



Additional Support Needs
Tribunals for Scotland

Tribunal User Group Meeting – Friday 13 November 2009

Europa Building, Glasgow

ASNTS hold regular Tribunal User Group (TUG) events to provide an opportunity to address any aspect of the Additional Support Needs Tribunals to the President and Secretary.

The latest TUG event took place in Europa Building, Glasgow on Friday 13 November 2009 and was attended by 21 users.

The President commenced the event with an overview of the legal issues currently facing the Tribunal.

<p>Legal Issues, Legislative Changes and the Tribunal</p> <p>Jessica Burns 13 November 2009</p>	<p>Legal Developments</p> <ul style="list-style-type: none">□ Impact of Exacting Criteria for CSP□ Use of Rule 24□ Expenses□ Placing Request Decisions Without Formal Offers of a Place□ Enabling Role Revisited□ Onward Appeal Delays
<p>[2009] CSIH 46 XA207/08</p> <ul style="list-style-type: none">□ Criteria for CSP not met where child had:<ul style="list-style-type: none">■ Disability nurse 2 hours per week■ Physiotherapy advisory and ongoing■ SLT – unspecified – delivered in blocks■ SWD – Section 23 report and changes in residence■ Befriender 3 hours per fortnight■ OT for several years transferred to school OT	<p>Lord Hardie held...</p> <ul style="list-style-type: none">□ Tribunal did not sufficiently link support to the requirement to enable the child to benefit from school education□ Failed to address frequency, nature, intensity and duration criteria□ Pointless to commit resources where no co-ordination likely□ Relevant period related to school transition and fresh reports required□ No evidence from only possible provider of significant support



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Observations on SALT Input

“Tribunal should have distinguished between therapy provided directly to AW by SALT and indirect therapy provided as part of the curriculum i.e. through the guidance of SALT by the teacher or classroom assistant to the class of whom AW is a member. In our view it is only if the former can be said to amount to significant additional support that the test in section 2(1)(d)(ii) can be satisfied.”

Application of Rule 24 – Expert Evidence

- Can be suggested by parties pre-hearing or by Tribunal
- Decision is for Tribunal and not Convener alone
- Assistance of an expert to enquire into and report
- Tribunal may direct that the expert shall attend the hearing
- Link to Rule 3(2)(c) - equality of arms

Expenses under Rule 39

- Sought by appellant where authority had manifestly failed to discharge its obligations under the Act in terms of conducting a review
- Sought by respondents where second reference, raising essentially the same issues as a previous reference, had failed

Placing Request Decisions

- Obligation on parent to obtain an offer of a place before making the application
- Obligation on authority to conduct a proper assessment of the respective merits of the educational provision before reaching a decision
- Tribunal directions to establish competent reference

Enabling Role Revisited

- ELLCC debates highlighted negative aspects of the Tribunal experience
- CREID research highlights positive aspects of the Tribunals' role in dispute resolution
- Trying to achieve more consistency in the way in which Tribunals take the role in questioning witnesses and ensuring clarity of procedure
- Continuing importance of the role of the representative in promoting access to the Tribunal

Onward Appeal Delays

- Average time taken between ASNTS decision and Court of Session opinion – 23 weeks
 - Shortest – 12 weeks
 - Longest – 54 weeks and counting
- 8 appeals Outer House; 4 Inner House. Is this appeal route proportionate?



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Issues for 2010

- ▣ **Secondary Legislation Review**
- ▣ **Legislation Implementation**
- ▣ **Equality Bill**
- ▣ **Future Organisation of
Tribunals in Scotland**
- ▣ **Representation for Parents**

There were some issues raised throughout the President's presentation.

An Education Authority representative indicated that there are sometimes inconsistencies in CSP drafting, for example, what might be considered as significant in one case may not be in another. It was also pointed out that it is not only parents who may find the Tribunal process stressful, professional witnesses can be left feeling 'bruised' as their credibility may seem to be under scrutiny.

The new Secretary, Sally Burns, gave a presentation on Tribunal activity since the last Tribunal User Group in 2008.



