

# **Education (Additional Support for Learning) (Scotland) Act 2004 (as amended)**

**Extending Children's Rights – Guidance  
on the assessment of capacity and  
consideration of wellbeing**

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## **Chapter One Introduction**

### **Introduction**

- 1 In Scotland children who have attained 12 years of age are now empowered by the extension of their rights in respect of additional support for learning in school education. Children now broadly have similar rights to parents<sup>1</sup> and young people for their additional support needs. The extension to children's rights is accompanied by safeguards in the form of assessments of capacity and consideration of impact on a child's wellbeing.

### **The purpose of this guidance**

- 2 The purpose of this guidance is to provide education authorities and schools with non-statutory guidance and information on the new rights of eligible children. Eligible child is used throughout, to refer to a child in school education who has attained the age of 12 but not 16, and who has been assessed as having capacity (sufficient maturity and understanding) to exercise their rights, under the Education (Additional Support for Learning) (Scotland) Act 2004 as amended, and that the education authority (or Tribunal) considers the wellbeing of the child would not be adversely affected by the child exercising their rights.
- 3 The guidance includes advice on assessing capacity of children, aged 12 to 15 to exercise their rights in respect of additional support for learning in school education. The guidance also provides information for considering the impact on a child's wellbeing when exercising these rights. This guidance complements that which is provided in the statutory guidance on the Additional Support for Learning (Scotland) Act 2004, the *Supporting Children's Learning Code of Practice*, which was updated in 2017 to take into account the extension of children's rights.
- 4 In this context, there are important differences for decisions about capacity compared to those for young people, (aged 16 and over in school education) or adults within services including education, social care or health services. This guidance does not provide advice in relation to capacity of young people in relation to the Additional Support for Learning (Scotland) Act 2004. Young people aged 16 and over and who have remained in education, have presumed capacity. Please see the *Supporting Children's Learning Code of Practice* for further information on this issue.

### **Who is this guidance for?**

- 5 This guidance is primarily for staff in education authorities and schools including:
  - Officials in education authorities with responsibilities for additional support for learning, and educational psychologists who work directly with, or advise schools about children and young people with additional support needs.
  - Headteachers of primary, secondary and special schools.
  - Support for learning teachers, centrally or school-based, at primary or secondary stages who act as the lead professional for children with additional support needs.
  - Primary teachers at P7 stages, or teachers in special schools and pastoral care and guidance teachers in secondary schools, who are the key individuals that know the child well in their school education.

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<sup>1</sup> The term "parent" refers to the definition defined in the (Additional Support for Learning) (Scotland) Act 2004, as having the same meaning as in the Education (Scotland) Act 1980 ("the 1980 Act"), and includes "guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of, a child or young person."

- Support staff in schools who provide support to pupils with additional support needs.
  - Those who work with looked after children, young carers and other pupils whose parents may not be able to act on their behalf.
- 6 Those in independent or grant-aided schools, health boards, social work services and voluntary services or agencies, who are providing help to education authorities to fulfil their functions under the Act, may also contribute and provide supporting evidence to schools and education authorities, in these assessments and considerations.

## Chapter Two Children's Rights

### Background

7 Scottish Ministers have set the ambition that Scotland is the best place to grow up and bring up children. This ambition requires a positive culture towards children. One where children are welcomed and nurtured. One where we all are alert to their needs and look out for them. Where children are listened to, where their views are heard and their rights protected. They should be respected as people in their own right, with rights to a life that allows them to fulfil their potential.

### Legislation

8 Parents and young people were given new rights under the Education (Additional Support for Learning) (Scotland) Act 2004 ("the Act"). The Act also includes children's rights to have their views taken account of, in relation to certain decisions that affect them, this remains the case. Children's rights in education in Scotland were extended by the Education (Scotland) Act 2016, which amended the Act. Eligible children now have rights in respect of additional support for learning in their own regard.

9 In practice, families will require to consider who will use their rights, in the circumstances that rights are being prepared to be used. It is not intended that eligible children and their parents can use their rights on the same issue at the same time, or indeed consequentially (to overturn the earlier effect). It is therefore essential that a decision is taken about whether the eligible child's rights will be used, or the parent's rights will be used in each circumstance. An agreement should be reached about whose rights should be used, particularly in the circumstances where there is disagreement between the eligible child and their parent.

10 Under the Act, as amended, eligible children now have rights to:

- request that the education authority establish whether they have additional support needs.
- receive advice and information about their additional support needs.
- request, **at any time**, a specific type of assessment and/or examination for the purpose of considering their additional support needs, as well as when the education authority propose to establish whether the child has additional support needs, or requires a co-ordinated support plan (or where a plan is being reviewed).
- agree that information can be shared about them with other agencies to support transition planning
- have their views sought and taken into account as part of the process of mediation.
- make use of dispute resolution arrangements for matters about additional support needs that are specified in regulations<sup>2</sup> – generally matters not eligible to be considered by the First-Tier Tribunal's Health and Education Chamber<sup>3</sup>, although the use of these arrangements does not affect any entitlement to refer any competent matter to a Tribunal.

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<sup>2</sup> Dispute resolution is used here to mean specifically the arrangements outlined in The Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005 (as amended).

<http://www.legislation.gov.uk/ssi/2005/501/contents/made> Further information can be found in chapter 8 of The Supporting Children's Learning Code of Practice, 'Resolving Disagreements.'

<sup>3</sup> The Additional Support Needs Tribunals for Scotland is expected to transfer into the Scottish Tribunals in January 2018.

