

Education Authority
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By email only: EAPlanSpEP@eani.org.uk

18 May 2023

Dear Sir/Madam

Re: EA Plan of Arrangements for Special Educational Provision consultation

Thank you for your email of 3 April 2023 seeking the feedback of our office on the EA Plan of Arrangements for Special Educational Provision ('EA Plan') consultation.

The ICO regulates the Data Protection Act 2018 (DPA 2018), the UK General Data Protection Regulation (UK GDPR) and the Freedom of Information Act 2000 (FOIA), among other pieces of legislation. We are pleased to respond to your consultation and have set out below some feedback on the draft EA Plan relevant to our regulatory remit set out in the aforementioned pieces of legislation:

1. Special Educational Needs (SEN) Register and Medical Register

The EA Plan makes reference to a school needing to maintain both a SEN Register and a Medical Register. It will be important for schools to bear in mind the [data minimisation principle](#) of the UK GDPR when it comes to such Registers, to ensure that only the information needed to be recorded, is recorded.

In addition, the [security principle](#) of the UK GDPR will be of key importance, to ensure that access to such registers is restricted only to those who need to have access to them, and to ensure that all other appropriate technical and organisational measures are in place to ensure the security of the sensitive personal data contained therein. The information contained within such Registers is likely to constitute [special category data](#), as it relates to children with special educational needs and/or specific medical conditions, a category of data subject which is very vulnerable, and as such warrants extra protection.

2. Reporting information

The EA Plan refers to the Department of Education (DoE) requiring “*accurate information about the numbers of children and young people in Northern Ireland with different types of SEN*”. When this information is being compiled by schools for the DoE, it is important that they consider whether individual children can be identified from the information being compiled, for example, by way of jigsaw identification, that is, piecing different bits of information together to create a more complete picture that could potentially result in a child being identified.

It is important to remember that only information which is truly anonymous is not covered by the UK GDPR. Other information which is personal data or pseudonymised data will fall under the UK GDPR. For further guidance on this area, we would direct you to our detailed guidance on [determining personal data](#). We are working to update existing Data Protection Act 1998 guidance to reflect the UK GDPR provisions but, in the meantime, you can refer to our draft [Anonymisation, pseudonymisation and privacy enhancing technologies guidance](#). Please note the guidance is still in draft form as we are in the process of considering feedback following consultation on the draft guidance which closed on 31 December 2022. We hope to be in a position to finalise the guidance and publish same soon.

3. Transparency information for children

We welcome the draft EA Plan setting out that schools must seek the views of the child and involve them in the process of making decisions on how best to meet their needs. As part of this requirement, schools must communicate to the child how their personal data will be used as part of the process. The [ICO's Strategic Plan \(ICO25\)](#) is concerned with ensuring a better understanding of how the personal information of vulnerable individuals is used and accessed, with specific reference to children. One of the objectives outlined in ICO25 is “*to push for improved transparency and use of privacy notices children can understand*”, and both these elements will be crucial in the delivery of the EA Plan.

Schools will need to adhere to the duties and requirements that run alongside the [right to be informed](#) set out within the UK GDPR, to ensure that appropriate privacy information is provided to meet the needs of such children. For all individuals, Article 12 of the UK GDPR requires organisations to provide information to them in a way that is concise, transparent, intelligible, easily accessible, and uses clear and plain language. In relation to children's personal

data, particular care must be taken to ensure that the information provided to them is appropriately written, using clear and plain language that a child would understand.

4. Data sharing

There are data sharing references and inferences throughout the draft EA Plan. It refers to other organisations and professionals being involved in the process of assisting a child with SEN and states that "*GDPR guidelines are adhered to at all times*", which is welcome.

Data protection law enables organisations to share personal data securely, fairly and proportionately. It will be important for all parties engaged in data sharing connected with this draft Plan to bear in mind the ICO's [Data sharing code of practice](#), which goes into more detail on the steps that organisations need to take to share data, while protecting people's privacy.

It will also be important for those organisations to decide whether they should put in place a data sharing agreement. Although they are not mandatory, a data sharing agreement can form a major part of compliance with the [accountability principle](#) of the UK GDPR. Government departments and certain other public bodies may enter into a memorandum of understanding with each other that includes data sharing provisions and fulfils the role of a data sharing agreement. Our data sharing code contains a [section](#) outlining this in more detail, along with helpful templates and checklists.

5. Parental "consent form"

The EA Plan makes reference to various routes of referral concerning the child with SEN, or potentially having SEN. For such referrals, the EA Plan outlines that the parent or carer of the child must complete a "consent form". It will be important to communicate to those parents/carers that 'consent' in terms of the referral does not constitute consent under the UK GDPR, as this is unlikely to be the lawful basis the school is relying on to process the referral. It is important for parents/carers to be aware of this so they are not confused when it comes to which rights they can exercise under data protection legislation, a number of which are dependent on the lawful basis for processing being relied upon.

6. Disagreement on SEN decision

It is possible that a parent and/or carer disagreeing with a SEN decision may seek to rely on some of the rights under data protection legislation as part of this disagreement. It will be important for schools and other bodies involved to be aware of the process to be followed if a parent/carers decides to exercise one or more of the rights under the UK GDPR, and how to deal with the request and the conditions attached to each of the rights.

For example, under Article 16 of the UK GDPR individuals have the right to have inaccurate personal data rectified. However, personal data is only inaccurate if it is incorrect or misleading as to any matter of fact, and not the opinion of a professional in diagnosing a child with SEN. In such cases, the exercise of the right may not therefore lead to the diagnosis being rectified, but it would be good practice for a note to be placed on the relevant systems/records indicating that the parent/carers has challenged the accuracy of the diagnosis, and their reasons for doing so.

In line with our commitments as set out in [ICO25](#), we would be happy to engage with you further as you consider your responses to this consultation and work towards finalising the EA Plan. Should you have any queries in relation to the above, please do not hesitate to get in touch.

Yours sincerely,
Regional Manager
ICO (Northern Ireland)