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Y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgiliau
Minister for Children, Education, Lifelong Learning and Skills



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref

Ms Eleanor Burnham
Chair
ALN LCO Scrutiny Committee
National Assembly for Wales
Cardiff Bay
CARDIFF
CF99 1NA

23rd October 2007

Dear Eleanor,

Thank you again for inviting me to attend your Scrutiny session on the proposed ALN LCO on Thursday 18 October when I hope that I was able to provide both clarification and confirmation on a number of the outstanding issues that were still exercising your members. I did, also promise to write to you on a number of issues on which I agreed that I would further reflect.

The first was whether travel arrangements for those persons who fall within the scope of the proposed LCO (proposed matter 5.17) could be extended to those who receive higher education. You will be aware that matter 5.10 is the relevant Measure power in respect of travel for those receiving education or training. Matter 5.10 gives the National Assembly for Wales ("NAW") the legislative competence to make Measures that can make provision about the travel of those receiving primary, secondary or further education or training (subject to the exceptions listed in that matter). Matter 5.10 does not extend to those receiving higher education but I will look further at this issue in light of the Committee's report.

Secondly, the Committee asked that I should consider amending the proposed Order so that it explicitly included "communications impairment" in the definition of "disability". In

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responding to this may I start by giving you my assurance, as I sought to do at the Committee on 18 October, that any 'communications impairment' would be covered by the current 5.17 b) definition that we have given on 'physical or mental impairment'. This issue is intrinsically linked to the third issue raised by the Committee, which is the suggestion that the definition of disability be removed entirely from the proposed LCO. I will therefore deal with both of these issues together.

However, before I deal specifically with those issues, I think the Committee would find it helpful if I explained further our thinking as to why the definition provided in the proposed LCO is used. I have already provided quite detailed information on this in my written submission to the Committee of 6 October.

The Committee have clearly recognised that we have not used the same definition as that provided in the Disability Discrimination Act 1995 (DDA). That order provides that in order to be disabled a person must have:

"a physical or mental impairment; and that impairment must have a particular consequence, namely a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities".

I am of the view that if this definition was adopted it would not capture all those that we would wish to be caught. The DDA definition focuses on a person's abilities in relation to 'normal day-to-day activities'. I am concerned that this may leave some doubt as to whether infants with a disability are captured.

The normal day to day activities of an infant tend to be carried out, to a large extent, by or with the assistance of his or her parent or other carer regardless of whether the child has a disability. In other words, in terms of ability to carry out normal day to day activities, child developmental milestones are such that it can often be difficult to see what extra help is given to a disabled as opposed to a non-disabled infant. Accordingly, it is difficult to show that any impairment of the child has a substantial and long-term adverse impact on the child's abilities to carry out normal day to day activities. This is an issue that crops up as a matter of law with reasonable frequency in the admittedly different context of the social security legislation, but in relation to the same underlying point.

For these reasons, we have not adopted the second 'impairment' limb provided for in the DDA. Any subsequent Measure could however, if thought fit, isolate certain categories of

impairment for the purposes of conferring educational benefits. A measure for example could establish a policy for pupils with Autistic Spectrum Disorder (ASD) or those with long term medical needs. By leaving the term 'physical or mental impairment' unqualified, we believe that the courts would look to the World Health Organisation's ("WHO") definition of disability for assistance in interpreting the term (this has been a feature of case law under the DDA and we see no reason why it would not be replicated for our purposes). That definition is as follows:

"any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being"

Unlike the DDA, the approach adopted by the WHO does not refer to "substantial and long-term adverse effect" and "normal day-to-day activities". The courts have interpreted the WHO definition by taking into account the views of recognised experts in the disability field. This means, therefore, that a wider range of individuals are captured under that approach and therefore, the definition used in the proposed LCO would also give a wider scope than the DDA definition.

Given that position, I think it is a fair question to ask why we have not replicated the WHO definition in the proposed LCO. We think that would be unwise because any future Measure would be constrained to that particular definition. Experience has shown us that the understanding and definition of disability is continuously evolving. Therefore we believe that flexibility is required here and it would be better to leave it undefined so that, in the future, it could operate by reference to developments in the understanding of disability.

The above paragraphs will go some way, I think, to explaining why we do not think it is necessary or desirable to insert "communications impairment" into the definition of disability. Inserting "communications impairment" would cast doubt on the generality of the definition we have used – "physical or mental impairment". For the purposes of proposed matter 5.17, communication impairment is a physical impairment and therefore no further definition is required. Inserting "communications impairment" might imply a limitation on the generality of the description currently used in the proposed LCO. An unintended consequence of doing so would be to cast doubt as to whether Measures made under this proposed LCO could make provision for other impairments, such as a sensory impairment

or perhaps in relation to other descriptions of physical and mental impairments that may arise in the future. That would undermine the whole purpose of this proposed LCO and therefore I am minded to keep the general definition that we have used in the current draft.

As a consequence of the perceived issues arising from the use of "physical or mental impairment" as a definition for "disability", you have asked me to consider whether a definition is actually required at all. I believe that a definition is required but that definition should not be too specific. If "disability" were not to be defined in the proposed LCO, then "disability" might give the impression that it encompasses all types of disability. For example, it could encompass financial disability. Dealing with such issues is not the purpose of this proposed LCO in so far as it relates to "disabilities". In deciding on the definition used in the current draft, I have undertaken a balancing exercise in ensuring, on the one hand, that the definition is sufficiently wide to embrace all the issues we wish to deal with including your prime example of 'communications impairment' but, on the other hand, that it is not so wide that it loses sight of the prime objective we are seeking to achieve by introducing this proposed LCO. Subject to any further views that the Committee may have, at the moment I am satisfied that we have struck that balance and that the wording used in the proposed LCO is appropriate.

I hope this is helpful.

A handwritten signature in cursive script, appearing to read "Jane".

JANE HUTT AM
Minister for Children, Education, Lifelong Learning and Skills