

Changes to legislation: Education (Scotland) Act 2016 is up to date with all changes known to be in force on or before 29 May 2023. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

SCHEDULE

(introduced by section 19)

MODIFICATIONS OF THE EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) ACT 2004

- 1 The Education (Additional Support for Learning) (Scotland) Act 2004 is amended as follows.

Commencement Information

II Sch. para. 1 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 2 For section 3 (children and young persons who lack capacity) substitute—

“3 Children and young persons: capacity

- (1) For the purposes of this Act, a child has capacity—
- (a) in relation to an act that may be carried out by the child under a provision of this Act, if the child has sufficient maturity and understanding to carry out the act,
 - (b) in relation to a decision of the child mentioned in a provision of this Act, if the child has sufficient maturity and understanding—
 - (i) to make the decision,
 - (ii) to communicate the decision,
 - (iii) to understand the decision and its implications for the child, and
 - (iv) to retain the memory of the decision,
 - (c) in relation to the provision, under a provision of this Act, of any information, advice or co-ordinated support plan by an education authority to the child, if the child has sufficient maturity and understanding to understand the information, advice or (as the case may be) plan,
 - (d) in relation to any view of the child mentioned in this Act, if the child has sufficient maturity and understanding to express the view;
- and any references in this Act to a child who lacks capacity are to be read accordingly.
- (2) For the purposes of this Act, a young person lacks capacity to do something if the young person does not have sufficient understanding to do it.
- (3) But a child or young person 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 good by human, electronic or mechanical aid (whether of an interpretive nature or otherwise).”

Commencement Information

I2 Sch. para. 2 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 3 After section 3 insert—

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“3A Children: assessment of capacity, etc.

- (1) Subsection (3) applies where, under a provision of this Act—
 - (a) a child who has attained the age of 12 years may do something only if an education authority is satisfied that the child has capacity in relation to the thing,
 - (b) an education authority may or must do something in relation to such a child only if the authority is satisfied that the child has capacity for the thing to be done in relation to the child,
 - (c) a child may do something in relation to an education authority only if the authority is satisfied that the child does not lack capacity in relation to the thing, or
 - (d) an education authority may or must do something in relation to a child only if the authority is satisfied that the child does not lack capacity in relation to the thing.
- (2) Before a child does a thing as mentioned in subsection (1)(a) or (c), the child must notify the education authority that he or she proposes to do the thing.
- (3) Before the child or (as the case may be) education authority does the thing, the education authority must—
 - (a) carry out an assessment of the capacity of the child to do the thing, or have the thing done in relation to the child, and
 - (b) consider whether it would adversely affect the wellbeing of the child to do the thing or have the thing done in relation to the child.
- (4) Subsection (5) applies where an education authority, having complied with its duties under subsection (3), is satisfied that—
 - (a) the child lacks capacity to do the thing or have the thing done in relation to the child, or
 - (b) it would adversely affect the wellbeing of the child to do the thing or have the thing done in relation to the child.
- (5) The child or (as the case may be) education authority may not do the thing in question.
- (6) Where an education authority is notified by a child under subsection (2) that the child proposes to do the thing mentioned in that subsection, the education authority must—
 - (a) notify the child's parents that the authority intends to—
 - (i) carry out an assessment of the child's capacity to do the thing, and
 - (ii) consider whether it would adversely affect the wellbeing of the child to do the thing, and
 - (b) notify the child and the child's parents of—
 - (i) the result of the assessment, and
 - (ii) the authority's determination as to whether it would adversely affect the wellbeing of the child to do the thing.

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3B Assessment of wellbeing

- (1) Subsection (2) applies where, by virtue of this Act, an education authority or Tribunal is required to consider whether the wellbeing of a child who has attained the age of 12 years would, or would not, be adversely affected.
- (2) The authority or, as the case may be, Tribunal is to consider the matter by reference to the extent to which the child is or would be—
 - safe,
 - healthy,
 - achieving,
 - nurtured,
 - active,
 - respected,
 - responsible, and
 - included.
- (3) The Scottish Ministers may by regulations modify the list in subsection (2) so as to amend, remove or add to the matters for the time being mentioned in the list.
- (4) Before making any regulations under subsection (3), the Scottish Ministers must consult such persons as they consider appropriate.

3C Rights of parents of children aged 12 or over

- (1) Subsection (2) applies where—
 - (a) a right is conferred under this Act on a child who has attained the age of 12 years,
 - (b) the right is one that is also exercisable by the parents of the child,
 - (c) the child—
 - (i) does not wish to exercise the right, and
 - (ii) does not wish the child's parents to exercise it, and
 - (d) the parents of the child do wish to exercise the right.
- (2) The parents of the child may exercise the right.”.

