

APPENDIX 1: The Legal Framework

NHS

1. Section 39 of the NHS (Scotland) Act 1978 as amended places a duty on the Secretary of State to provide for the medical treatment of all pupils in attendance at any Local Authority school or at any self-governing school. Specifically, Section 39 of the Act states,

"It shall be the duty of the Secretary of State to provide for the medical inspection, at appropriate intervals, and for the medical supervision and treatment of all the pupils in attendance at any school under the management of an Education Authority or at any self-governing school ...

2. The Secretary of State has delegated his duties under Section 39(1) to the Health Boards through the functions of Health Boards (Scotland) Order 1991. Thus it is Health Boards that are responsible for performing the general duty to provide for the medical treatment of pupils which is referred to in Section 39.

EDUCATION

3. There is no statutory obligation on Local Authorities to provide medical treatment to pupils. However an Education Authority is, in terms of Section 13 of the NHS (Scotland) Act 1978, required to co-operate with a Health Board in the exercise of their respective functions. On that basis they should, in providing school education pursuant to the Education (Scotland) Act 1980, co-operate in the matter of the Board providing for the medical treatment of pupils.
4. The following statutory duties and powers of Education Authorities are relevant.

Section 1 of the Education (Scotland) Act 1980 gives Education Authorities a general duty to secure that there is made for their areas adequate and efficient provision of school education. The width of this general duty allows scope for Education Authorities; if they consider it appropriate, to make arrangements which assist pupils with medical conditions to attend school.

Section 69 of the Local Government (Scotland) Act 1973 gives the general power to Local Authorities to do whatever is conducive or incidental to the exercise of their functions. Arrangements to assist pupils with medical conditions to attend school could be considered conducive to the performance of the duty to secure "adequate and efficient provision of school education" and of the duty under Section

13 of the NHS (Scotland) Act 1978 to co-operate with Health Boards.

Section 50 of the Education (Scotland) Act 1980 gives Education Authorities the duty to make arrangement for pupils to attend an appropriate school where the Education Authority considers that exceptional circumstances make them unable to receive the full benefit of school education unless special arrangements are made.

Section 3 of the Health and Safety at Work etc. Act 1974 requires employers to conduct their undertakings in such a way as to ensure as far as is reasonably practicable that persons who may be affected by them are not exposed to risks to their health and safety. This would apply to pupils in a school and require arrangements to secure that pupils with medical conditions are not exposed to risks.

5. Education Authorities and school staff also have a common law duty of care towards children under their control. Their responsibilities can also be enlarged by express delegation from parents.
6. In view of this statutory and common law background it is incumbent on Education Authorities to take reasonable steps to assist Health Boards in ensuring that medical treatment is available to pupils who require it. In particular it would be open to Education Authorities, with the agreement of Health Boards, to make arrangements for teachers or other staff in schools, with the consent of the parents concerned, voluntarily to supervise or administer medicines in circumstances where parents would normally do so. This is the basis on which existing arrangements mainly operate in schools in Moray, and indeed across Scotland.

SCHOOL STAFF

7. Routine administration of medicines:

For certain school staff it may be a term of their contract of employment that they provide support for pupils with medical needs and administer medication to such pupils on a routine basis with parental consent. They will accordingly be acting in the course of their employment when undertaking these tasks. Teachers' contracts do not oblige them to administer medicines to pupils and, subject to the emergencies exception explained at paragraph 8 below, they are not obliged to do so at common law. Teachers undertaking to administer medication to pupils on a routine basis therefore do so voluntarily. However, where an Education Authority decides that its co-operation with Health Boards will involve teachers voluntarily administering medicines to pupils with parental consent, and teachers agree to do so; such teachers will be undertaking this task in the course of their employment. In this context, it is reasonable for all school

staff undertaking such tasks to expect provision of indemnity against any potential liability incurred.

8. Emergency situations:

In normal circumstances teachers and other school staff are neither expected nor entitled to administer medicines or authorise their administration without the parents' consent. An exception is an emergency situation. At common law, school staff acting in loco parentis, would be expected, in an emergency situation, to secure such help and to take such action themselves to assist the pupil as would a reasonably prudent parent. No parental consent is necessary. Even in an emergency, however, a member of staff will not be expected to carry out complex or risky procedures for which she or he is not trained. The duty to assist in an emergency also extends to staff in charge of activities taking place off the school site, such as educational visits, school outings or field trips. Where such a party includes a child with known medical needs, however, and no volunteer is available to administer medicines during the off-site activities planned, serious consideration would require to be given as to whether it is appropriate for that child to take part in that activity at all without some form of additional support (e.g., from the parent).