- be informed of the outcome of requests under the Act, reasons why a request is refused and any applicable rights to have a decision reviewed, for example, through dispute resolution, or referred to a Tribunal.
- request that the education authority establish whether they need a co-ordinated support plan, or to review an existing plan.
- receive a copy of the co-ordinated support plan, and any amended plan, be asked for their views and have them taken into account and noted in the co-ordinated support plan.
- refer to the Tribunal specified matters relating to co-ordinated support plans, and failures by an education authority in relation to their duties regarding school to post-school transitions.
- have a supporter with them, or an advocate to present their case at any meeting with the school or education authority, in connection with the exercise of the education authority's functions under the Act, and at Tribunal hearings.
- have access to a free legal representation in Tribunal proceedings.
- have access to a support service for children that provides advice, and information, advocacy services, legal representation and a service to have their views taken independently.

Rights that parents and young people have within the Act that are not extended to children include:

- to request the use of mediation services.
- to make a placing request to the education authority (or appeal that decision to the Tribunal).

## Preliminary matters

11 In order to exercise their rights, a child must inform the education authority that they wish to do so. The Act requires that requests are made in writing, or another permanent form, and are able to be referred back to. In writing, includes the use of email or other electronic communication. Other permanent forms may include video and audio recording.

## New rights subject to safeguards

12 The extension of these rights to eligible children is subject to safeguards. The safeguards take the form of an assessment of capacity and a consideration of whether there would be an adverse impact on the wellbeing of an individual child. These assessments require an evidence-based decision to be made, in relation to both of these aspects. Education authorities have to be satisfied that the child has the capacity to carry out such actions, under the additional support for learning legislation, and these assessments will be used to decide on a child's capacity, as well as whether exercising such rights will have an adverse impact on their wellbeing. Parents and children should be involved and informed about the assessments carried out by schools (or, as the case may be, the Tribunal). Annex A includes some case studies of examples, when exercising children's rights, assessing capacity and considering wellbeing.

13 The Scottish Government views this extension of rights as becoming part of the day-to-day work of schools. This approach should not lead to increased bureaucracy, a paper filing exercise, or checklist approach that increases pressures on staff.

## **Ensuring active participation of children in realising their rights and securing their wellbeing**

- 14 Curriculum for Excellence and Getting it right for every child place the child at the centre for purposes of school education and services for children. Getting it right for every child recognises the rights of children and young people, focuses on developing and supporting wellbeing, and builds on the good practice evident in services across Scotland. In order for their progress in wellbeing and successes in gaining the four capacities of Curriculum for Excellence, children need to be active participants in the learning and development in our schools. Their active participation is just as important in making decisions about identification, assessment and provision for additional support for learning provision. Participation in decisions about their rights will prepare them for choices and changes in school education and beyond into post-school life.
- 15 The active participation of children can be supported by the Children and Young People's Commissioner for Scotland's resource, 7 Golden Rules for Participation. (See resources section)

### **Sources of support for children, young people (aged 16 and over), parents and carers**

- 16 Young people aged 16 and over with additional support needs and parents of children who have additional support needs can access further information through the Scottish advice service for additional support for learning, [Enquire](#).
- 17 Eligible children can be supported to use their rights by the Children's Support Service, which will provide; advice, advocacy, legal representation and a service to independently seek children's views. The service is intended to support children to prepare for their use of a right and to understand the outcome of the use of their rights, and their parents use of their rights where appropriate. The service will be in place for the commencement of the requirements of the Act in January 2018.
- 18 Education authorities are required to provide a range of information about additional support for learning services via their own websites and publications, including school handbooks. In addition, education authorities are required to have a named individual from whom children, young people and parents and carers can seek information about additional support for learning. Enquire provide an [online resource](#) which draws this information together for all authorities.

## **Chapter Three Assessment of Capacity**

### **Assessment of capacity and particular rights**

- 19 The new rights for children are subject to safeguards in the form of an assessment of capacity and a consideration of adverse impact on wellbeing of an individual child. Capacity, is defined broadly in the Act, as a child having “sufficient maturity and understanding”. This is different from adults and young people, who are presumed to have capacity, unless assessed as lacking capacity.
- 20 As indicated in paragraph 12, education authorities are required to assess the capacity of children who wish to use their rights. Education authority staff including teachers are best placed to decide on a child’s capacity, as they work with and know the child well. They will, as a result of their skills, experience and understanding of the needs of the child, be able to consider and provide evidence as to whether or not a child has capacity, in relation to the specific rights that the child is proposing to use.
- 21 Importantly, there is not a single decision on the child’s capacity which applies to all of the rights within the Act. It relates to the particular right which the child is proposing to use, at the time they are proposing to use it. Therefore, the child’s maturity and understanding to use their rights should be assessed for the particular right they are seeking to exercise at a given time. **The decision about the child’s capacity in relation to the use of one right should not be used to reach a conclusion in relation to any other right, within the Additional Support for Learning Act, or considerations of capacity under other legislative frameworks.** When carrying out an assessment of a child’s maturity and understanding, the education authority can take into account the following factors. This information is not exhaustive, and the child and those working and living with the child may use any evidence they consider appropriate to establish maturity and understanding:
- **the child’s age and stage:** to exercise their rights, a child will have attained 12 years of age whether at primary or secondary stages.
  - **sufficient maturity:** a child’s maturity will be evidenced by progress within health and wellbeing and its key features of healthy living and relationships, and in approaches to personal planning, assessing risk and decision making.
  - **sufficient understanding:** the **skills and experiences<sup>4</sup>** that children have gained as part of their learning, whilst working towards curricular levels, (including those at Curriculum level 2 and 3) can be used as evidence of whether the child will have sufficient understanding to exercise their rights.
  - **support from an adult who knows the child well.** The assessment by the teacher and school staff (whether in primary, secondary or special school) who knows the child, will be based on a wide variety of sources of evidence, including observing day-to-day learning, learning conversations and/or planned periodic holistic assessment. Those working closely with the child will have knowledge of whether the child is likely to have understanding, given their experiences of working with the child concerned, and whether any supports or adjustments which have previously

