

Post-school transitions: the legislative context

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Some useful definitions

A **child** is someone under the age of sixteen.

A **young person** is someone aged sixteen or seventeen.

A **pupil** is a person of any age who is receiving school education or is entitled to do so.

In Scotland, a **public school**, is a school managed by a local authority. An **independent school** is privately managed. A **grant-aided** school is privately managed but receives funding centrally from the Scottish Government.

The **education authority** in Scotland is the local authority for that area. Its schools do not have an independent legal existence from the authority. So, duties that apply to the education authority are often fulfilled through the schools they manage.

School age is ages five to fifteen (but see below).

A pupil receiving school education is said to “**belong to**” the education authority area in which their parent(s) normally live.

An education authority is said to be “**responsible for the school education**” of a child or young person who is or is about to be educated either in a school managed by that authority or by way of other arrangements made by that authority.

Secondary Education

On reaching **school leaving age**, a pupil is entitled to leave school, and their parent(s) no longer have a duty to educate them. A child reaches school leaving age on either the summer leaving date (31 May) or the winter leaving date (the first day of the school’s Christmas holidays, or 21 December for children who do not attend school) depending on when their birthday falls. The age of a pupil on the day they are entitled to leave school will therefore vary from about 15 years 8 months to about 16 years 3 months.

Education of young people

Many pupils choose to remain at school beyond their school leaving age. They are entitled to do so, and do not require permission from the school or from their parents to do so. However, there is not a free-standing right to education at this age. The eligibility for learning arises from the ability and right to remain in education. A young person who is not already in school education would find it difficult to enter into the education system at the age of 16 or 17, and this would rely on the discretion of the education authority.

On reaching the age of sixteen, a child becomes a young person in terms of education law. Unless they are for some reason unable to do so, a young person will acquire all of the rights in relation to their own education which were previously exercised by their parent(s). A young person may be unable to exercise these “parental” rights due to mental illness, developmental disorder or learning disability.

On reaching the age of 18, a person ceases being a young person! At this point, there are no substantive rights to remain in school education. Many children and young persons will have moved on to continuing, further or higher education by this stage, or to training or work.

Again, there remains a discretion for the education authority to extend a pupil’s school career. In practice, a young person at age 18 would ordinarily be allowed to complete the current school year before leaving. Many education authorities will allow pupils to remain until they reach the age of 19. This is particularly likely to happen in special schools. As a general legal rule, this discretion must be exercised reasonably. It must also be exercised in accordance with the authority’s duties under the Equality Act 2010 (Part 6 – Schools).

School Leaving Age

Date of 16th Birthday	May leave School on
1 March to 30 September	Summer leaving date
1 October to 29 February	Winter leaving date

Changing Schools and Leaving School

There are a number of circumstances in which a child or young person may be changing school or leaving school, for example:

1. transition from nursery school to primary school;
2. transition from primary school to secondary school;
3. transition from secondary school to further and higher education / work / training / community care etc.;
4. permanent exclusion from school;
5. elective change of school; or
6. elective change to home education or the independent sector.

Whatever the reason for the change of school, there ought to be some form of transition planning for children or young people with additional support needs.

An **appropriate agency**, is any one of the following:

- ◆ a Health Board;
- ◆ another local authority;
- ◆ Skills Development Scotland (Careers Service); and
- ◆ further or higher education institutions.

Strictly speaking, the Careers Service and FHE institutions are treated as **appropriate agencies** for all purposes (e.g. a child may be eligible for a CSP because they require significant additional support from the education authority and Careers Scotland). However, this is most likely to be of relevance in the context of school leavers and transition planning. While social work and other local authority departments are not, strictly speaking, **appropriate agencies**, the law is drafted such that the rules apply in almost the same way as they would to appropriate agencies.

Transition Planning

The legislation requires an exchange of certain information to take place between relevant agencies whenever a child or young person with additional support needs is approaching a change in school education. Broadly speaking, there are four categories of change covered by the law:

- starting a school for the first time (where the school is managed by or the place arranged by the local authority);
- starting primary school;
- starting secondary school; and
- changing school for another reason (e.g. moving house; an exclusion from school etc.).

