



**Issue 4
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Inside this issue

- **President's address** May Dunsmuir, Tribunal President welcomes you to the latest edition of the newsletter (*Pages 2 – 4*)
- **Specification and quantification of support within co-ordinated support plans** Iain Nisbet, Independent Education Law Consultant (*pages 7 – 13*)
- **Reflections - 'new and experienced'** Contributions from **Russell Hunter**, Tribunal convener and **Jane Laverick**, Tribunal member, on the March 2016 All Members' Training Conference (*Pages 14 - 17*)
- ***DM v Fife Council [2016] CS1H17*** (*Page 18*)
- **Speech, language and communication and the judgement of capacity** Kim Hartley Kean, Head of Royal College of Speech and Language Therapists Scotland Office (*Pages 19 - 21*)
- **Additional support needs and initial teacher training** Lio Moscardini, Tribunal member and Course Leader MEd in Inclusive Education, University of Strathclyde (*Pages 22 - 23*)

President's address

ASNTS President **May Dunsmuir** welcomes you to the latest edition of the newsletter.



Photograph by David Murray

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Dear members,

As we enter into summer and the approaching school holidays it is an opportune time to reflect on the last 6 months. Much has happened since our last Newsletter in December 2015, which includes our all member conference in March 2016, the introduction of the Education (Scotland) Act 2016 and our annual Tribunal Forum in May 2016.

Unmet legal need

When I was appointed as President in May 2014, I set out my commitment to expanding our understanding of ways in which the voice of the child could be heard in our Tribunal proceedings. I then expanded this in 2015, to consider how the rights of 'looked after' children were being addressed within the context of the 2004 Act. My focus in 2016 is on unmet legal need – which includes looked after children, children with mental health problems and children without a diagnosis. I was persuaded to include this last category following a conversation at our Conference with one of our members. In order to examine these areas further, I have met with the Children's Commissioner, Govan Law Centre (GLC), Who Cares? Scotland and the Mental Welfare Commission for Scotland.

Looked after children

Research indicates that looked after children are at risk of poorer mental health and lower educational attainment. During 2015 GLC repeated an earlier freedom of information request (the original in 2013) to the 32 local authorities in Scotland. This was to quantify the extent to which they were identifying and assessing the educational needs of looked after children. The conclusion from this research was that there is still some considerable way to go before the rights of looked after children under the 2004 Act are fully implemented.

Following on from this, I have been keen to identify why so few references or claims are made by or for looked after children, given the statutory presumption that looked after children have additional support needs, unless assessed as otherwise. Taking into account the findings of the GLC research and my own engagement with education authorities, statutory agencies and schools, it seems to me that a potential reason for this may be a lack of awareness of our Tribunal. I hope to improve upon this throughout my presidency.

Corporate parents

The *Children and Young People (Scotland) Act 2014* introduces 'corporate parent' provisions, and those listed in this category, which includes local authorities, will have corporate parenting responsibilities towards children who are looked after by a local authority and young people who are under 26 years who have previously been looked after. These responsibilities include assessing the needs of children and young people for services and support it (the corporate parent) provides and taking action to help those children and young people to access opportunities. I have shared with local authority solicitors; heads of education and the Children's Commissioner my concern to ensure that additional support needs are recognised as part of these services, support and opportunities.

Communication barriers

I remain committed to identifying and overcoming communication barriers to ensure that children who wish to convey their views in tribunals are not prevented from doing so. This includes providing children with a choice of communication. In this regard, I introduced a new Guidance Note earlier this year on independent advocacy. This in our proceedings clarifies the role of the independent advocate. I am grateful to *Partners in Advocacy* who I consulted with in the development of this guidance and to our Member Training Committee and Derek Auchie, who considered the draft and provided me with helpful comments.

Access to justice

It is essential that children in Scotland can access justice without having to overcome unnecessary hurdles. In this regard, it is important that our Tribunal *looks* accessible. In support of this, my Annual Report in 2015 was illustrated by the children of Seamab - and the "Sea changer: Hug" has become quite renowned as I travel around Scotland and across the border, to England and Wales. My Annual Report in 2016 will be illustrated by a child who is supported by *Partners in Advocacy*.

We will also develop a children's area on our website during 2017, in anticipation of the new legislative provisions under the 2016 Act; and we are progressing the development of a "having your say" style form for use by children in our proceedings.

Education (Scotland) Act 2016

You have heard me speak regularly on the passage of the Education Bill. The Act was given Royal Assent on 08 March 2016. The Act will expand the Tribunal's jurisdiction by giving rights to 12 to 15 year olds who are assessed as having capacity, in relation to the 2004 Act. It will also prevent complaints going to the Scottish Ministers under section 70 of the *Education (Scotland) Act 1980*, if they might also be taken to our Tribunal.

Before a child aged between 12 and 15 years can exercise a particular right under the 2004 Act, they will have to be assessed by the education authority as having the capacity to do so and that there is likely to be no adverse impact on the child's wellbeing from the exercise of the right. The Tribunal will have jurisdiction to hear appeals on the outcome of this assessment (by a convener sitting alone); and – before the child can exercise a right to make a reference, the tribunal will have to be satisfied on the two stage tests.

Commencement of the Act's provisions is expected to take place as a whole in November 2017. There will be training on the new provisions in 2017.

Case conference calls

I have recently issued a new Guidance Note on case conference calls. For the first time it will be possible for a member to participate in the case conference call where exceptional reasons exist. I hope conveners and members will find this guidance helpful. I am grateful to the Member Development Committee for reviewing the draft of this, and to Joseph Hughes, who made a number of helpful suggestions, which are included in the final version.

