

## Summary of Alternative Provision Census Background Issues

From January 18, pregnancy, mental and further physical health data, and young offender will be stored on the national named records for children. One of eight reasons will be ascribed to a child, to record their move from mainstream education into Alternative Provision.

Further new additional information are required about individual special educational needs.

These data will be sent to the Department for Education (DfE) for secondary uses, not for a child's direct care at national level. These are not anonymous statistics, but named permanent records and are distributed to third parties today after the AP census data are added to the National Pupil Database.

The Alternative Provision Census is a local authority obligation to provide DfE children's data on a statutory basis<sup>1</sup> and was expanded by a Statutory Instrument<sup>2</sup> that came into effect on September 1, 2017. This year it will be sent to the DfE between 18/01/2018 and 02/03/2018. The census of pupils in Alternative Provision (AP) has been collected at an individual level since 2008 (ten years) but these highly sensitive data are new.

The items collected are listed in Annex A attached to the link to parliamentary question [HL4236](#), however the list does not itemise the new 'SEND' data to be collected, or define the 'reasons for transfer' (as listed in the AP census guidance v1.4 items 1.3)<sup>3</sup> and in the table below.

### Pupil SEN type

Code	Description
SPLD	Specific learning difficulty
MLD	Moderate learning difficulty
SLD	Severe learning difficulty
PMLD	Profound & multiple learning difficulty
SEMH	Social, emotional and mental health
SLCN	Speech, language and communication needs
HI	Hearing impairment
VI	Visual impairment
MSI	Multi-sensory impairment
PD	Physical disability
ASD	Autistic spectrum disorder
OTH	Other difficulty / disorder
NSA	SEN support but no specialist assessment of type of need

### Primary reason for placement

Code	Description
EHC	Setting named on EHC plan
MHN	Mental health need
NEW	New arrival without a school place
OTH	Other
PCC	Pregnancy / childcare
PEX	Permanent exclusion
PHN	Physical health need
YOI	Pupil in young offender institutes / secure training centres

## Who is affected?

In January 2017, there was a reported total of 22,212 children in these settings. This year, every child who has been in AP at any time in the last 364 days will be included, and not only those on the census day itself.

This means each child affected, even if they were in Alternative Provision in April 2017, before the change of law was drafted in June or passed in September 2017, needs to have been told what data about them would be collected, or ascribed, and how it would be used by whom.

<sup>1</sup> HL4236 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-12-15/HL4236/>

<sup>2</sup> SI 807/2017 <http://www.legislation.gov.uk/uksi/2017/807/introduction/made>

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/671404/2018\\_Alternative\\_Provision\\_Census\\_Guide\\_V1.4.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/671404/2018_Alternative_Provision_Census_Guide_V1.4.pdf)

Children are educated outside state place funded schools (e.g. academies or maintained schools) for a number of reasons and in a variety of settings.

This includes, but goes far broader than only excluded children. For example, some children have medical conditions that mean they are educated in a hospital school or at home with one-to-one tuition funded by the local authority; some have Education, Health and Care plans where parents and the local authority have chosen a Non-Maintained Special School as the best place for meeting the child's special educational needs.

## Age range of children from whom data are collected

From 2016-17 personal data from children aged under 2 may now be collected in two additional year groups ('E1' and 'E2') to the codeset: "to provide schools with the functionality to distinguish between the increasing number of two year olds receiving funded early education within schools and 3 and 4 year olds typically recorded in year groups 'N1' 'N2' and 'R'. Therefore the data are from children age 2 -19.

## Key issues as outlined in our letter to the Department for Education

1. **Lack of fair processing and regard for privacy:** inadequate communication to children and families about the new data and its onwards sharing by the DfE. No Local Authority, PRU or AP setting we have asked has informed data subjects about the new reasons for transfer and SEND detail.
2. **Unsafe data: distribution to third parties** of identifying, pupil level data from the National Pupil Database to which these AP data are added.
3. **Data quality.**

Why do children and parents not know that these data are collected and distributed to third parties at pupil level? Children have a right to privacy under the Human Rights Act 1998. The UN Convention on the Rights of the Child Article 12 further says that children and young people have the human right to be involved in decisions about them. Under the Data Protection Act 1998 data controllers (and processors under GDPR) have an obligation to fair and lawful processing.

