



Additional Support Needs
Tribunals for Scotland

Tribunal User Group Meeting – Friday 19 November 2010

New Register House, Edinburgh

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 New Register House, Edinburgh on Friday 19 November 2010 and was attended by 21 users.

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

This was followed by a presentation from the Secretary on Tribunal activity.

Both presentations can be found at www.asntscotland.gov.uk

Question and Answer Session

In the case of placing request decisions made in late April of any year for places commencing the following August where the decision is to refuse the placing request, does the Tribunal anticipate that hearings will be take place before, during or after the summer holidays? It would be a great unfairness to Education Authorities if hearings are held during the summer holiday because its intended witnesses are likely to be teachers or other staff on teaching service conditions who cannot attend as witnesses during the holidays. In the most recent case of this kind in Edinburgh, the hearing was scheduled to take place after the summer holidays – although the reference was subsequently withdrawn before a hearing. Does the Tribunal have the capacity to conduct hearings before the holidays begin – as had been the practice of our Council appeal committee? (City of Edinburgh Council)

The Secretary responded that when placing requests are refused on 30 April, parents will have until 30 June (two months) to appeal which means that as July is not taken into account when calculating case statement periods, hearings are not likely to be heard until after the school summer holiday period if a reference is

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not received until late June. However, ASNTS is committed to clearing placing requests, where possible, before the summer if the reference is received by the end of May and the recent recruitment of conveners and members should make this more achievable. The Secretary also confirmed that as a result of the limited availability of education staff very few hearings have been heard during the summer holidays.

A representative from Kindred added that parents have reported that decision letters are often not received until May. What can education authorities do to ensure prompt decisions?

The representative from City of Edinburgh Council advised that in that authority parents are notified that if no decision is received by 30 April then it is a deemed refusal and of their subsequent appeal rights in the case of such an eventuality therefore there should be no delay in appeal.

The President added that although an appeal may be made on a deemed refusal decision, it is also important that parents are made aware of the statutory grounds of refusal as soon as possible in order to further their case with the Tribunal.

Paul Smart, Scottish Tribunals Service, enquired as to the reasons for the high percentage of withdrawals. The President responded that the reasons for withdrawal are not formally recorded by the Tribunal but some are withdrawn because the authority have granted a placing request or an agreement has been reached regarding a CSP. Conference calls have been successfully used to focus parties on the outstanding issues approximately two weeks in advance of a hearing and often encourage negotiation leading to settlement.

A solicitor from Campbell Smith W.S. LLP advised that as the result of an ASNTS decision where an appeal is now pending in the Court of Session, some authorities are now taking the view that there will be no decision on any placing request applications until 30 April rather than issuing a decision at the earliest opportunity.. Parents will often not consult a representative until a decision has been issued. When this decision is not received until end of April the timescales are very narrow for ensuring a detailed case is put forward, for example, should expert witnesses need to be instructed. This almost certainly means that the appeal cannot be heard until the commencement of the new school year,

The President responded that there always has been a cluster of placing request references around March, April and May but for authorities to invariably wait until

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30 April before issuing a decision was not the intention of the ASNTS preliminary decision regarding the refusal of placing requests.

The representative from City of Edinburgh Council highlighted that deciding on all placing requests in April was the only way to ensure strategic provision by considering all applications at the same time. The President noted that there is a tension between ensuring the best placement for the individual child and ensuring that provision is allocated strategically.

A representative from Dundee City Council raised the issue that for many children a decision on a placing request made in September may no longer be appropriate by the following August as it was impossible to anticipate the child's needs so far in advance. The President added that in the equivalent English jurisdiction the Tribunal have the opportunity to specify an appropriate school that has neither been requested by the parent or specified by the authority.

A representative from The Highland Council noted that transition planning cannot be carried out effectively if a decision on a placement commencing in August is not taken until April and highlighted that there is a conflict in the legislation here.

How practical is it to have joint hearings on ASL – DDA matters? (Glasgow City Council)

The President responded that she supported the opportunity to have conjoined hearings on DDA/ASL matters to ensure greatest flexibility for users. Circumstances where this would be appropriate would be limited but it may be in the best interests of the child, parents and the authority in terms of expediency and continuity. Two decisions would still be issued although the cases were heard at the same hearing. An example may be where a child has been excluded and seeks a placing request and also claims disability discrimination concerning the circumstances of the exclusion.

In what way will the Advocacy Service impact on the operation of the Hearing? (Glasgow City Council)

The Secretary indicated that it is difficult to predict the impact but there was at least the potential for the number of references to increase. A representative of the new advocacy service from Scottish Child Law Centre added that they were in uncharted territory and that the aim was to provide the best possible service to parents.



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A representative from ISEA (Scotland) enquired if there was an indication of when the service will be up and running. The representative from Scottish Child Law Centre confirmed that the service went live on 14 November and that meetings were currently in progress discussing how to progress the service.

Accessing second tier of Tribunal? (ISEA (Scotland))

The President described how the Upper Tribunal is accessed in the UK reserved jurisdictions. If a decision is appealed, this is returned to the original or a salaried judge. The judge then decides either to grant leave to appeal to the Upper Tribunal to review the decision or refuse the application. ASNTS decisions can be appealed to the Court of Session without any permission being granted by the Tribunal. There is no procedure in place for parties to be obliged to make an application for review first, hence there is nothing from preventing parties appealing directly to the Court of Session. The interesting issue will be whether parties will use the opportunity to request a review or if the Court of Session will remain the preferred appeal route. It was added that there wouldn't necessarily be an oral hearing required for review making it a quicker and cheaper appeal route than the Court of Session. If a review application failed then the option of an appeal to the Court of Session would remain.