Member expenses

The Scottish Government is presently considering our guidance on member expenses and the process for payment of cancellation fees. You will receive a draft revision of this to consider in the near future and I would encourage you to read this carefully and to make a response, where appropriate.

Thank you

Thank you for your continuing commitment to the work of our important jurisdiction, which includes an ability to adapt to change and a willingness to share from your own wealth of expertise. I am also grateful to our two Member Committees, who have continued to work hard over the last 6 months to deliver training and to review our practices.

I have commented before on the hard work that goes on in the background to ensure our jurisdiction continues to deliver an excellent service and I am grateful for the commitment, energy and enthusiasm of our administrative staff. After a period of staffing turmoil in 2015 we entered 2016 with an almost entirely new team: Hazel, Hugh, Lynsey and Megan. They have worked tirelessly to ensure the standards service users are entitled to expect of us are being delivered.

I hope you enjoy reading this Newsletter. Please continue to feel free to contact me or any of the Committee chairs if you wish to share any information or ideas that will enhance the work of the Tribunal.

With my best wishes,

May Dunsmuir

President



Each issue we speak to a member of the Scottish Courts and Tribunals Service (SCTS) staff about the work they do for the Tribunal.

Megan joined the administrative staff of the Mental Health Tribunal for Scotland (MHTS) in 2013 as a modern apprentice in the Business Improvement and Change team.



Megan's role was a Continuous Improvement Support Officer, which enabled her to work with all teams throughout the MHTS administration. For a short period Megan covered as PA to the Director of Tribunals Operations.

Megan joined the ASNTS administrative staff team as a caseworker earlier this year. Megan is enjoying learning about the important work of the jurisdiction. She is being supported in her learning and development by Hugh Delaney, Senior Case Officer.

In her spare time Megan enjoys spending time with friends and family, going to the cinema and going out for dinner.



Hazel has been a member of administrative staff within Tribunals since 2006, when she joined the Mental Health Tribunal for Scotland (MHTS) as a caseworker.

Hazel has mainly worked within MHTS Tribunal operations but also spent 1 year working and training in continuous improvement. Hazel worked within the MHTS Tribunal operational management team for 8 years.

Hazel transferred to SCTS Glasgow office in September 2015 as Operations Manager for the 4 jurisdictions within Glasgow and initially as the interim Secretary to ASNTS. Hazel was confirmed as the permanent Secretary to ASNTS in February 2016. Hazel is working with the President to ensure the discharge of the Tribunal's administrative functions are maintained at a consistently high level. She has also been assisting the President in managing the Tribunal's data handling responsibilities.

In her spare time Hazel enjoys spending time with family and friends, baking and going on holiday.

Tribunal Administration

An update on activities within the Tribunal's Administration

Since the last Newsletter edition the ASNTS administrative team has changed, with a new case officer and the permanent appointment of the Tribunal Secretary.

Contact details for the ASNTS administrative team are provided below.

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Specification and Quantification of Support within Co-ordinated Support Plans

by Iain Nisbet

Education Law Specialist and Consultant Solicitor at Cairn Legal (www.cairnlegal.co.uk)



Introduction

A Co-ordinated Support Plan (CSP) is a statutory document introduced by s 2 of the Education (Additional Support for Learning) (Scotland) Act 2004. The purpose of the document is to assist with the co-ordination of services for children and young persons with additional support needs. As the legislation came into force in November 2005, this year marks their tenth anniversary.

Despite other legislative developments within this time, the CSP remains an important part of the additional support for learning framework. In addition, the Scottish Government recently listed their 'continued commitment' to that legislative framework as the key commitment in their field of education, in their Draft Delivery Plan (2016–2020) for the UN Convention on the Rights of Persons with Disabilities.¹

In view of the importance of the CSP and the tenth anniversary of its introduction, this article provides a review of the way that the critical issues of the specification and quantification of support within CSPs have been dealt with. It includes discussion of the role of Individualised Educational Programmes.

The CSP and its Contents

The principal criterion for a CSP to be prepared is that the child or young person requires 'significant additional support' from at least two different specified sources.² This would usually mean education and health services or education and social work services, but there are other 'appropriate agencies', including further and higher education institutions.³

Section 18 of the 2004 Act affords parents and young persons a right of appeal to the Additional Support Needs Tribunals for Scotland in relation to the contents of specified parts of a CSP, once prepared by an education authority. Typically, much of the dispute between parent and authority will be about how specific the description of the support required to meet the child's educational objectives should be. It is an important issue, and a tribunal has pointed out that 'Specification and quantification of the additional support a child requires is a cornerstone of the Code of Practice ...'.⁴ Indeed, the Code of Practice⁵ could hardly be clearer on this point:

'The statement of support to be provided should be clear and specific and, wherever possible, should be quantified. Everyone should understand and be clear about what is being provided and why it is being provided.'

Statements such as “learning support as necessary” or “speech and language therapy as required” are too vague to be helpful.⁶

While the above approach is generally followed by the tribunals, there is also a need expressed for ‘caution as to making over-specific statements that quickly become irrelevant’ in cases where the child has a ‘variable profile’,⁷ or ‘impos[ing] an unrealistic and unnecessary burden on the authority’.⁸

So, there are limits to how far an authority must go in meeting the requirements for specification and quantification within a CSP. Those limits have been explored, to some extent, in the reported cases published by the tribunal.

One problematic case suggests that where in-house speech therapy provision was available on a full-time basis at the school, ‘it was not unreasonable to fail to quantify the periods of speech therapy’.⁹ This is presumably on the basis that the therapy would be available ‘on demand’, but it does not answer the statutory question: what support is required in order to achieve the child’s educational objectives? It is fair to say that this decision runs counter to the general thread of reasoning adopted by the tribunal.

