

SIAA response to ‘Non-Statutory Guidance on assessing capacity and adverse impact on wellbeing’.

1. Introduction

The Scottish Independent Advocacy Alliance (SIAA) finds this guidance problematic, given that it is intended primarily for staff in education authorities and schools. The information is not clear for parents, carers and children who are not familiar with the decision making processes of Local Authorities. Although the guidance may be adequate for staff at schools, it does not support parents and carers who have not been to Additional Support Needs Tribunals for Scotland (ASNTS) before, and who will be supporting children to make decisions and to express their preferences. The SIAA feels that the Scottish Government’s non-statutory guidance is weighted too heavily towards informing Local Authorities to make resource-driven decisions, and sidelines the rights of children who would benefit from support from parents, carers and independent advocates. This introduction also fails to use plain English to clearly articulate non-statutory guidance to parents, carers and children.

2. Children’s Rights

This information does not take a human rights based approach to supporting children and young people with additional support needs. The Scottish Independent Advocacy Alliance believes that children should be able to have their rights extended regardless of their capacity.

The code effectively assumes that a child’s capacity must be proven rather than assumed. Within Article 12 of the UNCRC, it is affirmed that “state parties cannot begin with the assumption that a child is incapable of expressing her or his own views.’ This also contradicts the presumption for capacity contained within the Age of Legal Capacity (Scotland) Act 1991. We therefore believe that the Scottish Government, whilst seeking to extend the rights of children, is attempting to do so by placing barriers which children must surpass by proving their capacity

The SIAA believes that too much power is being given to Local Authorities to make decisions about the rights of children, and this reinforces the power imbalance between Local Authorities and children. The Code’s approach is one that effectively allows Local Authorities to confer upon children the right to access Additional Support Needs Tribunals for Scotland (ASNTS). This ability to allow a child to exercise their rights is presented as a ‘safeguard’, but is in effect a restriction.

3. Assessment of Capacity

The document suggests that children who have capacity issues should be limited in their ability to exercise their rights. However, independent advocacy enables everyone to have a voice, regardless of their communication or capacity issues. All children, regardless of their capacity, should have the right to be supported to make their own decisions. Independent advocacy helps people to better understand and navigate systems, understand their rights, think through their choices, and influence the design and delivery of systems and services.

There is also an issue around what constitutes maturity. We do not find the boundary of 12 years old to constitute a reasonable definition of maturity. Children younger than 12 years old could demonstrate a greater level of maturity than someone older than 12 – this defined age of maturity therefore seems arbitrarily defined.

We are also concerned that the capacity assessments of children will be measured by Local Authorities who may be subject to complaints. A conflict of interest therefore exist as children who seek to access ASNTS - which will refer to provisions provided by Local Authorities - will have their capacity assessed by Local Authorities. There is a conflict of interest when a Local Authority advocates on behalf of a child.

There is also no specific reference to how non-instructed advocacy can be offered to children who have limited capacity. Although the document refers to issues relating to the communication needs of children - and how these instances cannot be used as contextual factors to undermine a person's claim of capacity - we believe that children who have limited capacity should have a human right to non-instructed advocacy. In a situation where a child does not have capacity to instruct an advocate, there may be individuals who can act as their advocate. Where it is established that a child has limited capacity, children could be offered non-instructed advocacy.

4. Consideration of Adverse Impact on Wellbeing

The SIAA believes that the assessment of a child's well-being should not act as a barrier for a child attempting to exercise their rights. This code has not taken a human rights based approach to supporting children with additional support needs, and instead encourages the use of assessments which effectively devalue the human rights that children should be presumed to have. Children should be allowed to exercise their rights independently of their teaching staff, and Local Authorities, whether or not these agents feel that a child has passed an 'adverse effect on well-being test.' We believe that this test will deprive children of agency, and will significantly shift the balance of power from children, and towards educational authorities.

It is an unfair to assume that a child's capacity can be measured against their educational attainment – a child's capacity and their educational attainment are not

necessarily linked. The code refers to how the Curriculum for Excellence can be used as a gauge of a child's mental, emotional, social and physical wellbeing. However, children with learning difficulties may have the capacity to request a referral through the Additional Support Needs Tribunals Scotland (ASNTS), even if their health and wellbeing is assessed to be poor through the criteria of the Curriculum for Excellence.

The assessment of the 'adverse effect on well-being' also conflicts with the notion of legal capacity, as if a child has a legal capacity to exercise their rights, then the power should not be given to Local Authorities to undermine these rights through their own assessments.

Similarly with issues relating to the assessment of a child's capacity, a conflict of interest will still exist with regards to the assessment of 'adverse impact on well-being'. A child may want to exercise their right to submit a complaint to the Local Authority, but be prevented from doing so if the Local Authority deems this process to constitute an adverse impact to a child's well-being.

5. Assessment of Change in Circumstances

Even when a child is considered to have limited capacity, efforts must be made to ensure that they are aware of their rights. The European Convention on Human Rights has stated that even if someone is considered to lack the ability to exercise their legal capacity, this does not mean that they are unable to understand their situation.

We believe that children with limited should still have the ability to exercise their human rights, and to be able, following instructed or non-instructed advocacy, to refer the outcomes to an ASNTS.

6. Key Principles in Assessment

While these principles affirm the importance of a child's ability to actively participate in their own learning, and the development of their own wellbeing, the guidance does not substantiate the claims that children being encouraged to participate in decisions about their own rights. This chapter conflates the realisation of rights with the security of wellbeing. We disagree that children should only be able to actively participate in decision making processes 'subject to their maturity and understanding and impact on wellbeing'. Children should not be compelled to meet conditions and criteria established by Local Authorities, in order to exercise the rights that they are presumed to have. Scottish Government policy should reflect Article 12 of the UN Convention on the Rights of the Child, which encourages adults to involve children in decision-making processes, and to ensure that children have the right to say what they think should when adults are making decisions.

7. Annexes/Resources

The example in Annex A, where Gary is told he can access advocacy support, is not an example of independent advocacy. In this case, it is not clear that the service which Gary is using is structurally nor psychologically independent of the services funded through Local Authorities. For advocacy to effectively support children to express their will and preferences, it must be independent of the services which they are attempting to access. This example does not clearly explain the benefits of independent advocacy for the children which need it.

In the second example, Leanne – who is autistic – has a legal right to access independent advocacy services under the Mental Health (Care and Treatment) (Scotland) Act 2003. This right should be specifically highlighted in the documents provided in the Annexes. These documents should also make it clear to parents, carers and children exactly what a coordinated support plan (CSP) is.

In the third example, there should be more information provided about what may happen after the meeting with the educational psychologist ends, and what a child may expect during the follow up assessment. There should be more information provided regarding how John's will and preferences may be ascertained following the initial meeting.

In Annex B, there are no references to the documents that have been developed by the Scottish Independent Advocacy Alliance, which highlight to variety of audiences what independent advocacy is.

8. Additional Comments

The guidance as a whole is not written in plain English, and needs to be presented through clearer language to ensure that this document is not only referred to by staff in schools and Local Authorities.