



GUIDANCE TO TRIBUNAL MEMBERS No 02/2018

CAPACITY AND WELLBEING

Purpose of this Guidance

1. The purpose of this guidance is to clarify the approach to be taken by a tribunal when considering the two tests of 'capacity' and 'wellbeing', which are set out in section 3 of the Education (Additional Support for Learning) (Scotland) Act 2004.

Meanings

2. In this guidance these words have the following meanings:

the Tribunal	the Additional Support Needs jurisdiction of the Health and Education Chamber of the First-tier Tribunal for Scotland
a tribunal	the three people who will consider a claim or reference and make a decision – one will be a legal member who is an experienced lawyer and the other two are specialist members, with expertise in education, social work or health. Occasionally a tribunal will be made up of one legal member, sitting alone
2004 Act	Education (Additional Support for Learning) (Scotland) Act 2004, as amended
the 2018 Rules	The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)
Code of Practice	Supporting Children's Learning, Statutory Guidance on the Education (Additional Support for Learning) (Scotland) Act (as amended) Code of Practice (Third Edition) 2017
Guidance on Capacity and Wellbeing	Education (Additional Support for Learning) (Scotland) Act 2004 (as amended); Extending Children's Rights – Guidance on the assessment of capacity and consideration of wellbeing (2017)
UN CRC	United Nations Convention on the Rights of the Child
UN CRPD	United Nations Convention on the Rights of Persons with Disabilities

CSP
child

Co-ordinated support plan
for the purposes of this Guidance, this means a child aged
12 to 15 years

Guidance to Tribunal Members No 01/2018: the views of the child

3. This guidance is to be read alongside Guidance to Tribunal Members No 01/2018: the views of the child, which sets out the range of ways in which a tribunal may hear the views of the child.
4. A tribunal has a duty to seek the views of the child¹.

Guidance to Tribunal Members No 03/2018: independent advocacy

5. This guidance is to be read alongside Guidance to Tribunal Members No 03/2018: independent advocacy, which explains the role of independent advocacy in tribunal proceedings.

UN CRC

6. The CRC is the most complete statement of children's rights ever produced and is the most widely-ratified international human rights treaty. Wherever possible, this guidance is to read in a way which is compatible with the terms of the CRC.
7. Article 12 of the CRC is of particular importance. Article 12 requires that every child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, their views being given due weight in accordance with their age and maturity.
8. Article 12.2 requires that children are entitled to be heard in any judicial proceedings affecting them, which include our Tribunal proceedings, either directly, or through a representative or an appropriate body.

UN CRPD

9. The CRPD places a greater emphasis on supported decision making and in maximising autonomy for disabled persons. Wherever possible, this Guidance is to be read in a way which is compatible with the terms of the CRPD.
10. Article 7 is of particular importance. Article 7 requires provision of age-appropriate assistance to children with disabilities. Article 7.3 requires that children with disabilities have the right to express their views freely on all matters

¹The 2018 Rules, rule 44

affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children. In order to realise that right, children with disabilities should be provided with disability and age-appropriate assistance.

9. This guidance does not apply to those aged 16 years and above; however, members should have regard to Article 12 (Equal recognition before the law) for assistance when deciding capacity, given that the 2004 Act does not have a 'best interests' test.
10. Article 12.3 requires appropriate measures to be taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity and to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.

Rights extended to children aged 12 to 15 years

8. From 12 January 2018, the 2004 Act will extend rights to children aged 12 to 15 years where they have the capacity to exercise the right and where the wellbeing of the child would not be adversely affected by exercising those rights. A child may access a range of rights in relation to their education authority. In addition, they have the right to make two types of reference to the Tribunal:
 - an appeal against the decision of the education authority on their assessment of the child's capacity² or wellbeing³ - a 'non-CSP reference'.
 - a reference in relation to a CSP – a 'CSP reference'.

10. Where the child raises the reference, the child is the appellant. The child is entitled to enter the process as a party with the same range of rights as the respondent.

Capacity: sections 3 and 3(A) of the 2004 Act

11. Section 3 provides that a child has capacity:
 - to **carry out an act**⁴ if the child has sufficient maturity and understanding to carry out the act

² s. 18 (3)(ea)

³ s. 18 (3)(eb)

⁴ s. 3(1)(a)

- to be provided with **information, advice or CSP**⁵ by an education authority if the child has sufficient maturity and understanding to understand the information, advice or the CSP
- to **express a view**⁶ if the child has sufficient maturity and understanding to express the view.
- to make a **decision**⁷ if the child has sufficient maturity and understanding to make the decision, to communicate the decision, to understand the decision and the implications for the child, and to retain the memory of the decision.