The benefits of specification are spelled out by more than one tribunal: ‘Specification . . . will assist all parties to co-ordinate the range of additional support that can be provided to the child’;¹⁰ it is intended ‘to ensure co-ordination in support of children with multiple and complex additional support needs’.¹¹ Where a CSP is ‘precise, quantified and measurable’, the child has the benefit of a document which ‘lets all parties know what is expected of them’.¹²

In addition to phrases like ‘as appropriate’ and ‘as necessary’, which have been effectively ruled out by the Code of Practice as vague and unhelpful, the tribunal has also found, in relation to the phrase ‘in line with clinical priorities’, that its use ‘cannot be accepted as correct [as]... support should be offered based on what is required to meet his educational objectives’.¹³ This is an important point because education authorities largely rely on NHS Health Boards to provide any medical input to a CSP, including input from allied health professionals such as speech and language therapists. The tribunal’s decision on the above point suggests that it is not safe to simply record the input that NHS practitioners have identified from a clinical viewpoint, but rather requires the education authority to arrive collaboratively at an assessment of what support is required to meet the child’s specific educational objectives. Where these are not the same, the educational objectives must take priority, and specification provided.

The phrases ‘normally weekly’¹⁴ or ‘will normally be provided on a weekly basis’¹⁵ in relation to provision have been accepted as ‘sufficiently clear and specific’ for a CSP in two separate tribunal decisions.¹⁶ In the first of those two cases, the phrase ‘regular ongoing’ was preferred to the term ‘daily’, which was thought to be ‘too prescriptive’ in the circumstances of that case. It was observed that the term ‘regular’ was ‘more needs led and allows for greater flexibility in addressing issues as and when they arise’.

These last cases perhaps most clearly identify the levels of specification required for a CSP to provide clarity for parents, while allowing a degree of flexibility for the education authority. It is submitted that in doing so, they also meet the requirements of the legislation and the Code of Practice.

Individualised Educational Programmes

In many, or indeed most, cases the child or young person with a CSP will also have an Individualised Educational Programme (IEP) or other non-statutory educational planning document in place. As of August 2016, it is anticipated that a statutory child's plan will be in place for all children who require targeted interventions (including educational interventions) in terms of Part 5 of the Children and Young People (Scotland) Act 2014.

In such cases, the question arises as to what belongs in an IEP and what in the CSP. More specifically, if additional support is contained within an IEP, does it need to be repeated in the CSP or can one simply refer to the IEP within the text of the CSP? This is a common approach to reducing unnecessary detail within the CSP, but education authorities must be clear that neither an IEP nor a child's plan can replace a CSP or any of its essential elements. It is important to ensure that the relationship between these documents is made clear, and desirable that unnecessary duplication is avoided, while not overriding the purpose of a CSP.

Again, the Code of Practice gives a strong lead in this area:

'What is important is that the plan contains those educational objectives which require the various forms of support to be co-ordinated if the educational objectives are to be achieved... other learning outcomes which... do not depend... on the level of co-ordination of support required by the plan... will be documented through other school planning arrangements such as personal learning planning, an individualised educational programme, or another approach used by the school and will not be listed in the co-ordinated support plan.'¹⁷

This is confirmed in the approach taken by the tribunals:

'Having regard to the terms of the Code of Practice, the Tribunal is of the view that the educational objectives which should be listed in the CSP are those which require the input of an agency other than education. The additional support provided by all agencies including education to meet those objectives should be detailed in the CSP together with quantification and identification of the provider e.g. class teacher or speech and language therapist.'¹⁸

The IEP (or other planning document) should therefore contain learning objectives which do not require input from other appropriate agencies or local authority functions. It may also contain shorter term objectives, which feed into the long-term objectives found in a CSP. This will often mean that the IEP will be the more detailed of the two documents:

'our view is that the intention of the statutory scheme is to have a greater level of detail in an IEP than would normally appear in a CSP. The CSP is intended to cover a full year period and to take a broader view of the child's potential and the support required.'¹⁹

This is not to say that the educational objectives within the CSP should lack detail or clarity: 'the educational objectives should be set out clearly and be separated into the constituent parts'.²⁰

A commonly used approach is to make specific reference within the CSP to the IEP (and vice-versa), so that the intended relationship between the two documents is clear.

In particular, it is important that there is a clear correlation between the CSP objectives and those in the IEP.²¹ For example, in one case, the tribunal set out: 'To ensure consistency of approach, and having regard to the Code of Practice, we considered that the authority should include in the CSP a statement that the child should have a PLP [personal learning plan] which defines SMART targets and strategies to be used by staff'.²² Indeed, the tribunal has been keen to avoid unnecessary duplication between the two documents: 'In view of the very detailed IEP and the educational objectives set out we do not consider that these require to be repeated and the reference to the IEP in the plan is adequate'.²³ However, caution must be adopted with this approach, given the comments regarding the relationship with the IEP in other cases (see below).

The CSP may also be used to dictate the appropriate content or approach of an IEP: 'the authority should include within the CSP a statement that the Individualised Education Programme prepared and reviewed for the child each term will show objectives which are SMART'.²⁴

The reported decisions of the tribunal twice mention the need for IEP targets to be 'SMART' (Specific, Measurable, Achievable, Relevant, Timed). Given the above-noted requirements of CSP educational objectives, these should also be SMART. Note that 'Achievable' does not mean that objectives will always be achieved. The law does not impose a duty to achieve the educational objectives within the annual review period of a CSP. Indeed, the tribunal has been clear that correctly framed educational objectives will not always be achieved: 'A CSP should not be framed in such a way that all objectives will always be met within the timescale of one year and it is sometimes appropriate to have aspirational objectives which can be worked towards even if these are not invariably

achieved'.²⁵ It is also worth remembering that the educational objectives will not necessarily be academic in nature. As one tribunal found: 'eating and drinking is something on which teaching staff and therapists were working when the child was in school. That is a legitimate education objective for the child'.²⁶ That same tribunal decision also helpfully draws a distinction between an educational objective and the support required to achieve it: 'the school provide a physiotherapy programme. This is a specific programme, used to achieve the specific objectives, and not an educational objective in itself'. This distinction is an important one, because the support to be recorded in the CSP is the support required by the child or young person to achieve those objectives²⁷ and so it is necessary to be clear about which is which.

