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An t-Ionad Fiosrachaidh

Education, Children and Young People Committee

6 March 2024

Additional Support for Learning

Introduction

This briefing is for the Committee's third formal meeting in its inquiry on Additional Support for Learning.

The Committee agreed to focus on the following themes during this inquiry—

1. the implementation of the presumption of mainstreaming
2. the impact of COVID-19 on additional support for learning
3. the use of remedies as set out in the Act

This week the Committee will take evidence from May Dunsmuir who is the President of the Health and Education Chamber of the First-tier Tribunal for Scotland. Prior to that she was the president of the Additional Support Needs Tribunals for Scotland before it transferred into the Health and Education Chamber in 2018. While the Tribunal's name has changed it is still commonly referred to as the ASN Tribunal or ASNTS and members will have seen this name being used in submissions and elsewhere.

The intention is that this meeting, the Committee will be focusing mainly on theme 3, and particularly the role of the Tribunal.

Health and Education Chamber of the First-tier Tribunal for Scotland

Tribunals are specialised bodies which adjudicate on disputes or claims, often in relation to governmental decisions taken in respect of a specific area of law or policy. In comparison to courts, their processes and procedures are often intended to be

relatively informal, and they are generally less adversarial. The Tribunal publishes details of its decisions.

One of the aims of this inquiry is post-legislative scrutiny of Section 15 of the Standards in Scotland's Schools etc. Act 2000 (Requirement that education be provided in mainstream schools) and the operation of the Education (Additional Support for Learning) (Scotland) Act 2004 with a particular focus on access to remedies. The Additional Support Needs Tribunals for Scotland was initially established by the 2004 Act. The Tribunal can hear cases in relation to certain duties under the 2004 Act (known as references) and disability discrimination claims (known as claims) under Schedule 17 of the Equality Act 2010. The Tribunal's submission commented on the operation of a number of legislative provisions.

Who accesses the Tribunal and representation

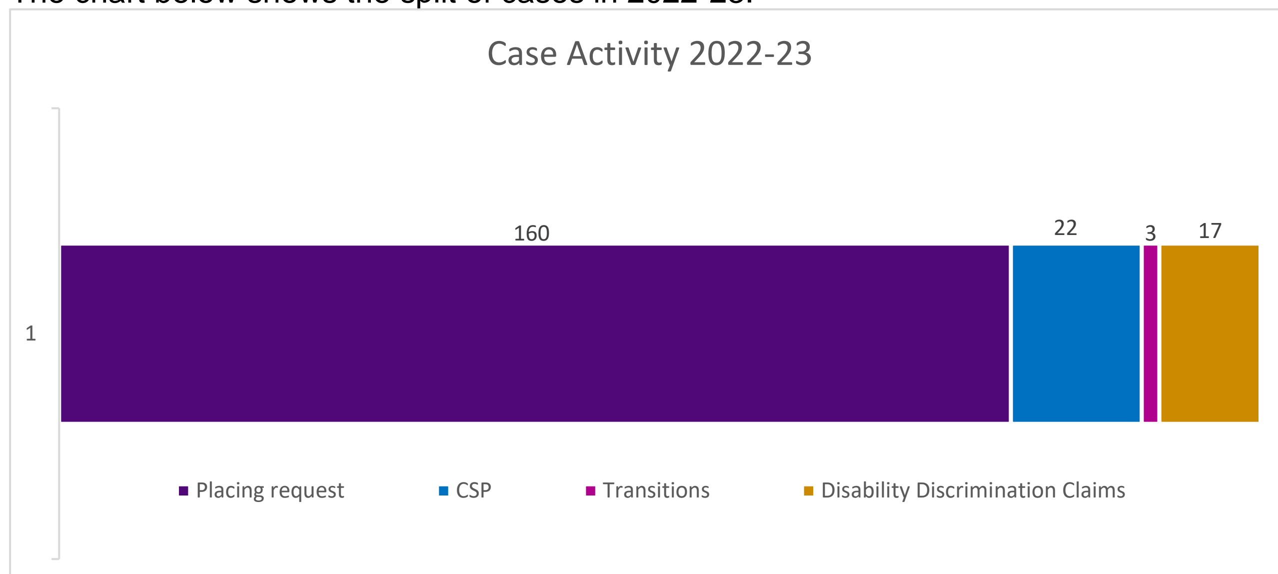
The Tribunal publishes bulletins twice a year on its work and developments within its jurisdiction. The latest was published in October 2023 and this reported that—

> "During the first half of this reporting year, the Chamber has again experienced a rapid increase in the receipt of applications. Between 1 April 2023 to 30 September 2023 we have received 151 applications. This can be broken down into 147 references and 4 claims."