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<sup>4</sup> [https://education.gov.scot/scottish-education-system/policy-for-scottish-education/policy-drivers/cfe-\(building-from-the-statement-appendix-incl-btc1-5\)/Experiences%20and%20outcomes](https://education.gov.scot/scottish-education-system/policy-for-scottish-education/policy-drivers/cfe-(building-from-the-statement-appendix-incl-btc1-5)/Experiences%20and%20outcomes) Curriculum for Excellence Experience and Outcomes

been made to support the child, will also be required in relation to their use of their rights.

- 22 Brought together, information from these sources will provide a rounded picture of the child's experiences and skills which will form a rounded picture of evidence to support the education authority's decision on capacity.
- 23 The *Supporting Children's Learning Code of Practice* (Third Edition) 2017 sets out the questions which should be used to decide capacity in each of the areas where new rights are enacted. The assessment of capacity is in the context of the particular right a child is exercising. When assessing whether a child has sufficient maturity and understanding, the following relevant questions are useful. For ease of understanding these are set out below:

**Does the child have sufficient maturity and understanding to carry out an action (i.e. to act to use the right)?**

**Where that particular right is in relation to making a decision – does the child have sufficient maturity and understanding to:**

- make the decision,
- communicate the decision,
- understand the decision and its implications for themselves, and
- retain the memory of the decision?

**In relation to rights relating to advice and information, or a co-ordinated support plan, does the child have sufficient maturity and understanding to understand the information, advice or plan?**

**In relation to rights to express their views does the child have sufficient maturity and understanding to express the view?**

- 24 It is not intended that every question should be answered. The choice of question to be used will be informed by the right which the child wishes to use (i.e. if the child (aged 14) wishes to exercise their right to consent to information being shared as part of post-school transition planning – this is a decision and the second question would be used). Only questions which directly relate to the use of the right the child is planning to use should be used (i.e. in the example above, the first question would not be used, as there is no 'action' associated with the decision (the education authority officer would share the information not the child themselves)).
- 25 Taking such factors into account and by answering the relevant questions, in almost all instances, those working with the child, e.g. the class teacher, pastoral care staff or support teacher, will have sufficient robust evidence to assess the child's maturity and understanding to exercise a particular right in context, and to inform the process of decision making. It is not intended that this should be a bureaucratic exercise, it is intended to confirm what is already known about the child. In the rare circumstances where there is not a clear conclusion, or it is not felt that sufficient information is available to reach a conclusion, the assessment could be supported through the advice and guidance of education authority officials, such as an educational psychologist.
- 26 It is recognised that Looked After Children who have recently moved placement may not be well known by their school. Information to support decision making should be drawn from information which is known about the child, from their child's plan, and from those who know them well outside of school, for example, their social worker.

## **Further support through quality assurance and moderation**

27 As described above, there is a wide range of assessment information which will support those working in schools and education authorities in reaching conclusions, as to whether or not a child has capacity and sufficient maturity and understanding. However, it is recognised that in a very few instances and with specific circumstances, perhaps where a child has not had similar experiences, i.e. they may have made decisions before, but not decisions of the same type or requiring the same preparation, there may continue to be challenges in reaching a conclusion on a child's capacity to exercise a particular right. Schools can develop approaches to quality assurance, moderation of such decisions, and recording and reporting on their assessment activities. In these circumstances, a specific assessment<sup>5</sup> by education colleagues, including education authority officials, may provide further clarification on the decision.

### **Timescales for decision**

28 There is no timescale set in statute for these decisions to be completed. As this decision is made in relation to a child who in almost all cases will already be known to the education authority through its schools, this decision should be able to be made quickly. It is not intended that a child's wish to use their rights should be unnecessarily delayed. If a clear decision is not able to be reached quickly, the decision to take additional support to reach a decision must be made expeditiously.

### **Decision on capacity**

29 When an education authority reaches a decision on whether or not a child has capacity they must inform the child and their parent or carer of their conclusions, as soon as reasonably practicable after the decision is reached.

30 In the circumstances where the child or their parent does not agree with the outcome of these considerations, they may refer this to the Tribunal for consideration. Where it is considered that the child is not considered to have capacity and there is adverse impact on wellbeing, the education authority (and the child) may not carry out the right.

### **Where a decision is reached that a child does not have capacity**

31 In the circumstances where a child does not have sufficient maturity and understanding as described above, they would be considered to lack capacity in relation to that (or those) rights. Where it is assessed that the child lacks sufficient maturity and understanding to exercise that right, the education authority (and the child) may not exercise the right. Children's maturity and understanding will change, and/or progress over time, and education authorities will take account of such changes towards capacity and adverse impact and wellbeing, as children make further progress within Curriculum for Excellence. Further information can be found in chapter 5, 'Assessment of Change in Circumstances.'