## Concerns

- Potential harms to children (safeguarding, trust, discrimination, restricting full flourishing, reputational risk).
- Harm through inaccurate data. There is no child or parental involvement or ability to correct error
- Loss of lifetime autonomy, control and integrity of digital identity and its use, and digital footprint
- Cycle of loss of data, without further oversight through loss, theft, and misuse by third parties.

The AP census data are linked to the school census data, in the National Pupil Database according to the NPD User Guide,<sup>4</sup> and from here the linked sensitive identifying pupil data are distributed and linked with further datasets, for example with HMRC and DWP records, to form "destinations data", the LEO dataset.

The data are named and identifiable at pupil-level, *not* anonymous, and stored forever.

The information in a child's national school record includes full name and address, date of birth, special educational needs, results across the educational lifetime from age 2-19 and much more potentially stigmatising data, such as reasons for exclusion, including violence, theft, and sexual misconduct.

The data distributed to third-parties are not anonymous statistics, but individual, identifying data. These data will potentially result in lifelong discrimination, and could harm children's development and restrict their flourishing to reach their full potential; used for direct interventions when linked with data across government, by police and released to other third parties at national level.

We are most concerned that data can be lost, stolen or misused because data are sent out to a wide range

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<sup>4</sup> p8/40 NPD User Guide [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472700/NPD\\_user\\_guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472700/NPD_user_guide.pdf) "New and updated data from the Alternative Provision Census is available in the NPD in June."



of third-party users<sup>5</sup>, rather than the users coming to the data. This process is insecure and without oversight in their own office settings.

Highly sensitive information including special needs data (SEN) have been passed out since 2012 about individuals to commercial companies, charities, think tanks, newspaper and TV journalists without any small number suppression. For example, The Telegraph<sup>6</sup> was given 9 million children's identifying data in 2013, and over 1,000 releases of identifying individual pupil-level data since include BBC Newsnight, The Times, and commercial companies like private tutoring group, Tutor Hunt, and Data consultancies. The government also use the data in the Cabinet Office Troubled Families Programme, and the National Citizen Service, are passed to the Home Office, and have been passed to the police.<sup>7</sup>

## Reasons for our recommendation that the collection is paused

- to give the Local Education Authorities time to tell pupils and parents what is going to happen.
- to give the Department time to put appropriate safeguards in place to make the data safe.  
Note: LEAs could submit statistics without a need to transfer the new data on a named basis.
- Both of these aims are in the best interests of the child.

If the Department of Education will not end the distribution of identifying data for indirect and commercial re-use, and commit to children's confidentiality; we believe the government should not collect the data at all.

## Evidence: Results of FOI sent to every Local Education Authority in England

1. None has any explicit communication to families or children about the new census expansion items.
2. There is also confusion in about one third, that only children in Alternative Provision on Census Day i.e. Jan 18, 2018 will be included whereas it should be retrospective and count any child who has been in AP at any time in the last 364 days.
3. Copies of Privacy impact notices collected from the Local Authorities show that:
  - Fair processing fails. None yet shows the items to be collected and sent to the national database.
  - Privacy notices say little if anything about DfE onward data sharing to third-parties.
  - Some do mention DfE data sharing but without detail, and other sentences suggest no data are shared without consent, or the forms require technology and understanding to follow several links and clicks into DfE national documents, without clear explanation at local level.
  - Further, lack of explanations given to children / families about optional data items such as ethnicity have been communicated in general.