The Scottish Tribunals Annual report for 2022-23 said that in that year, this Tribunal "saw a sharp rise in applications with a total of 202, the highest in any reporting year". The report continued—

- 193 applications were submitted by a parent or guardian. Eight were submitted by a child, the highest in any reporting year. One was submitted by a young person.
- Nine applications involved a child or young person who is 'looked after' by their local authority.
- The majority gender remains male.
- Autistic Spectrum Disorder (ASD) remains the highest single additional support need reported (in a total of 134 applications).
- Disposals of applications have increased month on month - with a total of 183 applications with an outcome in this reporting year

The chart below shows the split of cases in 2022-23.



The equivalent Tribunal in England covers a wider range of topics. Its case load is over 10,000 a year.

The Commissioner for Children and Young People Scotland's submission said that it has heard evidence that it is "parents with the most resource who can make use of the [redress] system" and this contrasts with the data which shows that "pupils who experience social deprivation have a greater likelihood of being identified as having an additional support need".

On 21 February, the committee was told by Matthew Cavanagh from the SSTA and a teacher in a special school that "parents' limited ability to access the available resources, their lack of confidence in relation to the language that is used and their capacity to understand what is available are massive issues in terms of inclusion." (Col 12)

Last week, Deborah Best from DIFFERabled Scotland said that her organisation has heard that parents who do not have access to legal aid found that costs of legal representation is a barrier to challenging local authorities' decisions. Local authorities will typically be represented by lawyers at the Tribunal.

References under the 2004 Act

Under the 2004 act, the Tribunal can hear references around:

- placing request refusals
- coordinated support plans
- school transitions

In addition, the Tribunal can consider a reference in relation to the local authority's assessment of a child's capacity or wellbeing, which is undertaken when the child seeks to exercise one of the rights available under the 2004 Act.

The types of placing requests the Tribunal can consider are where a placing request to a special school (or unit) has been refused and a placing request to a mainstream school has been refused for a child who has a CSP (or if a CSP is being prepared, considered, or a decision not to have a CSP is being appealed).

The Tribunal can consider a wide range of issues around the assessment, contents and delivery of a CSP. In all cases, it is the local authority (more precisely, the education authority) that would respond to the case.

School transitions are around the duties to exchange information with appropriate agencies and consider what support the local authority will be providing to the young person when they leave school.

Claims under the 2010 Act

The Tribunal's submission explains—

> "Since 2010, the HEC has heard claims from parents, children and young people against responsible bodies [e.g. a local authority] in relation to alleged disability discrimination in school education. Examples of types of claim include exclusion, expulsion, the use of restraint or seclusion, classroom provision and assessment process. Any aspect of the provision of school education can attract a 2010 Act claim."

Children and young people's engagement

The Education (Scotland) Act 2016 amended the 2004 Act and since 2018, children aged between 12 and 15 years are able to make references to the Tribunal in relation to CSPs and assessment of their capacity. These rights are subject to them having the capacity to make a reference and their wellbeing not being adversely affected by doing so. For claims under the 2010 Act, there are no comparable 'capacity and wellbeing' tests for children and young people to make a claim.

The Tribunal has undertaken work to support children and young people to access its processes. This includes the needs to learn website and the development of sensory hearing suites. The Tribunal's submission also highlighted the My Rights, My Say website which provides advice and advocacy for children. The Committee received a joint submission from Enquire and My Rights, My Say which stated it had "worked collaboratively with the Tribunal to ensure that the process is accessible and child-centred".

The Tribunal has a duty to seek the views of the child during its work. Its submission stated—

> "A child/young person may express their views either directly to the Tribunal (at the hearing) or through a report from advocacy services. It is very common for a child/young person who has the capacity to express a view to

> have that view represented in one of these two ways (or both). In addition, children/young people who do not have the capacity to express their views to an advocacy professional can benefit from a report based on Non-Instructed Advocacy."