There are also two key stages for any transition, that is, 12 months before a transition is due to take place, and six months before a change in school education is due to take place.

First, 12 months prior to a child's or young person's change in school education (or as soon as possible after the date is known) the education authority must seek relevant advice and information from **appropriate agencies** and from any other person thought to be appropriate by the authority. The purpose of the advice and information is threefold:

- ◆ to establish the child or young person's additional support needs;
- ◆ to determine what provision for those additional support needs may be required; and/or
- ◆ to consider the adequacy of the additional support currently provided (if any).

The views of the child and parent or young person will also be sought in appropriate cases.

All of the advice and information, thus obtained must then be taken into account in making appropriate arrangements prior to the change in school education actually taking place.

No later than six months prior to the change in school education, (three months in the case of pre-school children) the authority must consider whether the following information is required by any **appropriate agencies**.

- ◆ the likely date of the change in school education;
- ◆ the additional support needs of the child or young person; and
- ◆ the additional support provided during the previous six months (three months in the case of pre-school children).

Where information is provided in this way, a copy of that information must be also provided to the parent or young person. Information must not be provided to appropriate agencies without consent of the parent or young person.

Future Needs Planning

The legislation also requires an exchange of certain information to take place between relevant agencies whenever a child or young person with additional support needs is approaching their school leaving date.

There are also two key stages for any transition, that is, 12 months before leaving school is due to take place, and six months before leaving school.

First, 12 months prior to a child's or young person's anticipated leaving date (or as soon as possible after the date is known) the education authority must seek information from **appropriate agencies** which may be relevant as to provision which is likely to be available to the young person from that agency upon their leaving school. The views of the parent or young person will also be sought.

The information and view thus obtained, together with any information as to provision likely to be available from the authority's non-education functions e.g. social work, housing) must then be taken into account in considering the adequacy of the additional support to be provided to the child or young person prior to them leaving school.

No later than six months prior to the anticipated school leaving date, the authority must inform all of the **appropriate agencies** it thinks fit to, of the following:

- ◆ the likely date for the young person to leave school; and
- ◆ any other appropriate information as to the young person and their additional support needs.

The authority must also consider at the same stage what provision it is likely to make with regard to its non-education functions once the child or young person has left school. In so considering, it must have regard to the information listed above. This requirement essentially means that social work (or other departments in the Council) are treated as appropriate agencies in this context.

Once the young person has actually left school, the authority must provided confirmation of that fact to such appropriate agencies as it sees fit. Information must not be provided to appropriate agencies without consent of the young person or, as the case may be, parent.

In some cases this will be a simple process, requiring little more than a perusal of a few college or university prospectuses. In other cases it will be a more complex, multi-disciplinary exercise involving representatives from education, health, social work and further education institutions.

Code of Practice

Chapter 6 para 20 – "Preparation for adulthood should involve explicit recognition of the strengths, abilities, wishes and needs of each pupil as well as identification of relevant support strategies which may be required. It is

essential that there is good communication between the school leaver and parents and all supporting agencies. Information should be shared promptly and effectively, with the parents' or young person's consent."

Chapter 6 para 21 – "In their final years at school, those with additional support needs should engage personally in the transition planning process to help them to prepare their plans for the next stage in their education, training or employment. For example:

- some pupils may need to develop independence skills so that they manage money more effectively, learn to travel independently to placements, check a bus timetable and ask for information
- some may need help to organise how they will manage their new educational arrangements and/or their work commitments
- others with significant disabilities will need community-based services involving social, work health and the voluntary sector when they leave and may need to experience some of these services in preparation for leaving."

Chapter 6 para 22 – "Whatever prospective school leavers require to learn in order to make the transition successful should, in good practice, be planned for carefully and in a timely manner."

Chapter 6 para 23 – "Effective transition can involve a range of strategies. The school should ensure that the prospective leaver has sufficient information and understanding, within his/her programme of learning, on which to base decisions about the relevant choices of training or work placements, college or higher education courses and other day supports and services. This process of transitional planning should start at an early point in his/her secondary schooling, for example, prior to subject choices being made for externally validated course work. Opportunities to sample options should be made available through visits or work experience relevant to the pupil's aspirations and interests in order that he/she can be involved in making fully informed choices. A phased entry to college, training placement or workplace, for one or two days a week, while continuing at school for the remainder of the week would be an appropriate approach to making this transitional step less threatening for the pupil than an abrupt change to full-time attendance at a new provision."