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Tribunal Activity Since 2008 Tribunal User Group

Sally Burns
13 November 2009

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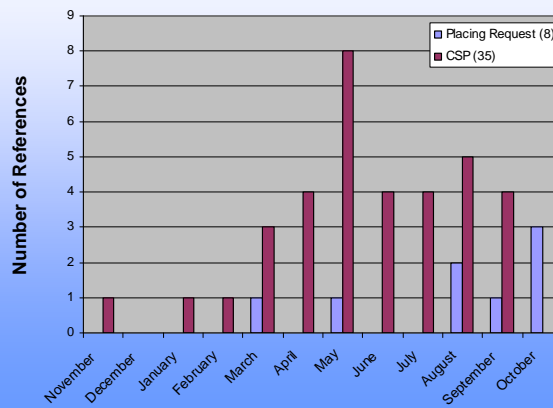


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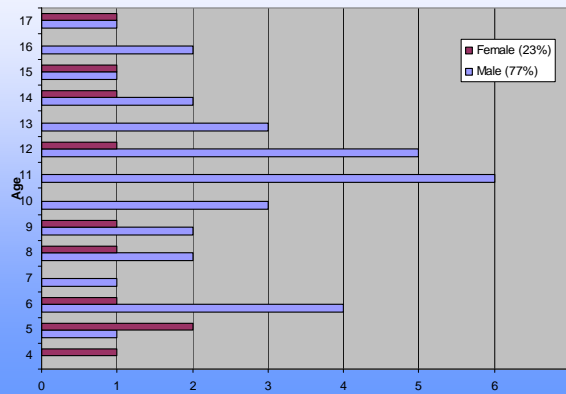
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References Received per Month 1 November 2008 – 31 October 2009



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References Received by Age and Gender 1 November 2008 – 31 October 2009

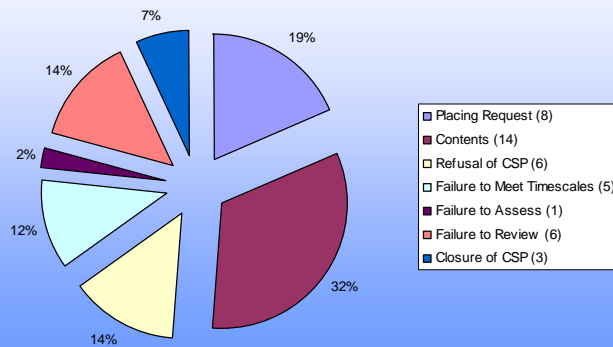




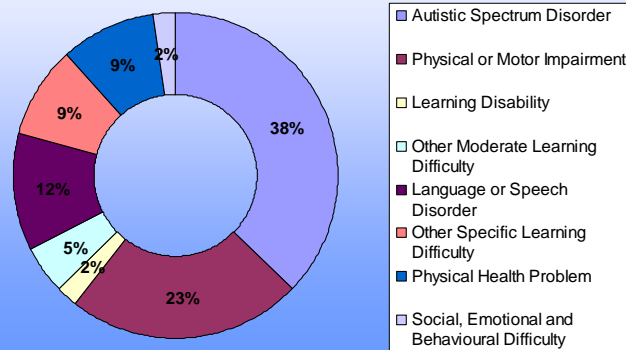
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References by Type 1 November 2008 – 31 October 2009