As before, one of the issues arising is the extent to which information in the IEP should be incorporated by reference. The decisions of the tribunal are not altogether consistent on this point, but there are some broad principles which can be identified.

To be fair to those sitting on the tribunal, it is clear that the practice among local authorities about references to IEPs is far from universal: 'Members of the tribunal have seen CSPs with such plans referenced in both columns... the references to the plans fitted marginally better in the "Additional Support Required" column as they contain significant further details of the level of support'.²⁸

Some tribunals seem to have taken the view that all of the additional support required should be included in the CSP, whether or not there is an IEP in place: 'The Tribunal is of the opinion that it is relevant to include in the CSP all additional support given to the child which supports his identified additional support needs arising from his complex or multiple factors'.²⁹

The more frequent view was that it is desirable and useful to simply refer to an IEP or similar document within the CSP. The view seems to be that it is important to include reference to other planning documents 'to ensure consistency and communication across all agencies when working with the child'.³⁰ That view is echoed in another decision:

'While duplication is to be avoided, the spirit of the Act is to enable all services providing co-ordinated support to a child to identify the aims and objectives and see easily and clearly what other agencies are providing. This ensures joined up provision and avoids duplication or inconsistency. By including reference in the CSP to other planning documents which are in existence the spirit of the Act is fulfilled.'³¹

References to 'the spirit of the Act' are enough to get many lawyers nervous, and to the extent that this might be interpreted as requiring little detail at all in the CSP itself, it goes too far. In the words of the former President of the Additional Support Needs Tribunals for Scotland, Jessica Burns: 'If this is the correct interpretation of the legislation then it leaves the CSP as a rather blunt tool for clarifying the support which the child, and parents, is entitled to expect'.³²

A more recent decision and (in the author's view) a better one, sets out an approach for reference to an IEP within certain limits:

'The CSP can refer to the IEP and it is not necessary to duplicate the terms of the same unless this is required to meet the statutory requirements for the plan. It is not appropriate to omit something from the plan that should be there, on the basis that it is contained within the IEP... It is necessary for education authorities to demonstrate an articulation between both documents.'³³

This strikes the author as better representing the statutory intention, given the requirement in the Act to state what support is required. If this was possible solely by way of reference to a non-statutory document, then it would allow the authority to bypass the statutory review process for the CSP and amend a child's support by simply updating the IEP.

In any event, references to other planning documents can only be as good as those other documents themselves. The older, the more incomplete or more inadequate such documents are, the less they will be able to be incorporated by reference into a CSP. This is illustrated very neatly by the 2009 tribunal decision highlighted below.

'The Tribunal is concerned that the educational planning for the child has been uncoordinated and piecemeal with no one document being available which lists his educational objectives, the additional support he requires and the persons delivering that support. While the Tribunal accepts that information contained in planning documents which is accessible to all those involved with the child and which is regularly reviewed need not be repeated in his CSP, such a planning document does not exist for the child. The Tribunal were referred to a Daily Support Plan and an Additional Support Plan. The former does not contain the level of detail required to ensure that the child's additional support needs are met. The latter has not been reviewed since its inception in or around August 2007. An updated Additional Support Plan dated April 2009 appears only to have been amended by the inclusion of reference to the child's diagnosis as having Asperger's Syndrome.'

The Additional Support Plan does not contain any educational objectives. ... [T]he Tribunal cannot be satisfied that information relating to the child's educational objectives, the additional support he requires to benefit from school education and the persons providing that support are to be found in any planning document. As a result the Tribunal cannot consider that the educational resources provided to the child in the form of additional support provided by the education service of the authority need not be detailed in the CSP ... Reference in the CSP to an Additional Support Plan is only of assistance to parties if that Additional Support Plan provides the relevant information and is regularly reviewed ... The Tribunal is not concerned with the title or name of a planning document which sits underneath the CSP. The Tribunal is more concerned with the existence of such a planning document. The appellants were keen to have an Individualised Education Plan established for the child and that the CSP make reference to it ... the Tribunal is concerned that the role of the educational and school staff in meeting the educational objectives in the CSP is not mentioned in the CSP and in addition that there was no reference to the Additional Support Plan within the CSP. The spirit of the Act is to enable all services providing co-ordinated support to a child to identify the aims and objectives and see easily and clearly what other agencies are providing. This ensures joined up provision and avoids duplication or inconsistency. One method of ensuring that the spirit of the Act is fulfilled by including reference in the CSP to other planning documents which are in existence. While such planning documents are deficient, all support requires to be detailed in the CSP.'

Conclusion

While the legal requirements for specification and quantification are clear, it is also clear that the system allows for a degree of flexibility. The use of terms like 'normally weekly' appear to be sufficiently precise to allow parents to be satisfied, while also giving some room for manoeuvre to education authorities to take a flexible, needs-led approach.

Further, the use of child's plans or other planning documents alongside CSPs should be beneficial and complementary, rather than an attempt to replace or water down a CSP. Their use at all relies on the plan being detailed enough to ensure the child's needs are being met. Other plans in use should also be accessible to all those involved with the child (both parents and professionals) and reviewed regularly (at least termly).

Even where this is the case and the IEP or other plan is referred to within a CSP, the CSP must contain sufficient minimum information to meet the statutory requirements.