Chapter 6 para 25 – "For most pupils with additional support needs, the transition process is helped by the involvement of a lead professional to co-ordinate planning. This might be a teacher, careers adviser, social worker, community education worker or someone from another agency. The lead professional can then assist the child or young person to make a smooth transition to employment, training, further or higher education, or other services. Where a pupil has a co-ordinated support plan, their co-ordinator should take the lead in ensuring that all relevant agencies are brought together to plan for transition to post-school and plan for the transfer of the lead person to someone who will effect that transfer."

Chapter 6 para 28 – "The duties apply to prospective school leavers with additional support needs for whose school education the authority are responsible but the duties do not apply to all leavers with additional support needs." **NB** – This is, in my view, incorrect in law.

Chapter 6 para 30 – "As noted in paragraph 27, the purpose of obtaining such information from an appropriate agency, or agencies, is to enable the education authority to consider the adequacy and appropriateness of additional support provided by the education authority and other services in the period up to the child or young person progressing beyond school; ultimately this is to support the process of ensuring a good match between his/her needs and options for subsequent support. These options include provision which may be made by an appropriate agency, or agencies, as well as any provision which the local authority make for the child or young person on leaving school; this provision includes, for example, that made by social services or housing."

Chapter 6 para 31 – "...the process will require to be started well in advance of the 12 month period to be carried out effectively for the benefit of the leaver."

Chapter 6 para 35 – "Education authorities should ensure that the arrangements required for transition to post-school are clear so that the leaver, and all those involved, know exactly what is happening, when it is happening,

and who is responsible. The effectiveness of the action required should be monitored by a lead person and reviewed if there is a change of circumstances, or if the child or young person requests a change.”

Chapter 6 para 36 – “The Act, as amended, allows the Tribunal to consider references in relation to an authority’s failure to comply with any of its duties in terms of post-school transitions.”

Chapter 6 para 37 – “The Act also enables parents and young people to use the arrangements in place for mediation and dispute resolution where they have concerns about how an authority has carried out their arrangements for all transitions.”

Mediation

The law requires that every education authority has in place arrangements for mediation, involving independent mediators, to try and resolve (or avoid) disputes between parents and the authority and/or school regarding a child who has additional support needs.

Independent Adjudication

Certain disputes relating to a child's or young person's additional support needs may be referred to a process of independent adjudication.

Additional Support Needs Tribunals

The Additional Support Needs Tribunals can hear references on a failure to comply with the transition duties (for school leavers).

Powers of the Tribunal

Where the appeal is about a failure by the education authority to comply with their transition duties; the Tribunal may require the education authority to take such action to rectify the failure as the Tribunal considers appropriate by such time as the Tribunal may require.

Representation

At a hearing a party may conduct their own case, on their own or with assistance from a supporter, or may be represented by a representative. A Tribunal may refuse to permit a particular person to assist or represent a party at the hearing, if there are good reasons for doing so. Let’s Talk ASN has been appointed to provide free representation in all cases.

Additional Support Needs Tribunals have been designed to be as informal as possible so that both parties can participate fully without needing legal representation. Legal Aid is not available for representation at a Tribunal, but parents may be eligible for some free legal advice and assistance in preparing their case.

Decisions

The Tribunal may deliver its decision verbally at the end of the hearing, or it may choose not to. In either case, written notice of its decision (with reasons) must be sent to both parties, normally within 10 working days of the date of the hearing. The notice will include details of the right of appeal (see below).

The authority is obliged to carry out the decision of the Tribunal within the time specified. If the authority fails to do so, the appellant may refer the matter to the President of the Tribunals.

Right of Appeal

Either party has a right of appeal against the decision of the Tribunal, on a point of law, to the Court of Session.

Equality Act 2010: Education

Protected Characteristics

The “protected characteristics”, as set out in s.4 of the 2010 Act include age and disability.