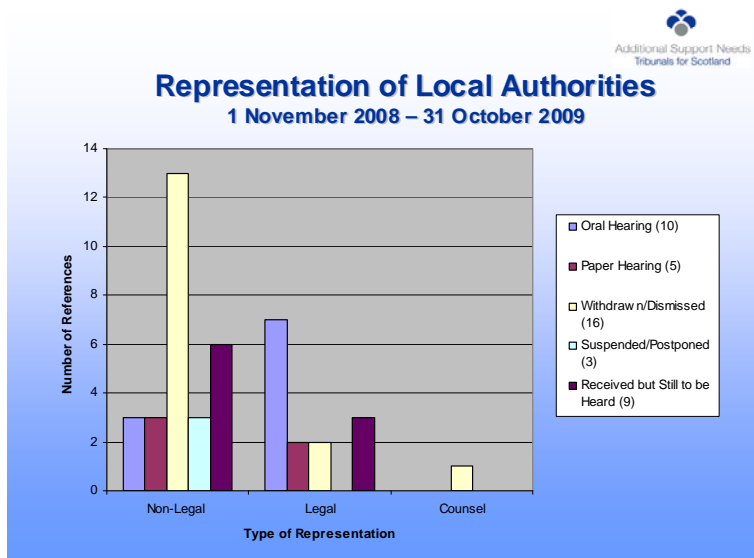
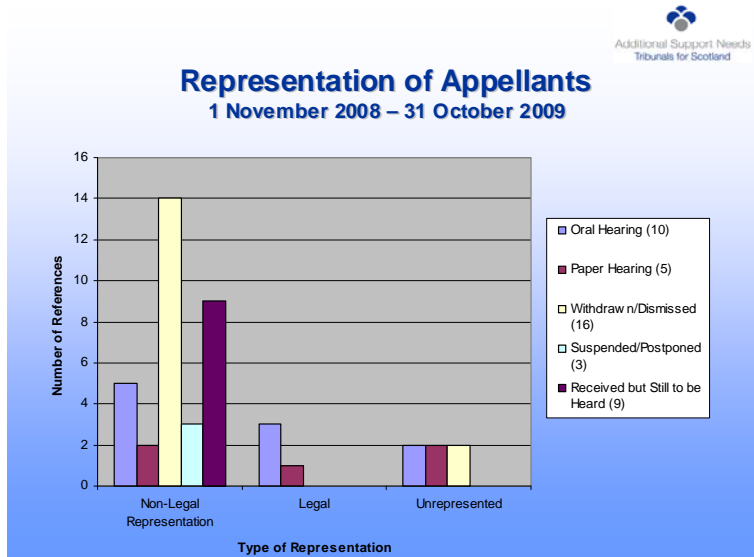


Nature of Additional Support Needs 1 November 2008 – 31 October 2009



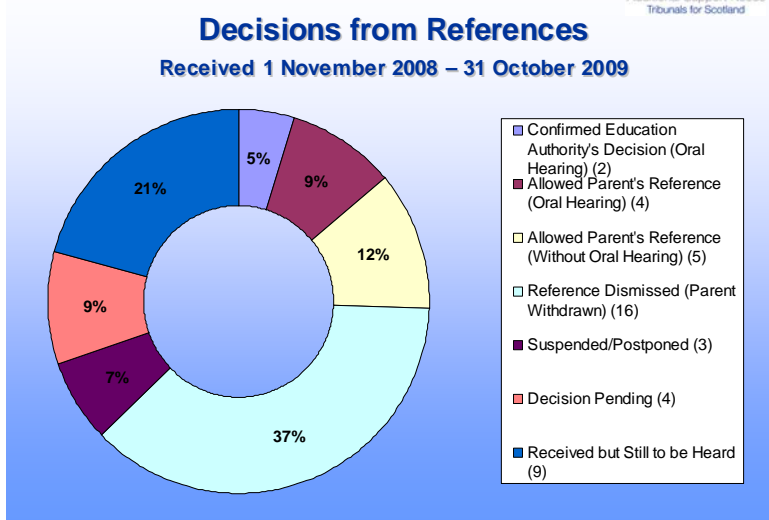


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There were also several questions following this presentation as it highlighted the few references from the group now included as a result of widening the definition of those with additional support needs.

For instance, it was suggested that children and young people in the social, emotional and behavioural difficulty group may not be allocated CSPs as schools are more likely to provide any support required from within their own resources and therefore there would be less involvement from other agencies.

It was also suggested that the families of children with social, emotional and behavioural issues may be less able to bring a reference and may be less resilient to the process.

A representative from the Advocacy Project asked where ADHD would fit within the statistics provided regarding the nature of additional support needs.

The President responded that they would come within the social, emotional and behavioural category but that these difficulties often overlap with ASD.

A representative from the Scottish Traveller Education Programme, asked why the statistics did not show the broader spectrum of needs.



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It was explained that the statistics shown only covered the needs of children/young people where there had been a reference made and therefore the figures reflected only the most severe end of the spectrum of needs.

It was raised that children are often compared against each other in a hierarchy when being assessed for additional support levels. It was asked if the action of taking a reference to the Tribunal was enough to get the dispute resolved, hence the high withdrawal rate.

A parent queried why only Education signs off a CSP and why, when there is usually involvement from Health is there no final indication of sign off or agreement from them?

The President stated that she was aware of cases where Health had apparently not been kept informed of developments where the matter had come to the Tribunal and there are concerns that in some areas Health and Education are still not working closely enough together.