These principles have been developed by a succession of tribunal decisions over the full course of the decade the 2004 Act has been in force.

While a right of appeal to the Court of Session against tribunal decisions does exist,³⁴ it has mostly been used in relation to placing request appeals,³⁵ and the court has never had cause to consider in detail the contents of a child's CSP. Therefore, it has been the members and conveners of the Additional Support Needs Tribunals for Scotland who have brought their knowledge and experience in the field to resolve these tricky questions of law. Despite the occasional wrong turn, they have done a good job and have made the task of preparing a CSP easier and clearer for everyone concerned.

References

1. Launched 8 September 2015: www.gov.scot/Resource/0048/00484854.pdf.
2. For a full discussion of when additional support qualifies as 'significant' for these purposes see *JT v Stirling Council* [2007] SC 783.
3. A full list of appropriate agencies can be found in s 23(2) of the Education (Additional Support for Learning) (Scotland) Act 2004 and the Additional Support for Learning (Appropriate Agencies) (Scotland) Order 2005 (SSI 2005/325), as amended by the Additional Support for Learning (Appropriate Agencies) (Scotland) Amendment Order 2010 (SSI 2010/143).
4. Additional Support Needs Tribunal decision d/06/2009. Tribunal decisions beginning with 'd_' can be found at: www.asntscotland.gov.uk/content/decisions-database.
5. 'Supporting Children's Learning' Code of Practice (2010), issued under the Education (Additional Support for Learning) (Scotland) Act 2004. The Code of Practice is published by Scottish Ministers in terms of their duty to do so found in s 27(1). The current code is the 2nd edition. Education authorities and appropriate agencies must, in exercising their functions under the Act, have regard to the Code: s 27(8).
6. 'Supporting Children's Learning', *ibid*, Chapter 5, para 61.
7. Additional Support Needs Tribunal decision d/08/2009.
8. Additional Support Needs Tribunal decision d/01/2011.
9. Additional Support Needs Tribunal decision d/04/2008.
10. Additional Support Needs Tribunal decision d/06/2009.
11. Additional Support Needs Tribunal decision d/14/2006.
12. Additional Support Needs Tribunal decision ASNTS/039/2012 (unreported).
13. *Ibid*.
14. Additional Support Needs Tribunal decision d/07/2009.
15. Additional Support Needs Tribunal decision d/01/2011.
16. See notes 14 and 15 above respectively.
17. 'Supporting Children's Learning' Code of Practice (2010), Chapter 5, paras 57 and 58.
18. Additional Support Needs Tribunals decision d/13/2009, see also decision d/12/2006.
19. Additional Support Needs Tribunal decision d/08/2009.
20. Additional Support Needs Tribunal decision d/16/2010.
21. Cf Additional Support Needs Tribunal decision d/08/2009.
22. Additional Support Needs Tribunal decision d/16/2010.
23. Additional Support Needs Tribunal decision d/10/2010.
24. Additional Support Needs Tribunal decision d/04/2008.
25. Additional Support Needs Tribunal decision d/14/2009.
26. Additional Support Needs Tribunal decision d/14/2006.
27. Education (Additional Support for Learning) (Scotland) Act 2004, s 9(2)(a)(iii).
28. Additional Support Needs Tribunal decision d/01/2011.
29. Additional Support Needs Tribunal decision d/019/2008.
30. Additional Support Needs Tribunal decision d/14/2006.
31. Additional Support Needs Tribunal decision d/12/2006.
32. ASNTS Annual Report 2007/2008.
33. Additional Support Needs Tribunal decision ASNTS/039/2012 (unreported), author's added emphasis.
34. Education (Additional Support for Learning) (Scotland) Act 2004, s 21.
35. Section 22 of and Schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 confers a right for the parents of a child with additional support needs to request a place at a specified school. The specified school can be a mainstream school or a special school managed by an education authority; a special unit within a mainstream school managed by an education authority; an independent or grant-aided special school; or even a special school in England, Wales or Northern Ireland. A placing request may only be refused if one or more of the statutory 'grounds of refusal' exists. Where a placing request is refused, a right of appeal lies to the Additional Support Needs Tribunals in terms of s 17 of the 2004 Act, unless the specified school is a mainstream school and the child does not have (and is not being considered for) a CSP. In those cases, the appeal is heard by the education authority's education appeal committee.

This article first appeared in the *Education Law Journal* [2015] Ed Law 241.

Reflections from a new convener

by Russell Hunter, Tribunal convener

On 16 March 2016 at the Hallmark Hotel in Glasgow, members and conveners of the Additional Support Needs Tribunals for Scotland (ASNTS) gathered for our annual Training Conference.



As a new convener this was a welcome opportunity to meet existing conveners, members and staff of the Administration; to gain insights into the jurisdiction, its specialities and ethos; and to discuss those issues with experienced conveners and members.

The day started with coffee and rolls, while the training programme itself started with an address by our President, May Dunsmuir. After that, the morning was broken into three sessions. The first comprised reflections by two people who have appeared before the ASNTS: one as a parent and the other as an education authority professional. I was deeply impressed as they spoke powerfully about the experience of appearing before a body that makes profoundly significant decisions, not only in personal terms for the child and the child's family, but for schools and education authority budgets.

"I was deeply impressed as they spoke powerfully about the experience of appearing before a body that makes profoundly significant decisions,..."

One of the key matters on which the two speakers initially agreed was the desire that tribunal panels behave more informally. This particular issue sparked a lively discussion between members and the two speakers themselves about the appropriate balance between formality and informality in proceedings taking place only because a relatively informal process such as mediation had not been tried or had been tried and failed. I found that the discussion was particularly interesting being informed as it was by the element of the overriding objective set out in the Tribunal's Rules requiring a tribunal to seek informality and flexibility in the proceedings.