### **Capacity of young people**

32 A young person aged 16 or over in school education would be considered to lack capacity to use a right, only if they do not have sufficient understanding to use it. There

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<sup>5</sup>The Education (Additional Support for Learning) Act 2004 (as amended) allows for parents to request a 'specific assessment'. That is a specific type of assessment for example a child psychiatry assessment, and educational psychologist's assessment. Although in the context referred to above this would not be asked for by a parent (as it is the education authority who is assessing capacity), the term has been used as it has the same meaning as that requirement. Further information is available in Chapter 3 (Meeting Additional Support Needs) of the *Supporting Children's Learning Code of Practice* (2017), available from 20 December 2017.

is no requirement to consider whether there may be adverse impact on wellbeing in relation to young people.

## Capacity and communication needs

33 A child or young person should not be treated as lacking capacity because of a communication need, which can be overcome by human, electronic or mechanical aid (whether of an interpretive nature or otherwise).

### **Case study – assessment of capacity – communication needs (see paragraph 33) and decision making**

Eilidh is 15 and attends a special school. She is making good progress in her broad general education and is experiencing learning in some experiences and outcomes at Second level. She does not attain and achieve the outcomes at this level, though she has attained a few outcomes in literacy and numeracy at First level. Eilidh has communication needs and uses a voice output aid that helps her communicate. Eilidh, her parents and her teachers are skilled at communicating through the vocal aid.

Eilidh's parents have been invited to a review to inform Eilidh's senior phase options and continue post-school transition planning. Eilidh's parents let her know about the review. Eilidh tells them that she wants to attend the meeting and be part of the discussion. As part of that discussion Eilidh will have to decide whether she wishes information about her to be shared with other agencies to support transition planning.

The education authority assess whether Eilidh has the capacity to make the decision on information being shared about her, including communicating the decision. They conclude that as she routinely uses a communication aid this will be the case in this discussion also, and that she is able to satisfy all of the criteria on decision making (see paragraph 23 for questions). The authority also consider whether Eilidh making the decision would have an adverse impact on her wellbeing. Having considered evidence against safe, healthy, achieving, nurtured, active, respected, responsible, and included, they conclude that there will be no adverse impact on her wellbeing as a result of making the decision. The authority email both Eilidh and her parents with the outcome of their decision and consideration.

At the review meeting they all discuss whether Eilidh is likely to leave or stay on at school, and her thoughts about her plans post-school. In the meeting, Eilidh indicates that she wants to stay on at school for her final year and then to go to college. It is agreed that Eilidh will stay in school for her final year and that transition planning will now focus on preparing Eilidh for college. As part of this, Eilidh is asked whether she agrees to information being shared about her with social work services and the college she plans to attend to support planning. Eilidh makes the decision that she is content for the education authority to share information with those other agencies in order to support planning. The education authority transitions officer gets in touch with social work services, and the college to consider support for Eilidh whilst she is at college, and the planning process then continues.

## **Chapter Four Consideration of Adverse Impact on Wellbeing**

34 When a child requests to exercise a particular right, the Act also requires education authorities to assess the child's capacity and **consider** any potential adverse impact on wellbeing that the use of the particular right may cause. It is expected that education authorities' consideration will be informed by the knowledge and experiences of the child which is known by those who work most closely with them. This will allow a range of perspectives and information to be taken into account in reaching a rounded, evidence based, decision about any potential adverse impact to the child's wellbeing as a result of using a particular right.

### **Communicating about assessment of capacity and consideration of adverse impact of wellbeing taking place**

35 The authority must inform the child and the parent of the child that an assessment is to take place, undertake the assessments and reach a conclusion on those matters. This must be undertaken prior to the right being used.

36 For example, where a child requests that there is a review of their co-ordinated support plan, the assessment of capacity and consideration of adverse impact on wellbeing should be carried out, prior to any review being undertaken in response to the child's request. Where the request is made, the authority must notify the child's parents of the request to review the co-ordinated support plan, and inform the child's parents of their intention to reach a conclusion on the capacity, and any adverse impact on wellbeing of the request.

### **Consideration of adverse impact on a child's wellbeing**

37 An education authority is to be satisfied that in exercising their rights, children will not experience any adverse impact on their wellbeing. The child's wellbeing is described by the wellbeing indicators in Getting it right for every child and focuses on the child being: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included. These have been incorporated into the Act for this purpose. Further detail on what is meant by each of the indicators is available from <http://www.gov.scot/Topics/People/Young-People/gettingitright/wellbeing>. This understanding will support full consideration of the potential impact of using the right, in order to establish whether that impact is likely to be adverse.

38 When considering adverse impact on a child's wellbeing using wellbeing indicators, when exercising their rights, an education authority can take into account the following factors:

- consider the impact on the child's health and wellbeing as part of Curriculum for Excellence, where their progress is assessed as the child is developing the knowledge and understanding skills, attributes and capabilities, which they need for mental, emotional, social and physical wellbeing.
- consider any adverse impact on the indicators of wellbeing, a variety of assessment tools can be helpful including for example:
- the Getting it right for every child interactive guide <http://www.gov.scot/Resource/0044/00446438.pdf>
- support from an adult who knows the child well. The consideration of the teacher and school staff who know the child, will be based on a wide variety of sources of evidence including: observing day-to-day learning, learning conversations and/or planned periodic holistic assessment.