Prohibited Conduct

Direct Discrimination occurs if, because of a protected characteristic, A treats B less favourably than A treats (or would treat) others who do not share that characteristic. [Section 13(1)]

NB. it is not unlawful to treat disabled people more favourably than non-disabled people. [Section 13(3)]

Discrimination Arising from Disability occurs if, A treats B unfavourably because of something arising from B's disability and A cannot show that treatment is a proportionate means of achieving a legitimate aim. [Section 15(1)] A lack of knowledge defence is available to A if A did not know, and could not reasonably have been expected to know, that B was disabled. [Section 15(3)]

Indirect Discrimination occurs if A applies to B a provision, criterion or practice which is discriminatory with regard to a protected characteristic. [Section 19(1)] That is, if it puts those with that protected characteristic (including B) at a particular disadvantage when compared with those without that protected characteristic and A cannot show then the treatment is a proportionate means of achieving a legitimate aim. [Section 19(2)] Indirect discrimination does not apply to pregnancy and maternity discrimination.

Duty to Make Adjustments

The duty to make reasonable adjustments includes three requirements:

1. to make adjustments to avoid substantial disadvantage from a provision, criterion or practice;
2. to make adjustments to avoid substantial disadvantage from physical features of a building;
3. to make adjustments to avoid substantial disadvantage from the lack of an auxiliary aid.

[Section 20]

The second requirement does not apply to schools. Instead, in Scotland, the provisions of the Education (Disability Strategies and Pupils Educational Records) (Scotland) Act 2002 apply. Improvements to the physical accessibility of schools is handled primarily through the responsible body's accessibility strategy. Cf. "Guidance on the preparation of Accessibility Strategies under the Education (Disability Strategies and Pupils Educational Records) Act 2002" (Scottish Government Guidance).

The third requirement now applies to schools.

Requirements 1 & 3 include, where relevant, making information available in accessible formats. Requirement 2 includes, where relevant, removing, altering or providing ways to avoid the physical feature in question. In requirement 3, "auxiliary aid" includes "auxiliary service".

A failure to comply with one of the 3 requirements is a failure to comply with the duty to make reasonable adjustments. That failure amounts to discrimination if it fails "in relation to" a disabled person. [Section 21]

Education (Schools)

Part 6, chapter 1 of the Act applies to schools. Part 3 of the Act applies to service providers and public functions – this would include the education authority, where not acting directly in relation to one of their own schools.

Enforcement

The Sheriff Court has jurisdiction to determine a claim relating to a contravention of Part 6 (education). [Section 114(1)(c)] In Sheriff Court proceedings, the power under rule 44.3 of Schedule 1 to the Sheriff Court (Scotland) Act 1907 (appointment of assessors) must be exercised, unless the Sheriff is satisfied that there are good reasons for not doing so. [Section 114(8)]

Time Limits

A claim may not be brought after the end of the period of 6 months starting with the date of the act to which the claim relates, or such other period as the Sheriff thinks just and equitable. [Section 118(1)]

Where the Sheriff finds there has been a contravention, the Sheriff has power to make any order they think appropriate.

An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis). [Section 119]

Burden of Proof

If there are facts from which the court could decide that A contravened the provision concerned, the court must hold that the contravention occurred. However, that rule does not apply if A shows that A did not contravene the provision. [Section 136(2) & (3)]

This rule also applies to claims brought in the Additional Support Needs Tribunal [Section 136(6)(f)]

Disabled Pupils (Enforcement)

Disability discrimination cases for schools are heard by the “Scottish Tribunal”, i.e. the Additional Support Needs Tribunals for Scotland.

A claim that a responsible body has contravened Chapter 1 of Part 6 because of a person’s disability may be made to the Tribunal by the pupil or their parent.

[Schedule 17, para. 8]

Where the Tribunal finds that the contravention has occurred, then it may make such order as it thinks fit. That power may be exercised, in particular, with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates, but does not include power to order the payment of compensation.

[Schedule 17, para. 9]

The conduct of such hearings is governed by the Additional Support Needs Tribunals for Scotland (Disability Claims Procedure) Rules 2011. [SSI 2011 No. 104]

Either party may appeal, on a point of law, to the Court of Session. [Schedule 17, para. 11]

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