The Tribunal's submission also noted that where a children or young person is not a party to a hearing, they have no right of representation. It continued—

> "Some children and young persons cannot be parties since they have no right to be, for example a child under 12, or a child between 12 and 15 who wishes to challenge a placing request refusal. Others have a right to be, but may not realise that they can be a party or how to go about becoming one. In both instances, the lack of legal representation for children acts as a barrier. Many children have the ability to instruct a solicitor. There are no barriers to doing so in a claim to the [Tribunal] under the Equality Act 2010, where there are no age or subject matter restrictions on who may be a claimant, as long as they have the capacity to instruct a lawyer …
>
> "Serious consideration ought to be given to the provision of free legal advice to children and young people with additional support needs on their 2004 and 2010 Act rights. One issue with allowing a child to enforce certain rights only through a parent is that the interests of parents and children do not always align."

An "adversarial" process?

A theme from some local authorities' submissions has been the view that the Tribunal can contribute to an adversarial relationship between the local authority and their staff and parents/carers. For example, Glasgow City Council's submission stated—

> "Tribunal process can be perceived as adversarial at times by the Local Authority. It is extremely time consuming and stressful for families, officers and practitioners. Professionals and families can leave the process with fractured and unhelpful, working relationships. Partnership working beyond Tribunal is essential to ensure we keep children's needs at the centre.
>
> "The Tribunal process could perhaps benefit from processes which would allow the revisiting of outcomes and impact on children, families and local authority staff to improve partnership working and support earlier resolution of conflicts."

Moray Council's submission stated—

> "There is often a perception that statutory remedies are the default position rather than following due process through staged intervention. Places like Govan Law Centre often have the unintended consequence of undermining relationships to the benefit of the young people. Sometimes the processes can cause conflict. The Tribunal system does not appear to be balanced as

> there would appear to be a bias towards parents/carers rather than LA and encourages confrontational approach rather than resolution. Due to the availability of the processes, reduced officer capacity is often diverted to conflict resolution rather than proactive support. However we do recognise the need for processes in some instances."

Last week, Deborah Best from DIFFERabled Scotland said that she had challenged a local authority around the support for her child and that this was "one of the most distressing journeys". Enable's submission said—

> "It is also important that there is an awareness of the right to advocacy for those parents and young people taking cases to an Additional Support Needs Tribunal, but also that further action is taken to ensure these often stressful processes can be avoided through positive engagement between local authorities and parents on the specific needs of children with additional support needs."

Govan Law Centre said that the Tribunal is working well and the "expertise of the Tribunal is invaluable in terms of determining decisions in relation to children and young people with additional support needs."

Implementation of the presumption of mainstreaming

The Committee has heard that there is broad support for the principle of an inclusive education where all children are educated together, at least to the greatest degree possible. This approach is considered to have the potential to provide educational and social benefits for all, and to support a more inclusive society in the long run.

Equally, a very common theme was that, in practice, these benefits are not being realised for everyone. Some of the reasons highlighted in submissions are: lack of resources, in school; and specialist services in both the public sector and the third sector; training for school staff; culture; and inappropriate physical environments.

Placing requests

The Tribunal will regularly consider issues around the settings where children and young people are educated and supported. In 2022-23, 160 of the 202 applications to the Tribunal were in relation to placing requests.

Section 15 of the Standards in Scotland's Schools etc. Act 2000 provides that education authorities will provide school education to all pupils "in a school other than a special school" unless one (or more) of the following circumstances arises—

> (a) would not be suited to the ability or aptitude of the child;
>
> (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or

(c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,

The 2000 Act says that “it shall be presumed that those circumstances arise only exceptionally”. If one of the circumstances listed above is true, the education authority may provide education to child in mainstream education, but it “shall not do so without taking into account the views of the child and of the child’s parents in that regard”.