- For children who are on the child protection register, the [National Guidance on Child Protection \(2014\)](#) will also support consideration of adverse impact on wellbeing.
- Taking such factors into account, in almost all instances the class teacher, pastoral care staff or support teacher, will be able to consider any adverse impact of a child exercising their rights. Teachers will discuss with the child, to consider whether there would be any adverse impact of them exercising particular rights. In a few instances, the assessment could be supported through the advice and guidance of education authority officials, such as an educational psychologist and through other agencies involved in supporting wellbeing. It is recognised that Looked After Children who have recently moved placement may not be well known by their school. Information to support decision making should be drawn from information which is known about the child from their child's plan, and from those who know them well outside of school, for example, their social worker.

### **Timescales for decision**

39 There is no timescale set in statute for these decisions to be completed. As this decision is made in relation to a child who in almost all cases will already be known to the education authority through its schools, this decision should be able to be made quickly. It is not intended that a child's wish to use their rights should be unnecessarily delayed. If a clear decision is not able to be reached quickly, the decision to take additional support to reach a decision must be made expeditiously.

### **Decision on whether there may be adverse impact on wellbeing**

- 40 When an education authority reaches a decision on whether or not a child using their rights may have an adverse impact on wellbeing, they must inform the child and their parent or carer of their conclusions, as soon as reasonably practicable, after the decision is reached.
- 41 In the circumstances where the child or their parent does not agree with the outcome of these considerations, they may refer this to the Tribunal for consideration. Where it is decided that the child is not considered to have capacity and/or there is adverse impact on wellbeing, the education authority (and the child) may not carry out the right.

### **Assessment of capacity and adverse impact on wellbeing further advice**

#### **Principles of assessment of capacity (maturity and understanding) of children aged 12-15 years of age in respect of additional support needs in school education in Scotland**

- 42 In carrying out duties and responsibilities, staff should give consideration to the following principles: (as well as the factors in chapter 3)
- Assess using a wide variety of sources.
  - Ensure active participation of child in realising their rights, and secure their wellbeing.
  - Involve and inform parents. Further information can be found in chapter 7 (working with children and families) of the *Supporting Children's Learning Code of Practice*.
  - Quality assure and moderate practice within and across schools.

#### **Assess using a wide variety of sources**

- 43 Evidence of progress and achievement will come from a variety of sources including:
- observing day-to-day learning within the classroom or working area;

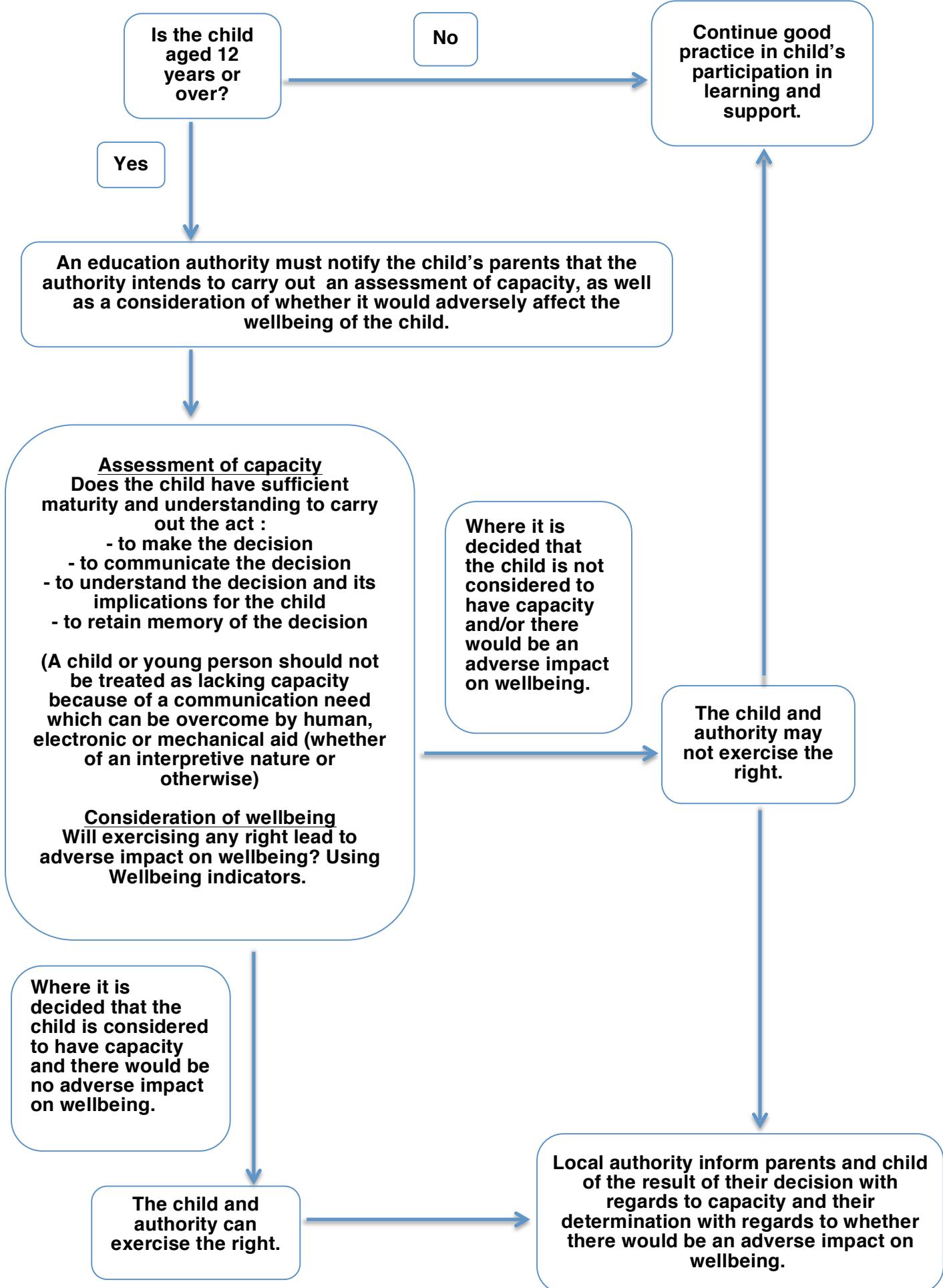
- observation and feedback from learning activities that takes place in other environments, for example, outdoors, on work placements;
- coursework, including tests;
- learning conversations;
- planned periodic holistic assessment; and will
- avoid over bureaucratic processes.