Commencement Information

I3 Sch. para. 3 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 4 In section 6 (children and young persons for whom education authority is responsible)—
- (a) after subsection (3)(a) insert—
 - “(aa) in the case of a child who has attained the age of 12 years and who the authority is satisfied has capacity to make the request, the child,”, and
 - (b) in subsection (4)—
 - (i) the words “the person who made the request of that fact” become paragraph (a) of that subsection, and

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- (ii) after that paragraph insert “, and
 - (b) where that person is a child falling within subsection (3)(aa), the child's parent of that fact.”.

Commencement Information

I4 Sch. para. 4 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 5 In section 7 (children and young persons for whose school education an education authority is not responsible)—
- (a) after subsection (3)(a) insert—
 - “(aa) in the case of a child who has attained the age of 12 years and who the authority is satisfied has capacity to make the request, the child,”,
 - (b) in subsection (8), after paragraph (a) insert—
 - “(aa) in the case of a child falling within subsection (3)(aa) who the authority is satisfied has capacity in relation to the information or advice, the child,”, and
 - (c) after subsection (8) insert—
 - “(9) Subsection (10) applies where an education authority receives a request as mentioned in subsection (1) relating to a child attending an independent or grant-aided school.
 - (10) The authority may request the managers of the school to provide the authority with such information and advice as the authority thinks appropriate for the purpose of enabling the authority to assess the capacity of the child in relation to the request.”.

Commencement Information

I5 Sch. para. 5 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 6 In section 8 (assessments and examinations)—
- (a) after subsection (2)(b)(i) insert—
 - “(ia) where the proposal relates to a child who has attained the age of 12 years, the child,”, and
 - (b) after subsection (2) insert—
 - “(2A) But a child who has attained the age of 12 years is an appropriate person for the purposes of subsection (2) only if—
 - (a) in a case where paragraph (a) of that subsection applies—
 - (i) the authority is satisfied that there has been no significant change in the circumstances of the child since the request mentioned in that paragraph was made, or
 - (ii) where the authority is not so satisfied, the authority is satisfied that the child has capacity to make the request referred to in subsection (1)(b) at the time that request is made,

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- (b) in any other case, the authority is satisfied that the child has capacity to make the request referred to in that subsection.”.

Commencement Information

I6 Sch. para. 6 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 7 In section 8A (assessments and examinations: further provision), after subsection (3)(a) insert—
- “(aa) where the request relates to a child who has attained the age of 12 years and who the authority is satisfied has capacity to make the request, the child.”.

Commencement Information

I7 Sch. para. 7 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 8 In section 9 (duty to prepare co-ordinated support plans), in subsection (2)(d)—
- (a) in sub-paragraph (i), after “parent” insert “ can obtain advice and further information ”,
- (b) after that sub-paragraph insert—
- “(ia) in the case of a plan prepared following a request mentioned in section 6(2), 7(2)(a) or 10(4) for a child who has attained the age of 12 and who the authority is satisfied has capacity in relation to advice or further information from the officer, the child can obtain such advice and information.”,
- (c) in sub-paragraph (ii), after “parent” insert “ can obtain such advice and information ”, and
- (d) the words “can obtain advice and further information” are repealed.

Commencement Information

I8 Sch. para. 8 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 9 In section 10 (reviews of co-ordinated support plans), after subsection (5)(a) insert—
- “(aa) in the case of a co-ordinated support plan prepared for a child who has attained the age of 12 years and who the authority is satisfied has capacity to make the request, the child.”.

Commencement Information

I9 Sch. para. 9 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 10 In section 11 (co-ordinated support plans: further provision)—
- (a) in subsection (3), after paragraph (a) insert—
- “(aa) where the proposal—
- (i) arises as a result of a request mentioned in section 6(2), 7(2)(a) or 10(4), and

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- (ii) relates to a child who has attained the age of 12 years,
- the child,” and
- (b) in subsection (5), after paragraph (a)(i) insert—
 - “(ia) in the case of a child who has attained the age of 12 years, to the child (but only if the plan was prepared or amended following a request mentioned in section 6(2), 7(2)(a) or 10(4) made by the child),”.

Commencement Information

I10 Sch. para. 10 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 11 In section 12 (duties to seek and take account of information)—
 - (a) in subsection (2)(b)(i), for “to express” substitute “ in relation to ”, and
 - (b) in subsection (6)(b)(i), for “to express” substitute “ in relation to ”.

