provision of advocacy, the Measure needs to reflect the current thinking of the Advocacy Development and Performance Unit in the Department for Children, Education, Lifelong Learning and Skills (DCELLS), which is for this to be placed firmly with the CYPPs.

the current regulation making powers in relation to the Tribunal's disability discrimination procedures should be transferred from the Secretary of State for Justice to Welsh Ministers (Section 15); and

It is consistent that wider powers linked to this legislation are passed back to Wales. There is a strong argument to make that in critical areas with substantial financial and human cost implications, piloting and testing processes to inform measured legislation is the way forward.

the responsibility for considering complaints about non-implementation of Disability Discrimination Orders should be transferred from the Secretary of State for Justice to Welsh Ministers (Section 15)

It would be consistent with the response made in d)

there should be an initial pilot and evaluation phase in some local authority areas, before the legislation is implemented throughout Wales (sections 17- 19).

As has been stated throughout this evidence, unless it is properly piloted and tested, the unforeseen consequences for children, young people and their parents and carers will not be understood and accommodated within the legislation. If this Measure is not based on clear evidence, then changes within this complex and often emotionally charged area have the potential to do immense harm. It is also essential that the financial implications of this legislation are fully assessed via pilot areas and also through current work across Wales in this area.

How will the proposed Measure change what organisations do currently and what impact will such changes have, if any?

There is a risk that the legislation focuses upon redress after the process has gone wrong. Fortunately WAG is investing in 2 year pilot studies to put the system right. It needs to include a more formal requirement to secure the child's views in these pilot studies. It is to be commended for piloting a new approach however it is our view that the right of the child to appeal should be developed as part of this piloted system.

What are the potential barriers to implementing the provisions of the proposed Measure (if any) and does the proposed Measure take account of them?

The key question emerges when the parents' views conflict with those of the child. To provide an example, when a parent wants their child sent to a residential school at some distance from their home area. The local authority may oppose this on the basis that it can meet needs in the locality. The child appeals on the grounds that they do not wish to be moved. The appeal would then become one of the child's views against those of the parents. The process then triggers an emotionally charged breakdown in relationship between the child and the parents. In terms of a court it is likely that the child will not be deemed to be 'competent' in law. Who then undertakes the ongoing work with the child and the parents to help to rebuild their relationship? How does this fit with the right of a child to ask to come into care?

Clearly the example illustrates that we need to pilot this approach to help highlight all the potential problems and pitfalls so that any legislation can be robustly framed in order to mitigate against issues such as these.

What are the financial implications of the proposed measure for organisations? In answering this question you may wish to consider Section 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the proposed Measure.

The cost implications are hard to define at this stage. It can be anticipated that there will be a need for a new third party advocacy

service, in addition to the work that is currently underway to provide independent advocacy for children and young people. This would need to be fully funded, with trained and accomplished practitioners who are able to elicit the views of a wide range of children and young people with differing cognitive capability and communication needs. It is important to understand what a challenge it will be to provide a quality service in this arena.

By implication an added layer of potential legal appeal would be added to the process and there would be likely legal costs and additional administrative and significant professional costs in responding to such appeals.

There is concern that another piece of legislation will bring additional duties and potential significant costs to local authorities that are already facing reductions in staff over the next 2 - 3 years.

What are your views on powers in section 18 for Welsh Ministers to amend existing, primary legislation, by secondary legislation (by order) such as the Education Act 1996 and Disability Discrimination Act 1995?

The right of Wales to exercise autonomy in its affairs seems to be a logical step in extending the role of governance from within Wales. However it will be important that with finite and limited resources the Welsh Assembly Government legislate on the basis of well tested and piloted issues with a good provenance of success.

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