44 Learning in health and wellbeing ensures that children and young people develop the knowledge and understanding, skills, attributes and capabilities, which they need for mental, emotional, social and physical wellbeing, now and in the future. Wellbeing is one of the key outcomes of *Curriculum for Excellence*. Assessment in health and wellbeing has to take account of the breadth and purpose of the wide range of learning experiences of children and young people in this curriculum area.

45 Children's progress and achievement in many aspects of health and wellbeing will depend upon the stage of growth, development and maturity of the individual, upon social issues and upon the community context. From the early years through to the senior stages, children's and young people's progress will be seen in how well they are developing and applying their knowledge, understanding and skills in, for example, key features of healthy living and relationships and in approaches to personal planning, assessing risk and decision making.

46 Assessment in health and wellbeing should also link with other areas of the curriculum, within and beyond the classroom, offering children and young people opportunities to apply their knowledge and skills in more complex, demanding or unfamiliar learning or social contexts. (See examples of wellbeing indicators on page 12 and resources section page 21).

## Extending Children's Rights: a flow chart on assessing capacity and wellbeing, when a child wishes to exercise a right



## **Chapter Five Assessment of Change in Circumstances**

### **Assessing capacity and adverse impact on wellbeing when similar matters have recently been considered**

47 Where a child has requested to exercise their rights within a short period of time after an earlier request to use a similar right, an education authority will assess whether there has been any significant change in circumstances of the child, since the request was made. This assessment will take into account the following factors:

- time elapsed since request was made, usually there will be little time elapsed between a request to exercise a right and the use of the right, in other instances the time elapsed may be a significant factor,
- consideration of any changes in the child's circumstances, in the key barriers to learning:
  - learning environment
  - health and disability
  - social and emotional factors
  - family circumstances
- ensure active participation of the child in decision-making,
- support from an adult who knows the child well. The assessment of the teacher who knows the child will be based on a wide variety of sources of evidence including observing day-to-day learning, learning conversations and/or planned periodic holistic assessment,
- involve and inform parents, good communication with parents and carers will lead to everyone being updated about significant changes.

### **Notifying the conclusions of considerations on capacity and adverse impact on wellbeing**

48 The child and their parents or carers must be informed of the conclusions of these considerations. In the circumstances where the child or their parent does not agree with the outcome of these considerations, they may refer this to the Tribunal for consideration. Where it is decided that the child is not considered to have capacity and/or there is adverse impact on wellbeing, the education authority (and the child) may not carry out the right.

## **Annex A Case Studies**

### **A request for identification of additional support needs and support with outcomes.**

#### **Gary**

Gary is 12 years of age and has recently started at his new secondary school. At primary school, he was achieving well in line with expectations and in secondary, he is now making progress towards attaining outcomes at Third Level, across many of the curriculum areas and in literacy and numeracy. His primary school report specifically mentions his maturity within lessons and his ability to understand challenging problems. After several weeks in secondary school, Gary had his settling in interview with his form tutor, Calum. During the settling in interview, Gary shared with Calum that he was finding it hard to concentrate in lessons, particularly when faced with writing tasks and wasn't managing to complete them all on time. He had asked the class co-operative teacher for some support in English. He asked if he could be assessed for dyslexia, as he said other children in his class got support for their dyslexia. Gary emails this request to Calum.

Following his request, Calum informs Gary's parents that he has requested to use this right, and that he will assess his capacity and any adverse impact on wellbeing. Calum assessed that Gary was mature and showed good understanding, based on evidence from his coursework, and the information from his primary school and from their discussions. Calum considers whether Gary has capacity (sufficient maturity and understanding see chapter 3) to make the request for, and to undertake, the assessment (to act). Calum also considers whether the request of assessment, or the process of assessment, would have an adverse impact on Gary. He discusses this with Gary and concludes that there would be no adverse impact. Gary has indicated he would welcome advocacy support from the Children's Service, to help him to understand the outcome of that assessment. Calum emails Gary and his parents, to inform them of the outcome of the assessment of capacity and considerations on potential adverse impact on wellbeing. Calum then asks his learning support colleagues to assess Gary for dyslexia. He also makes a referral for Gary to receive support from the children's service.

### **Request for consideration of a co-ordinated support plan for a Looked After Child.**

#### **Leeanne**

Leeanne has been receiving additional support for autism. Due to a significant change in circumstances, Leeanne has recently become looked after, and is now living in a residential unit. She attends the local secondary school and is aged 15. Due to her rapid change in circumstances, Leeanne has indicated that she needs more support at school. She has spoken with her Care Worker, who says to Leeanne that she should request that a coordinated support plan (CSP) be prepared, as she is autistic and looked after.