The second session was a fascinating exposition by a speech and language therapist of the means by which children and young people, some of whom have severe communication disabilities, can appropriately be supported in making their own views known to the tribunal. I believe that an understanding of these methods is invaluable for a tribunal required to consider whether steps need to be taken to hear the views of the child and, if so, to ensure that those views are obtained in a way appropriate to the needs and interests of the child.

The morning was completed with a short presentation by the Administration about the availability of secure email accounts to members and the streamlined, simplified, system for payment of fees and expenses. As a new convener, this was very helpful.

“I believe that an understanding of these methods is invaluable for a tribunal required to consider whether steps need to be taken to hear the views of the child and, if so, to ensure that those views are obtained in a way appropriate to the needs and interests of the child...”

The first afternoon session involved members working in small groups considering several scenarios requiring consideration of Guidance to Members on Independent Advocacy, Practice Direction 5 (hearing from the child or young person) and various of the Tribunal’s Rules. These scenarios allowed time for detailed discussion of issues both in the small groups themselves and in the group feedback sessions. I found the opportunity for exchanges of view between new and existing members and between members and conveners invaluable in extracting the most from these scenarios.

The afternoon concluded with an excellent presentation by a retired sheriff on assessing expert evidence, with consideration of relevant and recent case law.



I found that the Conference involved some hard thinking and hard work by myself and my fellow members on the day, but most of all it required hard work by the members of the Training Committee and the Administration who put the programme and event together and by those who gave of their time and experience to give presentations. Their hard work rewarded us all and I record here my thanks for their efforts.

Annual Tribunal Forum: 3 May 2016

Each year the President hosts a Tribunal Forum which provides people with the opportunity to meet the President, Tribunal Secretary and members of the Secretariat, and to discuss topical matters in relation to the Tribunal. This was previously called the Tribunal Users’ Group and is now called the Tribunal Forum.

Anyone can attend the Forum, including Tribunal members and conveners.

The President’s presentation and note of discussion is available on the Tribunal’s website @

<https://www.asntscotland.gov.uk/content/tribunal-forum>

Reflections from an experienced member

by Jane Laverick, Tribunal member

The Hallmark Hotel, Glasgow was the venue for the Additional Support Needs Tribunals for Scotland annual conference on 16 March 2016 which had *Evidence* as its theme.



As always, it was great to have a chance to meet with other members and conveners to chat informally as well as share thoughts and experiences in workshops throughout the day. This year, it was also an opportunity for the newly-appointed members and conveners to meet with the existing ASNTS cohort.

The ASNTS President, May Dunsmuir, addressed the group at the start of the day, highlighting the importance of hearing the voice of the child or young person at tribunal hearings and the need to think flexibly about the ways in which this might be achieved. She also reminded us about the Education (Scotland) Act which was passed on 8 March 2016, and its implications for the Tribunal. Young people aged 12 years and above with capacity have an extended range of rights, including being able to bring references to the Tribunal. Finally, she spoke about the structure of the new Scottish Tribunals and the implications for ASNTS members and conveners, including the potential to be assigned to other chambers.

The conference then heard from two speakers who talked about their experiences of attending tribunal hearings. A parent gave us her perspective on her experience of the tribunal and highlighted the difference between her expectation and the reality of what a hearing will be like. She also spoke about her personal experience of bringing a child to the hearing to give evidence, as well as giving evidence herself as the final witness of the day. We also heard from a local authority representative. She explained that she had attended many hearings and commented, in particular, on their formality and the amount of information given in evidence. It was interesting to hear about their perceptions and, indeed, their frustrations with the tribunal process.

“A parent gave us her perspective on her experience of the tribunal and highlighted the difference between her expectation and the reality of what a hearing will be like...”

A Specialist Speech and Language Therapist gave us a fascinating presentation about ways in which children and young people, with a range of communication difficulties, might be encouraged to express their views. As well as covering different types of speech, language and communication needs, she also discussed strategies that might be helpful when communicating with children and young people in terms of tribunal evidence. Towards the end of the session, members and conveners had an opportunity to learn about using Talking Mats as an aid to eliciting opinions and to think about how they might be used to facilitate interaction with children and young people.

The ASNTS Secretariat updated us on secure email accounts and explained the new, much-simplified, process for claiming fees and expenses.

After lunch we returned refreshed and replete to consider, in groups, various scenarios in relation to the new Independent Advocacy Guidance to Tribunal Members issued by the President in January 2016.

The final speaker of the day was a retired Sheriff who gave a stimulating and thought-provoking presentation about assessing evidence. He spoke about the ASNTS as a specialist tribunal bringing relevant experience and knowledge to the decision-making process and the degree of flexibility this brings when taking evidence. He also raised interesting points about admissibility, assessing expert evidence and what to do in situations when evidence from witnesses is conflicting.

“He spoke about the ASNTS as a specialist tribunal bringing relevant experience and knowledge to the decision-making process and the degree of flexibility this brings when taking evidence...”

“”

As well as introducing the speakers, the Training Committee ensured the sessions ran smoothly and to time. Thank you to our Member Liaison Officer and the rest of the team for organising a successful and most enjoyable event.



DM v Fife Council [2016] CS1H17

A young person with autism who was granted decree against a local authority to pay for a further year of his education at a private school for pupils with special educational needs after he turned 18 has seen the decision overturned on appeal.



Judges in the Inner House of the Court of Session ruled that while a sheriff was entitled to find that the pupil was the victim of “indirect discrimination” as a result of his disability, it was “not open” to the sheriff to make an award for school fees of more than £43,000.