CONSENT TO TREATMENT

9. Under the **Age of Legal Capacity (Scotland) Act 1991** Section 2(4) a child under the age of 16 has a legal capacity to consent to any surgical, medical or dental treatment or procedure so long as that child is capable of understanding the nature and consequences of the proposed treatment or procedure. This also means that a child may exercise his right to refuse such examination or treatment. This provision should be considered carefully by Head Teachers in reaching any agreement to administer medicines. In particular where the child is capable of understanding the nature and consequences of the proposed treatment or procedure, the Head Teacher should consider whether, if there is to be a written agreement with the parents, this should include the child's consent. The Act imposes no specific lower age limit. This could therefore mean that a child as young as five years old who can understand the importance of taking his/her medicine for a particularly serious condition may fall within this category. It is possible that although a written agreement may have already been reached, at the point of medicine being administered a "capable" child refuses treatment. If this occurs the member of staff will require in the first instance to rely on his/her own judgement as to whether the child's wishes should be overridden. Factors to consider would include the urgency of the treatment, availability of medical help, the child's mental state (i.e. whether their thinking may be confused as a result of their condition) and the child's age. In general if there is no urgency in the administration of the medicine and a "capable" child refuses treatment,

Form 4 should be completed, indicating that the child has refused treatment and the parents should be contacted immediately.

10. In reaching any agreement with the child's parents, the Head should also ensure that the person with whom they reach agreement is a person with **parental responsibilities**. Bearing in mind the importance of the agreement they are likely to be entering into, they should perhaps take such precautions as requesting to see the birth certificate of the child, the marriage certificate (if appropriate) of the parents and if appropriate any court order imposing or removing parental rights and responsibilities.

SUMMARY OF OTHER RELEVANT LEGAL PROVISIONS

11. The **Health and Safety at Work etc Act (HASAWA) 1974** places duties on employers (the Authority) to ensure, so far as is reasonably practicable, the health, safety and welfare of all their employees, who in schools would be the Headteacher, Teachers and non-teaching employees within school premises. It also imposes a duty on the authority to conduct their activities in such a way as to ensure so far as is reasonably practicable, that persons not in their employment, such as pupils and visitors, who may be affected are not exposed by risks to their health and safety. There is no legal or contractual duty on school staff to administer medication and supervise the pupils taking it. If it is agreed by the Head-teacher or representative to take on this responsibility it is on a voluntary basis.
12. The **Management of Health and Safety at Work Regulations 1992**, made under the HSWA, require employers of staff at a school to:-
 - make an assessment of the risks of activities
 - introduce measures to control these risks
 - tell their employees about these measures.

In some cases children or young people with medical needs may be more at risk than their classmates. The establishment may need to take additional steps to safeguard the health and safety of such children or young people. In a few cases individual procedures may be needed. The employer is responsible for making sure that all relevant staff know about and are, if necessary, trained to provide any additional support these pupils need.

13. The **Children (Scotland) Act 1995** at Section 22 requires a Local Authority (i.e. the whole Authority) to safeguard and promote the welfare of children in their area who are in need. Children "who are in need" means children in need of care and attention because they are unlikely to achieve or maintain a reasonable standard of health or development without the provision of Local Authority services; or because their health or development is likely to be impaired without such services; or because they are disabled within the meaning of Section 23(2) of the Act. This definition is contained in Section 93(4) of

the Act. Pupils with medical needs could by this definition be children in need.

14. Some children with medical needs are protected from discrimination under the Equalities Act 2010. The Act defines a person as having a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his abilities to carry out normal day to day activities.

Under the Act, responsible bodies for schools (including nursery schools) **must not** discriminate against disabled pupils in relation to their access to education and associated services – a broad term that covers all aspects of school life including school trips and school clubs and activities.

Schools should be making reasonable adjustments for disabled children including those with medical needs at different levels of school life; and for the individual disabled child in their practices and procedures and in their policies. Schools are also under a duty to plan strategically to increase access, over time to schools. This should include planning in anticipation of the admission of a disabled pupil with medical needs so that they can access the school premises, the curriculum and the provision of written materials in alternative formats to ensure accessibility.

Early years settings not constituted as schools, including childminders and other private, voluntary and statutory provision are also covered by the Equalities Act 2010. Duties cover the refusal to provide a service, offering a lower standard of service or offering a service on worse terms to a disabled child. This includes disabled children with medical needs. Like schools, early years settings should be making reasonable adjustments for disabled children including those with medical needs. However, unlike schools, the reasonable adjustments by early year's settings will include alterations to the physical environment as they are not covered by planning duties.