Commencement Information

I11 Sch. para. 11 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 12 In section 13 (provision of information etc. on occurrence of certain events)—
 - (a) in subsection (4A), for “to express” substitute “ in relation to such ”, and
 - (b) in subsection (5)—
 - (i) before paragraph (a) insert—
 - “(za) in the case of a child who has attained the age of 12 years and who the authority is satisfied has capacity to give consent, the child,”, and
 - (ii) in paragraph (a), for “a” substitute “ any other ”.

Commencement Information

I12 Sch. para. 12 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 13 In section 14 (supporters and advocacy), in subsection (2), after paragraph (a) insert—
 - “(aa) in the case of a child who has attained the age of 12 years and who the authority is satisfied has capacity in relation to discussions or representations as mentioned in subsection (1), the child,”.

Commencement Information

I13 Sch. para. 13 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 14 In section 15 (mediation services), after subsection (1) insert—
 - “(1A) In making arrangements under subsection (1) for the provision of mediation services in respect of a matter that is the subject of a disagreement (or potential disagreement) between an education authority and the parents of

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a child, the authority must seek and take account of the views of the child in respect of the matter.”.

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I14 Sch. para. 14 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 15 In section 16 (dispute resolution)—
- (a) in subsection (1), after paragraph (a) insert—
 - “(aa) any child who has attained the age of 12 years and who the authority is satisfied has capacity as respects views or decisions relating to the purposes of resolving such disputes,”; and
 - (b) in subsection (3), after the word “parent”, where it occurs in each of paragraphs (a) and (b), insert “, child”.

Commencement Information

I15 Sch. para. 15 in force at 1.8.2017 by S.S.I. 2017/164, reg. 2, sch.

- 16 In section 18 (references to Tribunal)—
- (a) in subsection (2), after paragraph (a) insert—
 - “(aa) where the decision, failure or information relates to a child mentioned in subsection (2A), the child,”;
 - (b) after subsection (2) insert—
 - “(2A) The child is a child who has attained the age of 12 years and—
 - (a) who the Tribunal is satisfied has capacity to make the reference, and
 - (b) whose wellbeing would, in the opinion of the Tribunal, not be adversely affected were the child to make the reference.”;
 - (c) after subsection (3)(e) insert—
 - “(ea) a decision of an education authority in relation to the capacity of a child who has attained the age of 12 years to exercise a right under this Act,
 - (eb) a decision of an education authority that it is, or is not, satisfied as respects a matter relating to the wellbeing of such a child,”; and
 - (d) after subsection (7) insert—
 - “(8) For the purposes of subsection (7), it is irrelevant whether the further reference, and the last reference, mentioned in that subsection relate to the same or to different specified schools (which expression is to be construed in accordance with paragraph 2(3) of schedule 2).
 - (9) Nothing in subsection (7) prevents a further reference being made during the period mentioned in that subsection if the last reference so mentioned is, by virtue of rules under paragraph 11 of schedule 1, withdrawn before any hearing by a Tribunal in relation to the last reference is held.

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- (10) But where a further reference is made in the circumstances mentioned in subsection (9), the President may, if satisfied that there is good reason to do so, decide that the reference is not to proceed to consideration by a Tribunal.
- (11) Subsection (7) applies in relation to a decision referred to in subsection (3)(ea) or (eb) as it applies in relation to a decision referred to in subsection (3)(da) or (e); but only where any further reference would relate to—
- (a) the same right as mentioned in subsection (3)(ea) as the last such reference relates to, or
 - (b) the same matter as mentioned in subsection (3)(eb) as the last such reference relates to.”.

Commencement Information

I16 Sch. para. 16 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 17 In section 19 (powers of Tribunal in relation to reference), in subsection (2), for “or (d)(iv)” substitute “, (d)(iv), (ea) or (eb)”.

Commencement Information

I17 Sch. para. 17 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 18 In section 26 (publication of information by education authority)—
- (a) in subsection (2)(f)—
 - (i) the word “and” immediately following sub-paragraph (i) is repealed, and
 - (ii) after that sub-paragraph insert—
 - “(ia) children having additional support needs and who have attained the age of 12 years, and”, and
 - (b) in subsection (2A), after paragraph (a) insert—
 - “(aa) in the case of such a child who has attained the age of 12 years, the child.”.

Commencement Information

I18 Sch. para. 18 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 19 In section 27 (code of practice and directions), in subsection (2), after paragraph (d) insert—
- “(da) the carrying out of assessments under paragraph (a) of subsection (3) of section 3A,
 - (db) the consideration of whether something would adversely affect the wellbeing of a child as mentioned in paragraph (b) of that subsection,
 - (dc) the assessment of whether there has been a significant change in the circumstances of a child as mentioned in section 8(2A)(a),”.