Facts

After the appellant succeeded in a placing request appeal in the sheriff court, the defenders (Fife Council) paid for the young person’s (DM) school fees at Butterstone School (also known as “The New School”). DM has an autistic spectrum disorder and dyspraxia. As DM approached his 18th birthday (06 June 2013), his mother and the head teacher of Butterstone considered that he needed a further year at the school to enable DM to transition to further education and/or employment. They both wrote to the education authority to request continued funding for the 2013/14 academic year, but the education authority refused on the basis that their statutory obligation to provide education came to an end when the young person reached the age of 18 years - albeit he was able to remain at Butterstone for the final three weeks of term until 28 June 2013 because his fees for 2012/13 had been paid in advance.

Sheriff court action

A summary application was raised by DM’s mother (Dr KM) in the sheriff court, on the grounds of “unlawful discrimination” on the basis of age and disability, contrary to the *Equality Act 2010* and the sheriff found in favour of Dr KM, granting decree against the education authority for payment of £45,910 for school fees including £2,500 for Dr KM’s “injury and loss”, and ruled that the education authority discriminated against DM in failing to take account of his disability and on the basis of his age, and failed to make “reasonable adjustments”.

Inner House decision

The Inner House ruled that while a sheriff was entitled to find that DM was the victim of “indirect discrimination” as a result of his disability, it was “not open” to the sheriff to make an award for school fees.. Lord Bracadale added: “*While I can see that a reasonable adjustment in relation to a class of disabled persons who were approaching the age of 18 and were having difficulty with transition might be to advise the disabled persons in that class of the availability of discretionary bursaries to fund a seventh year, or to treat a request for funding as an application for a discretionary bursary, **I do not think that it can be the case that a reasonable adjustment for such a class of disabled persons would be to pay the fees for a further year of school education in every case.*** (emphasis added)

Full Judgement can be viewed online @

<http://www.scotcourts.gov.uk/search-judgments/judgment?id=b3e70ba7-8980-69d2-b500-ff0000d74aa7>

Speech, Language and Communication and the Judgement of Capacity

by Kim Hartley Kean

Kim Hartley Kean is a registered SLT and Head of the Royal College of Speech & Language Therapists' Scotland Office.



The Education (Scotland) Act 2016 modifies the Education (Additional Support For Learning) (Scotland) Act 2004 by describing what is meant by 'capacity' and conferring duties on education authorities to assess a child's capacity in relation to actions, decisions, provisions and views of the child. This article highlights the links between capacity, as defined in the new Act, and speech, language and communication as well as providing pointers on how practitioners can go about reliably establishing a child's capacity at any particular time in relation to any particular 'thing' they or the child might wish to do. The article will look at some of the terminology within the new Act and explain the relevance of communication to this.

To comply with the new Act practitioners will be required to determine a number of the child's capacities. All text highlighted in red and bold below has a clear speech, language and communication aspect to it. Given this is the case, 'capacity' cannot be separated from the child's speech, language and communication ability.

1. *For the purposes of this Act, a child has capacity —*
 - a) *in relation to an act ... if the child has **sufficient maturity** and **understanding** to carry out the act,*
 - b) *in relation to a decision of the child ... 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... of any **information**, **advice** or co-ordinated support plan ... 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).***

- **Maturity** is, in part at least, about an awareness and understanding of socially acceptable behavioural norms and having the verbal and non-verbal communication skills to interact in acceptable ways. Judgements of maturity are subjective in nature.
- **Understanding** is about the ability to hear, listen to and process verbal, visual and other sensory information. Sufficiency of understanding will be determined by both the child's developmental comprehension level and complexity of information presented, both of which can be objectively assessed. Understanding can be enhanced or impaired by the way information is presented to a child.
- **Making decisions** is about being aware that different choices (e.g. of ways of living or doing things) are available. It is about understanding what each choice/option would be like and understanding descriptions of potential future consequences of each choice/option. Comprehension of language about future events and ability to ask questions about the future is a relatively high level language skill. Again understanding and exploration of information can be enhanced by the way it is presented.
- **Communicating decisions** is about ability to express preferred choices – verbally or non-verbally using speech, writing, gesture, symbols, body language etc. The ability to express is determined by the child's expressive speech and language developmental level and complexity of what they are trying to express. The ability to express can be enhanced or impaired by the expressive communication supports, sometimes known as augmentative and alternative communication systems (AAC) available to the child and which they are familiar with using.
- **Understanding the decision and its implications** involves similar speech, language and communication skills as those related to *Making decisions* above.
- **Retaining memory** is not in itself a communication skill; however memory (i.e. what we have stored in our heads) is tested by asking someone to express (i.e. communicate) what they can recall. An understandable record of decisions can greatly enhance memory. Those who cannot write or read can be helped to retain memory of decisions and to communicate about them by use of AAC.



A child cannot 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)...

A child cannot 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). This is about ensuring the child is given every opportunity to be directly involved in their learning and decision making through the use of augmentative and alternative communication (AAC) systems or strategies which enable that individual child to understand and/or express him or herself. AAC encompasses a variety of ways of communicating including using objects, gestures, signing, photographs, drawing and symbols to get information over and or facilitate expression, as well as the use of simplified

Consideration of capacity is not a one off measure. Children will have capacity to make some decisions but not others.

Factors impacting upon a child's communication and consequently the ability to demonstrate capacity include not just their learning needs but their life experiences and opportunity and mental health.