12. It may not always be a simple task to identify which of the section 3 rights the child is seeking to exercise. For example, what is a decision and what is an act? If it is the former, the four-part test in section 3(1)(b) is triggered. Where there is a dispute, a tribunal will have to determine which capacity test is engaged.

Wellbeing: section 3B

13. A child's wellbeing is assessed by reference to the extent to which the child is or would be:

- Safe,
- Healthy,
- Achieving,
- Nurtured,
- Active,
- Respected,
- Responsible, and
- Included.

14. The Guidance on Capacity and Wellbeing suggests that consideration is made of the impact on the child's health and wellbeing as part of the Curriculum for Excellence and signposts a variety of assessment tools which can be helpful including the *Getting it right for every child* interactive guide⁸.

⁵ s. 3(1)(c)

⁶ s. 3(1)(d)

⁷ s. 3(1)(b)

⁸ chapter 4, paragraph 38

Non-CSP reference

Assessment of capacity and wellbeing by an education authority

15. Each time a child seeks to exercise a right under the 2004 Act (which is not a right to make a reference to the Tribunal) the education authority must complete an assessment of the child's capacity and wellbeing.
16. The Guidance on Capacity and Wellbeing emphasises the need for the education authority to reach evidence-based decisions⁹.
17. Where the child or his/her parent disagrees with the decision of the education authority, the child or his/her parent may make a non-CSP type reference to the Tribunal.

Tribunal procedure: legal member sitting alone

18. There is provision within the 2018 Rules for a legal member to sit alone when hearing an appeal against the decision of the education authority on its assessment of the child's capacity or wellbeing¹⁰. This provides for the efficient hearing of the reference in keeping with the Tribunal's overriding objective¹¹.
19. There is provision for the reference to be decided on the written evidence, without the need for an oral hearing¹².

Written evidence

20. Where the reference is an appeal against the education authority's decision on the child's capacity or wellbeing, the education authority will be expected to provide a tribunal with the following:
 - ✓ A summary report which provides a **pen picture** of the child.
 - ✓ A summary report, which sets out the **steps taken** by the education authority to reach their decision on the child's capacity and/or wellbeing. The summary report should identify:
 - how the child was involved in the assessment;
 - any communication barriers and what steps have been taken to overcome these;

⁹ see chapter 3 (capacity) and chapter 4 (wellbeing)

¹⁰ The 2018 Rules, rule 23

¹¹ The 2018 Rules, rule 2

¹² The 2018 Rules, rule 37(2)(f)

- how the rights, will and preferences of the child have been considered;
 - those involved in making the assessment, their position/qualifications and their level of contact with and knowledge of the child.
- ✓ **Any expert report** the education authority has instructed in relation to the assessment.
 - ✓ **Any other material** which is relevant to the particular right the child is seeking to exercise under section 3.
21. Where the child is the party and represented by the Children's Service or another representative, the child's representative will be expected to provide the following:
- ✓ **A statement** setting out the reasons why the child does not agree with the education authority's decision. This statement can be provided in a range of ways, as described in other guidance.
 - ✓ **Any expert report** instructed by the child.
 - ✓ **Any other material** which is relevant to the particular right the child is seeking to exercise under section 3.
22. Where the child is the party and unrepresented, the legal member will remind the child of his/her right to representation during the case conference call and, where necessary, adjourn the case conference call to allow the child to seek representation. Where a child nevertheless does not wish to have representation, the legal member will make inquiries with the child to identify responses to those matters set out in paragraph 20 above, taking any additional steps as necessary, which may include instructing a report from an independent advocate.

CSP reference

Tribunal procedure

23. A CSP reference will be heard by a tribunal panel. The question of capacity and wellbeing will be addressed as a preliminary matter to determine if the reference is competent. The legal member shall, during the case conference call, identify any steps which require to be taken in advance of a preliminary hearing, to ensure that this hearing can proceed with efficiency.
24. Where there is no dispute between the parties on the child's capacity and wellbeing, it is unlikely that the preliminary hearing will be contentious or lengthy,

although the tribunal will require to be independently satisfied that both tests are met.