## Parliamentary questions on due diligence and communication to the children

### There was no privacy impact assessment they replied when asked in October, **PQ108570**<sup>8</sup>

*"Conducting a privacy impact assessment is not a legal requirement of the Data Protection Act. The changes to the AP census relate to information already required (and held) by local authorities during the process of commissioning placements in AP and do not require the collection of any additional information by local authorities or AP providers from the individuals. The AP census is a long-standing data collection with established protocols and processes in place for the handling, collection and disclosure of individual level information. As the AP census already collects a range of characteristic information about individuals, these additional items of information (about the same individuals) do not present any new privacy risks over and above those already present so **a formal privacy impact assessment was not completed.**"*

<sup>5</sup> <https://www.gov.uk/government/publications/dfe-external-data-shares>

<sup>6</sup> In a 2013 DfE email the Telegraph newspaper gives "cast iron assurances" not to compare the performance of individual teachers, or publish identifying data of any child, from the multiple years of Tier 2 'identifying and sensitive' pupil data they were given. In effect, the Department outsourced the management of children's privacy to ten journalists, of identifiable SEN, Free School Meals, ethnicity; attainment, school locator and more personal data for millions of children. Freedom of Information requests in 2015 show that the Telegraph had not confirmed it had destroyed the ca. 9 million children's data by the due date. How many exactly is unknown, as the volume of pupils included in distributed historic extracts is not kept. [PQ109113]

<sup>7</sup> Ministerial correction HCWS272 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-11-27/HCWS272/>

<sup>8</sup> <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-18/108570/>



**Government was asked about communications in October 2017 (PQ 108559)** “*what guidance and advice the Department plans to provide for data subjects and their parents on the alternative provision collection of pregnancy, health and mental health data from January 2018; and with and to whom those data will be shared and made accessible?*”

They answered, “*As data controllers in their own right, it is important that local authorities and AP providers collect, process and store all data (not just that collected for the purposes of the Department data collections) in accordance with the relevant data protection regulations. Being transparent and providing accessible information to individuals about how their personal data will be used is a key element of both the Data Protection Act 1998 (DPA) and the upcoming General Data Protection Regulation (GDPR). The most common way to provide this information is via a privacy notice. The Department provides template privacy notices that schools and local authorities can use. However, the notices must be reviewed and amended according to local needs and circumstances. The AP census guidance reminds data providers of their responsibilities in this area and provides links to the template notices.*”

**In December the Department again showed that there was no national communication planned to children by the DfE about the DfE’s new collection, in answer to PQ 120138.**

**An Impact Assessment has not been prepared for this instrument.**

According to the SI Explanatory Notes<sup>9</sup>, “*the legislation falls under statutory exclusions contained in s.27 of the Small Business, Enterprise and Employment Act 2015, because it regulates business activities acting on behalf of a public authority as part of the delivery of public services.*”

There was no public consultation or clear communication to all involved.

## **Failure to fair process the School Census data**

Children in PRU who may be considered out of mainstream school are counted in the school census, not alternative provision census. The sample privacy and data collection notices we have seen in the course of two years of review, that are used to collect children’s personal confidential data in all settings, vary in quality.

Consistently, there is lack of clarity in schools which of these data are optional. None explains the secondary re-use of data explicitly or accurately.

The **DfE privacy template** does not explain this clearly, nor does it list the AP items.

All the named data collected from the termly census and more starting from the Early Years settings for children aged 2 through to age 19, are processed to the National Pupil Database (NPD) and given away to third parties by the Department for Education.

**Our separate research on the School Census privacy notices also shows that this privacy notice fails to reach pupils and parents adequately and therefore does not process data *fairly*, therefore failing to meet the Data Protection Act 1998.**

- School census guide 2016-17 fails to mention commercial, charities and press uses but states that because there is a statutory gateway for collection: “*schools do not need to obtain parental or pupil consent to the provision of information and **it ensures schools are protected from any legal challenge that they are breaching a duty of confidence to pupils.***”
- See our FAQs for more information: <http://defenddigitalme.com/faqs/> and data use case studies.