The submission from the Tribunal explained that local authorities commonly rely on this to refuse placing requests. The Tribunal noted that there are twelve other grounds for refusing a placing request of a pupil with additional support needs set out in schedule 2 of the 2004 Act. The Tribunal’s submission stated—

> The ‘presumption of mainstream education’ should not be a ground for the refusal of a placing request. Mainstream education is right for some children and young people with additional support needs. For others, education in a special school (as defined in section 29(1) of the 2004 Act) is required to meet their needs. Some recent research undertaken in this area suggests that the type of provision (mainstream or special) is not, in itself, influential on pupil success.[1] A default bias in favour of one or the other is, in principle, therefore, wrong.
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> …
>
> “The addition of a mainstream presumption ground [to those set out in Schedule 2 of the 2004 Act] not only creates a bias in the mainstream-special school question, it clutters an already crowded field of grounds for refusal of placing requests. It also adds duplication: the three circumstances in which the requirement in section 15(1) [of the 2000 Act] does not apply refer to suitability, impact on other pupils and resources, all of which are already catered for within the other twelve refusal reasons.”

The Tribunal also commented on the interpretation of the 2000 Act’s provision that the circumstances where a presumption of mainstreaming should apply only exceptionally. It said that the exceptions in the 2000 Act “are tightly defined already, and another overall test seems misplaced … it is not clear how to apply the exceptionality requirement.”

Overall, the Tribunal argued—

> “An inclusive education for those who have additional support needs would be best served by the removal of a bias in favour of a particular type of education. A bias of this type is the reverse of an inclusive approach.”

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[1] See the papers Waddington and Reed *Comparison of the effects of mainstream and special school on National Curriculum outcomes in children with autism spectrum disorder: an archive-based analysis*, Journal of Research in Special Educational Needs 2017 Vol 17 132-142 (full text of article available at the link) and Shaw, *Inclusion: the role of special and mainstream schools*, British Journal of Special Education 2017, Vol 44 pages 233-369 (article abstract linked).

Some local authorities expressed disappointment with some of the decisions of the Tribunal on placing requests. Fife Council stated

> "We have an increasing number of parents, supported by advocacy services, who make Placing Requests to independent educational provision, which often results in a reference to an Additional Support Needs Tribunal. Being involved in the process of an ASN Tribunal is enormously expensive to local authorities in terms of officer time and can be expensive in terms of ongoing costs if the ASN Tribunal decision is to place the child in the independent provision. In our experience this decision can often be costly to the child's education if the placement does not then go well and the child returns to an educational placement in the local authority, having had their education significantly disrupted and interrupted by this process."

The City of Edinburgh Council said—

> "Within Local Authority budgets additional support for learning costs cannot be predicted and are often outwith the control of officers leading to significant financial risk and pressure. The increasing demands for [out of area] provision and the inclination of the ASN Tribunal to support parental placing requests to independent schools is increasingly adding additional pressure; costs associated with out-with placements is the main budget overspend in most local authorities alongside transport. Independent school placements can cost anywhere between £70K to £180K per year with children and young people often remaining in placement for over 8 years. These placements cannot be predicted or planned."

Later the City of Edinburgh Council's submission said—

> "It is unclear what quality assurance is carried out on these decisions to see if the child's experiences and outcomes are improved as a result. Whilst there can be learning for local authorities from the ASN Tribunals, it is often the case that the child would be better served within their local authority with a review of their needs and supports and in line with the principles of inclusion set out in legislation."

Special Schools and Units

As noted above, the Tribunal can consider cases where there has been a refusal of a placing request to a special school (or unit) or to a mainstream school (where there is involvement with a CSP). The statutory definition of a "special school" includes either a school or "any class or other unit forming part of a public school which is not itself a special school" but is especially suited to the additional support needs of pupils. Enquire's submission noted that the interpretation section of the 2004 Act which includes ASL units as part of the definition of a special school. This can lead to complexity when considering the legal position around, for example, placing requests. Enquire said—

> "Using [the legal] definition, some of the [ASL units] are legally special schools. However, some would not meet this definition, for example if a pupil would not need to be 'selected for attendance' at the unit, but rather has

access to it by nature of being a pupil at the mainstream school which has the unit on site.

"This leaves complicated scenarios to unpick when considering the legislation on the presumption of mainstreaming, and on other legislation that it interacts with, such as the provisions on placing requests for pupils with additional support needs. … There are differences in the ways that such units are established and operated across local authority areas. Each may draw different conclusions in how they are legally defined."