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Commencement Information

I19 Sch. para. 19 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

20 In section 27A (collection of data on additional support needs), for subsection (1) substitute—

“(1) The Scottish Ministers must each year collect from each education authority such information as is specified in regulations made by the Scottish Ministers relating to children and young persons having additional support needs for whose school education the authority is responsible.

(1A) Before making regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.”.

Commencement Information

I20 Sch. para. 20 in force at 1.1.2017 for specified purposes by S.S.I. 2016/386, reg. 2, sch.

I21 Sch. para. 20 in force at 10.1.2018 in so far as not already in force by S.S.I. 2017/354, reg. 2(a)

21 In section 29 (interpretation)—

(a) in subsection (1), after the definition of “Tribunal” insert—

““young person” means a person who—

(a) is aged 16 years or over,

(b) is a pupil at a school, and

(c) has, since attaining the age of 16 years or over, remained a pupil at that or another school.”, and

(b) in subsection (2), the words ““young person”” are repealed.

Commencement Information

I22 Sch. para. 21 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

22 In section 31 (duty to inform in writing or alternative permanent form), after the word “parent”—

(a) where it first occurs, insert “ , child who has attained the age of 12 years ”, and

(b) where it second occurs, insert “ , child ”.

Commencement Information

I23 Sch. para. 22 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

23 After section 31 insert—

“31A Provision of support service

(1) The Scottish Ministers must secure the provision of a support service to be available, on request and free of charge, to children who have attained the age of 12 years and—

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- (a) who wish to exercise, or are considering exercising, relevant rights, or
 - (b) whose parents wish to exercise, or are considering exercising, relevant rights.
- (2) In this section, “a support service” means a service under which—
- (a) advice (including legal advice), assistance and information in relation to relevant rights are provided to children mentioned in subsection (1),
 - (b) a person is provided to be present at any discussions with an education authority in relation to the relevant rights of such a child for the purpose of supporting the child (where the child wishes such a person to be present),
 - (c) a person is provided to conduct such discussions (or any part of them), or make representations to an education authority, on behalf of such a child (where the child wishes such a person to be provided), and
 - (d) an advocacy service (within the meaning of subsection (3) of section 14A) is provided to such children (the reference in that subsection to persons mentioned in subsection (2) being read as if such children were mentioned in that subsection).
- (3) Subsection (4) applies where—
- (a) a child, or parent, as mentioned in subsection (1) wishes to exercise, or is considering exercising, relevant rights, or
 - (b) some other thing is done, or proposed to be done, under this Act by or in relation to such a child.
- (4) Any person providing a support service under this section may seek the views of the child as respects—
- (a) the exercise of the relevant rights, or
 - (b) the doing, or proposed doing, of the thing.
- (5) In this section, “relevant rights”—
- (a) in relation to a child who has attained the age of 12 years, means any rights conferred by or under this Act on such children, and includes the right—
 - (i) to receive any document or information, and
 - (ii) to give consent in relation to any matter, and
 - (b) in relation to the parents of such a child, means any rights conferred on the parents by or under this Act.”.

Commencement Information

I24 Sch. para. 23 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

- 24 In section 34 (orders, regulations and rules)—
- (a) in subsection (4), after “except” insert “ section 3B(3), ”, and
 - (b) in subsection (5)(b), after “section” insert “ 3B(3) or ”.

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I25 Sch. para. 24 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

25 In schedule 1 (Additional Support Needs Tribunal for Scotland), in paragraph 11(2)

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- (a) after paragraph (f) insert—
- “(fa) seeking the views of children whose parents have made references to a Tribunal under section 18(1) in relation to the children,”
- (b) after paragraph (ka) insert—
- “(kb) enabling a convener of a Tribunal and without holding a hearing to determine specified matters relating to the decision of an education authority as respects—
- (i) the capacity of a child who has attained the age of 12 years to exercise a right under this Act, or
- (iii) whether something would adversely affect the wellbeing of a child who has attained the age of 12 years,
- (kc) the practice and procedure relating to matters that may be determined by a convener alone by virtue of paragraph (kb),
- (kd) applying (with such modifications as may be specified) section 19(2) to a convener determining a matter by virtue of paragraph (kb) as that section applies to a Tribunal,” and
- (c) in paragraph (v), after “Tribunal” where it second occurs, insert “, or a convener alone following a determination mentioned in paragraph (kb).”.

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I26 Sch. para. 25 in force at 10.1.2018 by S.S.I. 2017/354, reg. 2(a)

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Changes and effects yet to be applied to :

- specified provision(s) amendment to earlier commencing S.S.I.2017/164, sch. by [S.S.I. 2017/352 reg. 2](#)