Leeanne speaks to the Principal Teacher of support for learning, Daniel, and says her Care Worker says she should have a CSP. Leeanne says that she thinks she should have a CSP and emails the Principal Teacher to ask to be assessed for this. The Principal Teacher has been working closely with Leeanne, to build her ability to manage her support needs and to support her during her change in circumstances, and knows her very well as a result. Following Leeanne's request, her Principal Teacher informs her Care Worker that that she has requested to use this right, and that he will assess her capacity and any adverse impact on wellbeing.

Leeanne's Principal Teacher views her as having good understanding generally, in terms of comprehension, and also in understanding her own needs. This has been evidenced through various conversations in the last 6 months, and so he concludes that she has capacity, in relation to her decision to request a CSP (to act). He also considers whether there is any potential adverse impact on Leeanne's wellbeing, as a result of making the request. He considers that the circumstances which have led Leeanne to become looked after are very sensitive and may impact on her sense of being nurtured, as the preparation of the information to support the request would revisit those issues. However, on balance, he feels that Leeanne has been very well supported by her Care Worker throughout, to understand her circumstances, and that this would continue. He also considers that instead of an adverse affect, there is possible benefit to Leeanne, of being able to make the request herself, in terms of the Included wellbeing indicator. As a result, on balance, he concludes that she has capacity and that there would be no adverse impact on wellbeing. He informs Leeanne's Care Worker of the outcome of his considerations.

He then passes Leeanne's request to the educational psychology team, along with the information that he has to support her request, including the views that she has expressed to him. The Educational Psychologist responds, indicating that the assessment will go ahead as requested, but that the authority will take the lead in arranging it, in line with their responsibilities to assess whether or not, looked after children require additional support and a co-ordinated support plan.

### **Request for a review of a co-ordinated support plan, where there is adverse impact on wellbeing.**

#### **John**

John is 13 and has complex additional support needs which require significant support from education and another agency, in this case, health. John's co-ordinated support plan (CSP), details that he should receive weekly speech and language therapy, provided by his classroom assistant, in line with advice and guidance provide by speech and language therapy services. Progress should be reviewed termly, by the allocated speech and language therapist. John has been making progress in his learning and his pronunciation of words has improved over time. John has recently had a significant disagreement with his classroom assistant and no longer wants to work with her on speech and language tasks. John has emailed the education authority officer named on his CSP, to request a review of the CSP, with a view to removing the requirement to provide speech and language therapy.

The education officer recognises that she must assess John's capacity to request the review of the CSP and any potential adverse impact on his wellbeing arising from that request. In order to make these assessments, she requests information from John's parents, school, teachers, and support staff .

#### **Capacity**

When considering John's capacity, the education officer must consider whether John has sufficient maturity and understanding to make this request. The information from John's school indicates that they believe, based on his skills and experiences in learning, his ability to deal with complex problems, and to overcome challenges, that he has capacity to make this request.

## Wellbeing

All of the wellbeing indicators are considered by the school and they conclude that John's request to review his CSP is likely to have an adverse impact on his wellbeing, as reduction or removal of speech and language therapy, would potentially affect his learning outcomes. Taking all of the information into account the education officer's decision is that whilst John has capacity, there would be adverse impact on wellbeing related to the indicator of achievement. John and his parents are informed of this decision, the result of which is that John is unable to exercise this particular right at this time.

John's parents believe that John should be able to exercise his rights as he wishes. They agree with the education authority's decision on capacity, but disagree with their conclusion on adverse impact on wellbeing. They support John to make a reference to the Tribunal to challenge the education authority's conclusion, in relation to adverse impact on wellbeing (under section 18(3)(eb)).

John is supported to make his reference using legal representation services, provided as part of the children's service.

## The Tribunal

The Tribunal considers the reference using a Convener sitting alone. She first, as a preliminary matter, considers the written evidence in relation to John's capacity and decides that no further evidence is required. She determines that John has capacity to make the reference. She considers whether there would be an adverse impact on John's wellbeing as a **result of making the reference** to the Tribunal. She assesses the written evidence and considers John's views, which are set out in a report to the Tribunal by his independent advocate and determines that there will be no adverse impact on John's wellbeing, as a result of making the reference.

The Convener then considers the subject matter of the reference. The Convener considers the reasons for the decision of the education authority and reviews the written evidence provided to her by both parties (John's legal representative and the education authority). Her conclusion, based on the balance of the evidence presented, is that the decision of the education authority is confirmed.

She notifies John's legal representative and the education authority of the decision. This confirms that John is unable to exercise his right to review the co-ordinated support plan at this time. The Convener notes in her decision, that John may benefit from the support of advocacy services provided by the Children's Service, to understand and come to terms with this decision.

## **Request for independent adjudication - conclusion that there is not capacity and there is adverse impact on wellbeing.**

## Omar

Omar is 12 years old and has social, emotional and behavioural needs. He is in first year at his local secondary school. Omar was adopted from an orphanage overseas at age 4. It is known that he has experienced trauma, but the details of this are not fully known. Omar can have difficulty concentrating and at times, regulating his own behaviour. He can respond impulsively if challenged. Omar spends 6 hours per week, spread across 4 days, in the Support for Learning base within the school, to ensure that he is able to focus on and complete learning tasks. He checks in with support staff on the day which he doesn't

attend the base, and he can attend the base at any time if needed, to support both positive relationships with classmates and behaviours in class. On the whole, Omar is progressing well with his learning.