The preliminary hearing

25. Where there is no dispute between the parties, it should be possible to determine the child's capacity and wellbeing on the written evidence and without the need for an oral hearing.

26. Where an oral preliminary hearing is fixed, the President shall be informed.

Assessment of capacity by a tribunal

27. A tribunal shall assess the child's level of maturity and current understanding in relation to the specific right the child seeks to exercise.

28. 'Sufficient maturity and understanding' as a concept is not age specific.

For example, a care experienced child aged 12 years, who has a history of caring for her younger siblings due to parental neglect, may have a greater degree of maturity and understanding than a 15 year old child, who has not had similar life experiences and responsibilities.

29. A child may be described as having a particular intellectual age, but this does not necessarily mean this particular age applies to everything.

For example, a child may be described as having an intellectual age of 9 years. She may not have the capacity to understand the concept of a CSP but she may understand that there is a document that has some impact on how her education is delivered. She may have a particular preference for additional hours of support in the classroom from her pupil support assistant. In these circumstances, the child may have the capacity to express a view on the content of her CSP.

30. Capacity is not a static concept. A child may lack capacity to exercise certain rights, but hold capacity to exercise others. Capacity must be measured in relation to the particular child and the exercise of the particular right at the particular time. There is no single formulation to assess a child's capacity against the range of rights within the 2004 Act.

31. The Mental Welfare Commission for Scotland recommends a functional approach when determining capacity to make a decision¹³. This focuses on whether an

¹³ Consent to Treatment, A guide for mental health practitioners - Mental Welfare Commission for Scotland
<http://www.healthscotland.com/documents/2306.aspx>

individual is able to make the particular decision at the particular time when the decision has to be made. Tribunal members should have regard to this definition when considering the meaning of capacity, but they are not bound by it.

For example, a child may not have the capacity to make a decision in relation to the making or review of their CSP, but he may have the capacity to express a view with regard some or all of the educational objectives within the CSP. An example of this could include a request that the input of his speech and language therapist is extended.

32. When considering the child's capacity a tribunal shall consider¹⁴:

- the child's age¹⁵ and stage of learning
- the child's practical understanding of the particular right he/she is seeking to exercise
- the extent to which the child appears to understand the consequences of exercising the particular right at the particular time
- the child's progress within the context of the Curriculum for Excellence and its key features of healthy living and relationships, approaches to personal planning, assessing risk and decision making
- the child's level of achievement and ability to understand core learning in relation to literacy and numeracy
- the views of the child in relation to the particular right
- the views of the child's parent in relation to the particular right
- the views of the child's class teacher, support teacher or pastoral teacher who knows the child well
- the views of an educational psychologist where one has been engaged

Overcoming barriers

33. A child is not to be treated as lacking capacity by reason only of a lack or deficiency in a faculty of communication, if that lack or deficiency can be made

¹⁴ See also Code of Practice and the section entitled 'Rights of Children who have capacity', from paragraph 18 onwards

¹⁵ A child who is 12 years of age and in primary education is still able to exercise rights under the 2004 Act.

good by human, electronic or mechanical aid (whether of an interpretative nature or otherwise)¹⁶.

The views of the child

34. In all types of reference, whether or not the child is a party, a tribunal will have regard to its statutory duty to seek the views of the child, to the relevant range of Tribunal guidance, to the Code of Practice, to the Guidance on Capacity and Wellbeing and to all relevant international conventions.
35. The threshold for obtaining the views of a child engaged in Tribunal proceedings is low, and every effort should be made to overcome any barriers to this. A tribunal must distinguish between a lack of ability to express a view, and a lack of capacity to exercise a right; and where it is the former, to take all necessary steps to facilitate and support the child to express their view.

For example, a 13 year old boy who wishes to attend an oral hearing, who is non-verbal but who communicates using his mobile phone as a text/communication aid should be supported at the hearing to express his views. This should be done by him being given adequate time to respond to any questions and to make any comments he wishes to make during the course of a hearing. One member of a tribunal, or the legal member where s/he is sitting alone, will confirm understanding by repeating what is set out in each text.

36. It is a matter for each individual tribunal to determine the weight to be attached to the views of the child when determining questions of capacity and wellbeing.

May Dunsmuir
President
January 2018

¹⁶ s.3(3)