When considering a child's capacity in each instance practitioners will have to ask themselves:

- 1. What does the child have to understand to make this decision?**
- 2. Has the child developed the required level of understanding (comprehension) to be able to participate in making this decision?**
- 3. Can information be presented to this child in such a way as to support their understanding, in order that they can participate in decision making?**
- 4. Can AAC supports be provided to this child to enable them to express their views?**

Speech and Language Therapists can, within the bounds of service availability, support practitioners to answer these questions. For example SLTs can:

- Identify the 'language level' of any information; that is its relative complexity and therefore the level of understanding a person will need to comprehend information.
- Break information down into simplified, structured language to match the child's comprehension level. Where complex verbal or written information cannot be simplified to match the child's comprehension level SLTs may recommend alternative ways of helping a child understand information which matches that child's comprehension strengths.
- Where a child is known to a service the SLT will normally hold information profiling the child's comprehension and expressive communication strengths and difficulties. With appropriate consents they can advise others about the sorts of strategies to use to support the child's understanding and expression. SLTs can update communication profiles and assess if the child will be able to participate with any particular type of decision from a communication capacity perspective.
- Give practitioners advice, training and practical support with provision of AAC materials, for example symbolised plans, pictorial option appraisal charts and signing.
- Provide a broad range of general and bespoke training for example on screening speech, language and communication skills and inclusive communication good practice.
- Where a child is deemed not to have capacity SLTs can assist authorities to still optimally engage that child in decisions by recommending strategies which optimise the functioning of the child's understanding and expressive abilities.



Practitioners working within the new Act would benefit from discussing their new duties with their local SLT services to consider effective and efficient means by which they can work in partnership to deliver children's rights and enhance participation.



Additional Support Needs and Initial Teacher Education

by Dr Lio Moscardini

Tribunal member

Course leader MEd in Inclusive Education, University of Strathclyde

Vice-Chairperson Scottish Teacher Education Committee Inclusion Group

I have been teaching on Initial Teacher Education (ITE) programmes on a full-time basis since 2007 and as a visiting lecturer since 2000. A statement which students regularly feed back is '*we do not do enough on additional support needs*', previously the comments referred to special educational needs.

Campaigns from various organisations and lobby groups promote the view that more needs to be done in this area in initial teacher education with regular calls for more explicit teaching relating to particular groups and/or particular conditions or impairments. These statements and positions require consideration as to whether or not the expressed need relates to more input in a general sense about policy, legislation and practice or whether it is a call for more specific input relating to specific groups of learners and particular conditions. If it is policy and legislation relating to additional support needs which is being called for then this is certainly covered in ITE courses but this knowledge needs to be understood within the context of school-based practices and procedures and students require to be supported in schools in developing an understanding of these processes in practice. This is an ongoing aspect of professional learning relevant to all practitioners and can be challenging as is evidenced, for example, by the time required for the development and implementation of *GIRFEC* in schools. An aim of the ITE is to develop teachers to support all children.



An aim of ITE is to develop teachers to support all children.

Fundamental to this is an acceptance of their responsibility towards all children.

A concern might be that additional support needs is seen in a narrow sense applied to particular conditions, for example autism or dyslexia. If the call for more on additional support needs is in relation to particular groups of children or particular conditions or impairments then who should be privileged and who should be left out? When, for example, would be the best time for a student to learn about Down Syndrome or Smith-Magenis Syndrome, in the second year of an undergraduate course or in practice in the context of working with a particular child?



'WE DO NOT DO ENOUGH ON ADDITIONAL SUPPORT NEEDS...!'

It is important that students understand additional support needs in the broad social sense which includes any child who at any time may require additional support and that the largest group of children with additional support needs will not have a particular label or condition. Instead of thinking that 'I don't know anything about dyslexia' students need to be encouraged to recognise the pedagogical knowledge and skills that they have to support all learners in reading and also to identify what further knowledge they need to develop in relation to individual children and how they might access this knowledge.

“It is important that students understand additional support needs in the broad social sense which includes any child who at any time may require additional support and that the largest group of children with additional support needs will not have a particular label or condition...”

I am not suggesting that student teachers do not need to know about autism, hearing impairment, visual impairment or any of a vast number of particular conditions. Of course there is specific knowledge in particular areas which teachers need to understand but this needs to be understood in relation to the individual child along with the complexity of circumstances that relate to that child. Student teachers need to recognise this as an aspect of their career long professional learning.



The General Teaching Council of Scotland sets out standards for provisional as well as for full registration for teachers.



The General Teaching Council of Scotland sets out standards for provisional as well as for full registration for teachers. The Standard for Provisional Registration specifies what is expected of student teachers at the end of Initial Teacher Education. At the core of the Standards are the professional values and personal commitments required of all teachers. These underpin the professional knowledge and understanding and the professional skills and abilities required of teachers. It is worth noting that this model, with value and commitment at its heart, followed the model set out in the National Framework for Inclusion which places values and beliefs at the centre. The Framework for Inclusion was commissioned in 2007 by Scottish Government of the Scottish Teacher Education Committee Inclusion Group which is a working group representing each of the Scottish Universities providing initial teacher education.

The GTC Standards state that teachers should demonstrate a commitment to the 'principles of democracy and social justice through fair, transparent, inclusive and sustainable policies and practices in relation to: age, disability, gender and gender identity, race, ethnicity, religion and belief and sexual orientation.'

As far as professional knowledge and understanding and professional skills and abilities are concerned, student teachers are required to have an understanding of current legislation and policy relating to additional support needs and also the appropriate skills to meet the needs of all learners. ITE courses are purposely designed to equip student teachers to meet these standards.

However, the realisation is perhaps more complex and challenging.

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Past editions of
the newsletter



Additional Support Needs
Tribunals for Scotland

Our next edition will be issued in December 2016

Contributions

If you wish to make a contribution to future editions,
please contact the editorial team using the e-mail
address opposite.

***Contributions for the December 2016 edition must be
lodged no later than 31 October 2016.***

***Contributions should be set out in Arial font, size 12
and justified, which improves accessibility.***

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