Omar has asked for extra time in the base. Following his request, his parents are advised that he has requested to use this right, and that an assessment of capacity and a consideration of wellbeing will be carried out. This has been declined by the school, as it would affect his ability to attend a wide range of curricular subjects and would narrow the breadth of his learning. It was felt, on balance, that he is making good progress across subjects and that the focus on this approach should be sustained. Omar and his parents are advised of the decision.

Omar has decided that he would like to make an application for independent adjudication, to challenge this decision (under [2\(a\) of the specified matters](#)). He lets his Form Tutor know that he wants to do this by email. Following his request, his parents are advised that he has requested to use this right, and that an assessment of capacity and a consideration of wellbeing will be carried out. In order to support the education authority's decision on Omar's capacity to make that request (to act), his Form Tutor gathers evidence from colleagues, including support for learning staff. He is confident that he will be able to evidence that Omar would have the understanding to make the request, but there is concern that he may not have the maturity to do so, and so he seeks specific information on this also. As a result of the information he receives from colleagues, he is able to conclude that Omar does not have sufficient maturity, at this time, to make the request. He therefore concludes that Omar does not have capacity.

Omar's Form Tutor then considers whether making the application for independent adjudication would have an adverse impact on wellbeing. It is considered that the only area where there would be any concern regarding adverse impact on wellbeing, is in relation to the safe wellbeing indicator. While there is no risk to Omar, the need for him to prepare biographical information about himself and his needs, as part of his evidence to support his independent adjudication application, may cause him to revisit some very difficult past events, which may undermine his current sense of safety, albeit temporarily. Therefore, the decision is reached that there would be adverse impact on Omar's wellbeing.

Omar and his parents are informed of these decisions by the education authority. Omar and his family have a discussion as a result, and it is decided that instead, Omar's parents will pursue the independent adjudication application, in relation to Omar's support.

## **Annex B Resources**

### **Resources in support of Children's Rights and assessment of capacity and wellbeing**

#### **Children's Rights**

#### **Enquire's webpages**

Enquire is the Scottish advice service for additional support for learning.

<http://enquire.org.uk>

Their REACH website offers information and advice to children and young people on their rights.

<https://reach.scot>

#### **Children and Young People's Commissioner Scotland**

The Children and Young People's Commissioner Scotland website has information on participation and education, and their 7 Golden Rules for participation.

<https://www.cypcs.org.uk/education> <https://www.cypcs.org.uk/education/golden-rules>

#### **Rights Respecting Schools Awards**

UNICEF works with schools in the UK to create safe and inspiring places to learn. UNICEF's Rights Respecting Schools Award embeds these values in daily school life and gives children the best chance to lead happy, healthy lives and to be responsible, active citizens.

<https://www.unicef.org/rights-respecting-schools/>

#### **It's About Ability**

This child-friendly UNICEF publication explains the United Nations Convention on the Rights of Persons with Disabilities. Its main purpose is to empower children, with and without disabilities, to play their part in challenging discrimination and promoting the Convention's principles.

[https://www.unicef.org/publications/index\\_43893.html](https://www.unicef.org/publications/index_43893.html)

#### **Assessment of wellbeing**

#### **Getting it right for every child interactive guide**

The guide gives staff a clear understanding of wellbeing and demonstrates the links between wellbeing and the teaching and learning process. It provides tools in the form of wellbeing wheels to gauge the level of wellbeing.

<http://www.gov.scot/Resource/0044/00446438.pdf>

#### **National Guidance on Child Protection 2014**

<http://www.gov.scot/Publications/2014/05/3052/0>

## Other helpful resources

### **The Supporting Children's Learning Code of Practice (Third Edition) 2017**

<http://www.gov.scot/ISBN/9781788515177>

### **Autism toolbox**

Autism toolbox provides helpful approaches to supporting communication.

<http://www.autismtoolbox.co.uk/supporting-pupils/communication/>

### **Supporting Learners and Families – Dyslexia toolkit**

<http://addressingdyslexia.org/supporting-learners-and-families>

### **Intandem**

Intandem provides mentors for children aged between 8-14 years who are looked after by their local authority, but living at home.

<https://www.inspiringscotland.org.uk/what-we-do/thematic-funds/intandem/>

### **Centre for excellence for looked after children in Scotland- CELCIS**

<https://www.celcis.org/>

### **Who Cares? Scotland**

Who Cares? Scotland is a national voluntary organisation, working with care experienced young people and care leavers across Scotland.

<https://www.whocaresscotland.org/>

### **Parental Involvement Act**

<http://www.gov.scot/Publications/2006/09/08094112/0>

### **Getting It Right For Looked After Children And Young People Strategy**

<http://www.gov.scot/Publications/2015/11/2344/0>

### **Looked After Children's Rights**

<http://www.gov.scot/Publications/2014/04/9542/0>

### **Young Carers**

<https://carers.org/country/carers-trust-scotland>

### **Skills Development Scotland (SDS)**

SDS support pupils, parents and teachers with a range of career information advice and guidance (CIAG) services. Their interactive school services table provides an overview of the support on offer from Primary 5 through to S6. <https://www.skillsdevelopmentscotland.co.uk>

### **Scottish Independent Advocacy Alliance publications**

<https://www.siaa.org.uk/publications>



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