It was also observed that parents do not need to sign or agree with the CSP.

The President replied that the CSP is in the ownership of the authority and it is their duty to implement the support for the child whether or not the parent has an interest or been actively involved.

Highland Carers Advocacy reported that there was good co-ordination in Highland with a high level of commitment from Health and draft CSPs being redrafted following parental comments.

An Education Authority representative intimated that there can be difficulties securing face-to-face meetings with health professionals and asked if Education was always responsible for arranging such meetings and meeting the resource requirements.

The President answered that should the Tribunal decide that 1-1 speech and language therapy is required but Health indicated that there were no current resources, it would still be the responsibility of Education to buy in the resources to meet the need.

The President also added that when the Act was originally passed there was assurance given that Health would work closely with Education. If provision



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detailed in the CSP is not implemented, a complaint can be brought to Ministers under Section 70.

The Advocacy Project also highlighted that Social Work and Education are not always working together as closely as would be expected by two departments within the one authority in that Social Work are not always invited to CSP meetings.

A parent attendee noted that where a parent had requested the parental comment to be included in the CSP stating that there had been a lack of communication with them, the authority had refused.

The President stated that the ownership of the CSP was with the Authority and whilst it may be good practice to incorporate the parental comment, good or bad, there was no remedy where the comment section did not adequately reflect the parents' views.

Question and Answer Session

What increase in referrals is anticipated as a result of the changes to be made in the 2009 ASL Act? (Govan Law Centre)

The Secretary predicted that the provision of free advocacy would have the greatest impact. Also, the number of placing requests currently referred to the EAC which would be referred to ASNTS following implementation of the 2009 Act suggested that placing request figures may double to about 20 each year.

The President added that the current financial climate may increase placing request refusals, as authorities may be less likely to be able to commit resources to independent education and this would produce higher rates of referral.

Govan Law Centre suggested that Lord Hardie's decision in June 2009 may affect the number of references received as it appeared to make the criteria for a CSP more difficult to meet. Since enquiries about taking references to the Tribunals have dropped at Govan Law Centre, it is felt that the criteria are now so narrow that there is little chance of success.

ISEA added that some independent schools are often not offering places unless the authority agrees to fund the place first and this leaves parents without any recourse to the Tribunal.



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The President replied that this policy may change as independent schools could find it difficult to fill places unless a firm offer of a place is given to the parent.

Govan Law Centre intimated that it is often the case that the school tells the parent that their child can attend the school but then a written offer of a place is not forthcoming.

The authority view was that funding is increasingly becoming an issue and that availability of support is led by available funds.

An Education Authority representative suggested that the expansion of the inter-authority placing request provisions in the amended legislation may result in more parents seeking places at host local authority special schools which may cause placing request references to the Tribunal to more than double.

In England and Wales the government have announced their intention to allow children to make their own SEN appeals. Are there any plans to introduce a similar right in Scotland to the ASN Tribunal? (Govan Law Centre)

The President responded that there were no plans presently; she was aware of some interest in this proposal and this may be regarded as appropriate in the future. There would always be the issue of ensuring that the child had the capacity to bring their own case.

When is it anticipated that the ASN Tribunal will take over jurisdiction in DDA school cases? (Govan Law Centre)

There is currently no information on the commencement of this legislation. There is no date for a second reading in the Commons. Depending on the date of the next general election, there may be inadequate time for this complex legislation to be brought through by the current government.

It was added that if there were to be a change in government, the Conservatives have indicated that the Equality Bill is not a priority for them although it currently has all party support.

How many references have been made by young persons? (Govan Law Centre)

One ongoing reference only.



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In how many references have additional witnesses (more than two per party) been allowed and how many refused? (Govan Law Centre)