Co-ordinated Support Plans and multi-agency working

The only statutory plan in school education is the Co-ordinated Support Plan under the 2004 Act and associated regulations. Local authorities have a statutory duty to put in place a CSP if the statutory conditions are met. These are that a child has longstanding ASN arising from one or more complex factors or multiple factors which require significant additional support to be provided by more than one service. The statutory guidance on the 2004 Act states that local authorities must "seek and take account of the views of children and their parents, and young people themselves" throughout the process of determining whether a CSP is required and then developing the CSP. CSPs must contain (among other things):

- the education authority's conclusions as to the factor or factors from which the additional support needs of the child or young person arise
- the educational objectives intended to be achieved taking account of those factors
- the additional support required to achieve these objectives
- details of those who will provide this support.

After concerns that CSPs are under-used in local authorities, a short life working group was established and this reported in November 2021. This found "variations in awareness and understanding of the legislation, support and planning process" including in the purpose and statutory requirements on local authorities.

In 2022-23 the Tribunal heard 22 cases in relation CSPs. The Tribunal can consider a range of issues in relation to CSPs, including—

- Assessment
- The need for a CSP
- The contents of the CSP
- Providing the support indicated in the CSP in full
- Review of the CSP

The Tribunal has a wide range of remedies open to it when considering cases in relation with CSPs; the Tribunal can determine that a local authority—

- Make a CSP;
- Discontinue a CSP;
- Change the content of a CSP;
- Review the CSP; and
- Provide the additional support specified in the CSP.

The Tribunal's submission described the criteria for CSPs as "very narrow and restrictive". It noted a decision of the Upper Tribunal (appealing the decision of the ASN Tribunal) in September 2023. The submission explained, "it has been confirmed that it is not enough for the child or young person to require significant additional support overall for a CSP to be required; they must require significant additional support of an education type and significant additional support of a non-educational type". The submission indicated that there is a case for relaxing the statutory criteria for CSPs.

Peter Bain from SLS told the Committee on 21 February that there are two factors which can influence the use of CSPs. These were "the strength of expertise in [local authorities'] central teams" and the "the strength of the partnership arrangements that sit in each local authority area and which work in each school community". He continued—

> "CSPs are dependent on different agencies working together to support the implementation of the actions within them. If there are regular meetings with strong partnership working in a school community—for example, with education staff, health professionals, social workers and educational psychologists; at times, the police come in, too— there is likely to be a more effective success rate for establishing CSPs, because they almost always require interagency support. If strong local partnership working is going on, CSPs are more likely to happen and to be progressed more effectively at the practical level. If such working is not happening locally, CSPs are often not progressed as they should be, because authorities cannot get partners to agree who will do what." (Col 19)

Section 23 of the 2004 Act also provides that education authorities may seek assistance from other agencies (e.g. a local health board) in supporting pupils with ASN, examples of this could be Speech and Language Therapy or Occupational Therapy. Those other agencies must comply with such a request unless it "is incompatible with its own statutory or other duties" or "unduly prejudices the discharge of any of its functions". The Tribunal considers disputes with education authorities, not with other agencies.

Last week the panel noted that CSPs are useful in that they allow for greater accountability and potentially recourse to the Tribunal. However, the panel also

noted that planning is in the service of creating better outcomes. Susan Quinn from EIS told the Committee on 21 February—

> "There needs to be some simplification, with consideration given to where the value is in doing something that takes people away from working directly with young people. It is important to have records and the like, so that people know what support has been provided and what support is needed, but that cannot happen to the detriment of actually working with the young person. We cannot have staff saying, "I can't work with you today because I've got to have a meeting with everybody to decide whether you need support." We know that the person needs support and that we need to work together to get them that support, and having a bit of paper does not necessarily address that. That sort of situation comes through a lot from our members across the country, and there is a need to address it." (Col 22)

Other remedies and advocacy

The Committee is exploring the statutory support and remedies available to families and young people in relation to ASL. These are: access to a supporter, advocacy, mediation, adjudication, and recourse to the Tribunal.

In terms of cases at the Tribunal, advocacy services may support parents/carers or the children and young people. The Tribunal's submission also stated—

> "Mediation is common in HEC proceedings and cases are regularly suspended (paused) to allow mediation to take place. Where mediation is successful, that will usually lead to the withdrawal of the reference/claim; where not, the case will resume and move to a hearing."

Ned Sharratt, Senior Researcher (Education, Culture), SPICe Research
29 February 2023

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