The **Director General for Regulation at the UK Statistics Authority** wrote to the Department for Education calling for improved transparency and handling in April and there is an ongoing review.<sup>10</sup>

<sup>9</sup> [http://www.legislation.gov.uk/uksi/2017/807/pdfs/uksiem\\_20170807\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/807/pdfs/uksiem_20170807_en.pdf)

<sup>10</sup> <http://defenddigitalme.com/2016/04/director-general-for-regulation-uk-statistics-authority-supports-call-for-transparency-and-better-data-handling-of-20-million-pupils-data/>

In summer 2017, the Office of the Information Commissioner told Department for Education to improve their duty to inform parents of their data protection rights<sup>11</sup> including privacy notices and to make clear which data are collected, how they are transferred and used. We see no effort to do so.

And after data are collected, you cannot find out how your data were used by which external third party the Department has passed the data on to.

In answer to PQ109113 the Department confirmed they do not know how many children's identifying data they have given away in each of over 1,000 identifying releases since 2012, "***The Department does not maintain records of the number of children included in historic data extracts.***"

## Summary asks of what we want to see changed

1. Children and families must be told that the new data will be collected.
2. Children's confidentiality will be respected, ending distribution to third parties of pupil level data.
3. Data will be made safe.<sup>12</sup> Access to the data can be distributed, not the data themselves.

## Detailed recommendations made in December 2017 based on ongoing work

1. Commit to starting a new model of distribution of data access through "safe settings" under research conditions, and to stop distribution of identifying data through other channels.
2. SEN, all exclusion reasons, and the new AP transfer reasons, should only be available at individual pupil-level to external third-parties for secondary uses on a consent basis.
3. Exclusion reasons such as abuse, theft, violence, akin to criminal records, and new AP transfer reasons, should be filtered from distribution for research purposes, and expunged after a standard time period, aligned with the timeframes of the Rehabilitation of Offenders Act 1974.
4. A review of all data collected, to assess its continued necessity and proportionality including retention periods for all sensitive or identifying pupil data.
5. All pupils past and present need to be informed of data uses. Consider a national e-letter.
6. Communications and Information Commissioner scrutiny must be built into any future process.
7. Subject Access requests should be met, to show people what data are held, how their data are used, enable rectification of mistakes to improve data quality and reduce intervention error rate.
8. Consultations on all future data expansions, to make plans open to transparent scrutiny.
9. Privacy Impact Assessments must be standard practice for every expansion or change.

We appreciate and support the important need to understand SEND and reasons behind pupil AP transfers, in particular concerns about children "managed out" from mainstream school to boost league table results. However, the way it is done should not cost any child their confidentiality.

## Action so far with the Department for Education and Timeline of events

We asked the Department to reconsider plans in September<sup>13</sup>, when the law was changed and sent a letter to the Department and Information Commissioner at that time.

Representatives of over 20 NGOs, charities, academics, and advocates of child rights or privacy, supported our letter asking for change sent to Justine Greening. We wrote again in January, to the Rt Hon Damien Hinds, after the change of Secretary of State for Education.

On Census Day, the Department is yet to respond the collective letter(s).

For more information link to timeline: <http://defenddigitalme.com/timeline-alternative-provision/>

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<sup>11</sup> <https://schoolsweek.co.uk/information-commissioner-cracks-down-on-pupil-nationality-data-collection/>

<sup>12</sup> A safe data model has been in discussion for over two years along lines of 5 safes [http://rsss.cass.anu.edu.au/sites/default/files/rsss/Ritchie\\_5safes.pdf](http://rsss.cass.anu.edu.au/sites/default/files/rsss/Ritchie_5safes.pdf)

<sup>13</sup> [http://defenddigitalme.com/wp-content/uploads/2017/11/DDM\\_Letter\\_DFE\\_SEN\\_redacted-2.pdf](http://defenddigitalme.com/wp-content/uploads/2017/11/DDM_Letter_DFE_SEN_redacted-2.pdf)