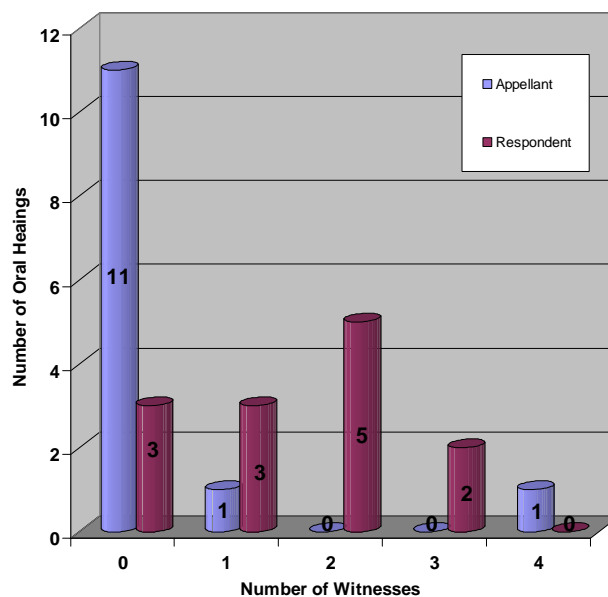
The Secretary responded to this stating that there have been no cases where applications for additional witnesses have been refused over the previous reporting year but there have been three cases where more than two witnesses have been allowed.

A parent suggested that there would need to be several witnesses required for each aspect of Health provision, for instance.

The President suggested that some evidence can be given in writing through reports without the need for those to be spoken to or perhaps the co-ordinating professional such as a community consultant paediatrician could be called to speak to all aspects.

The chart below illustrates the numbers of witnesses heard at oral hearings for references received 2008-2009.

**Number of Witnesses at Oral Hearings
References Received 2008/2009**





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Under what circumstances will the Tribunal instruct an expert under Rule 24? (Govan Law Centre)

This had already been covered in the President's presentation. The President indicated that she may issue guidance on this matter and will also cover this topic at the Tribunal Training Day on 26 November.

Has there been any increase in representation of the child's views or further references from young people? (Common Ground Mediation)

The President responded that there had been a number of cases where the child's views had been taken by an advocacy worker and presented to the Tribunal. It is important that the Tribunal work harder on getting the child's views heard. There has been an issue over whether parents should be told about how and when the child's views will be taken by the authority in preparing the CSP. It should not be necessary for permission to be given for the child's views to be sought but may be helpful if parents are notified as to how and when this will be done and given sight of these views.

ISEA noted that with regard to the child's views it was especially appropriate to seek these in the context of placing requests.

A parent queried whether it would be advantageous for the child to meet the Tribunal on every occasion.

The President answered that this can be helpful but the Tribunal cannot insist on hearing from the child directly where the parent does not consider this to be in the child's interests. Video evidence or the use of a child advocate intermediary can also be useful in this situation.

Scottish Borders Council, enquired as to what age a young person should be able to give consent for sharing information with other agencies without also gaining the consent of parents.

The President replied that in relation to CSPs, agencies should make that information available as there is a duty under the 2004 Act. It was observed that GIRFEC introduces firewalls between agencies which may be counter-productive in some instances. There is still a tension as to whether the child's right to privacy should be the paramount consideration or the best interests of the child?



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Is there flexibility to reschedule Tribunal hearing when the child or parent is a hospital inpatient on the day of the hearing? (Estelle Biteau, SNIP)

The President informed the group that last minute hearing postponements have been a challenge to the Secretariat and hearings are in fact rearranged for many different reasons on a regular basis.

The President confirmed that it would be possible in some circumstances for the parent to leave a hearing as long as the representative could remain throughout.

What impact will changes to the ASL Bill have on existing advocacy organisations without additional funding to support the Act's requirements? (Highland Carers Advocacy)

The representative expanded on her question and stated that she was aware of the lack of legal advocacy in Highland. Highland Carers Advocacy does not have the level of funding required for a big block of work and the number of hours involved in Tribunal work.

The Secretary stated that the advocacy provision is a work in progress. There will be funding for this in view of the terms of the amending primary legislation which commits to free advocacy for parents to bring a case to the Tribunal but how the funds will be allocated is not yet known.

There was a question as to whether organisations will be required to bid for funding to undertake this role.

The President responded that it was her understanding that organisations may be funded or funding may be allocated on a case by case basis but the details had still to be settled.

Resolve, added that although Ministerial agreement for funding for an expanded role for mediation had been secured there is no model as yet. Advocacy provision should be in place by the implementation of 2009 Act, but possibly earlier.

A parent suggested that more emphasis could be put on how enabling the process can be and that parents do not need representation.



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The President agreed that parents should not get a sense that they need legal representation. There was no correlation between success at a hearing and the availability of legal representation for either appellants or respondents.

The President concluded the event by thanking all for attending and voicing her appreciation to all those who had raised issues.