The review process will not be undertaken by the President as this would prevent the President from sitting on Tribunals. All reviews would be considered by the original Tribunal.

A representative from Govan Law Centre asked is there was a mechanism to review a direction or if this was reserved for full directions. The President responded that any error in law in a direction could be raised in appeal following the final decision. A preliminary decision that disposes of the reference or deals with issues around competency could be appealed or reviewed.

The representative from City of Edinburgh Council added that there appears to be a grey area between appealing on a point of law on an error in the facts. Will Tribunal review only look at points of law? The President confirmed that only requests to review on a point of law would be valid. When decisions have been overturned by the Court of Session on an error in finding inadequate facts, the Tribunal has been criticised for not applying the legal tests correctly.

Continuity of Tribunal decisions? (ISEA (Scotland))



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An ISEA (Scotland) representative expanded on the issue by stating that one Tribunal may rule that the parent should be included as 'persons providing additional support' in a CSP and another may rule that the parent should not be included. This sends mixed messages to all parties.

The President responded that even where parents are clearly involved in providing support, an authority will have no control over the nature of that support provided by the parent. However, a parent might want their role to be included in the CSP and could be helpful. There may be a conflict between the strict legal requirements of a CSP and the policy/good practice approach as to what should be included. The President added that whether there should be a standard way of dealing with CSPs had been discussed by conveners at a recent training event.

The representative from City of Edinburgh Council stated that whether or not 'parent' should be included in a CSP came down to what parents were doing at home. City of Edinburgh Council has a different view on the widening of the term education to include out of school support. Whether support is in or out of school it must be necessary for a child to benefit from school education and opening this up to respite and home education would be contrary to the Minister's intention of the 2009 Act.

The President responded that the amendment was specifically inserted so that the interpretation should not be interpreted too narrowly.

Could you clarify once again who has responsibility for providing additional support and services (e.g. PSAs, Psychological Services etc.) if a pupil is (a) looked after (b) is on a placing request in an authority? (East Renfrewshire Council)

The President indicated that the ownership of the CSP lies with the authority where the child is educated under Section 6 (1A) regardless of the status of the child. This may involve liaising with services provided by the home authority.

A representative from North Lanarkshire Council added that in the case of a looked after and accommodated child, the home authority would be responsible for providing psychological services. The President suggested that this would be in the context of a social services plan and not within a CSP. It was added that in a recent reference, a placing request had been lodged for a child currently under a Supervision Order. ASNTS had jurisdiction but the issue was whether the Tribunal's decision would have trumped that of the Children's Panel.

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What is the anticipated caseload for ASNTS: a) now that the jurisdiction is extended to include all special school placing request appeals; and b) when it is further extended to include discrimination cases? (Govan Law Centre)

The Secretary indicated that there had already been an increase in activity since last year. The disability discrimination jurisdiction and free advocacy service have the potential to further increase the number of references but it is difficult to predict to what extent.

The representative from The Highland Council enquired about the transition period for disability discrimination appeals from the Sheriff Court to ASNTS. The President indicated that the initial provision was going to involve an extended transition period but this has been reduced to a period of six weeks where appeals can be lodged with either the Sheriff Court or ASNTS.

The representative from Govan Law Centre asked whether it would be possible not to lodge discrimination appeals until the jurisdiction rested with ASNTS. As there is a six month period for lodging such appeals, the President confirmed that this should be possible although the result of the consultation on the draft rules had not yet been published.

It was also asked what the remedies would be where appeals on discrimination were allowed. The President confirmed that there were no financial penalties however, declaratory decisions stating that there has been discrimination could be issued, the Tribunal could also direct that official apologies be given, that a child be re-admitted to school, that different practices are employed by the authority or that specific training is undertaken. The person bringing the claim can also state what remedy they are seeking.

A representative from ISEA (Scotland) enquired as to how exclusions on the basis of discrimination appealed to the Tribunal would sit alongside Education Appeal Committee decisions. The President stated that this is not clear and that exclusion will likely be the major disability discrimination issue.

The representative from The Highland Council asked if the Tribunal makes a decision that the Health Board should provide a certain amount of therapy, is the Health Board under the same obligation as education to carry this out? The President confirmed that the 2004 Act was introduced on the basis of concordat between Health and Education. Financial implications made this difficult but if



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Health cannot deliver the necessary therapy then arguably it is up to Education to buy in appropriate services to ensure that the necessary support is put in place.

The representative from Campbell Smith W.S. LLP added that his advice to parents when therapy required by a CSP has not been provided by a Health Board would be that the child's needs are not being met but the child's needs can be better met at X school and to lodge a subsequent placing request. The authority would then need to look at the greater expense of funding a special school place over providing independent therapy.

A representative from ISEA (Scotland) highlighted that she was surprised to hear that there were no statistics on the reasons for withdrawal as the withdrawal form asks for this information. The President responded that there is often no specificity included on this form and as this is not always completed by parents, then it is difficult to get an accurate picture.

It was also highlighted that there had been a problem sourcing a venue in Fife. This issue had however been resolved. Paul Smart, Scottish Tribunals Service, stated that one of the benefits of creating a Scottish Tribunals Service administration would be access to a wider range of venues across the country.

The President concluded the event by thanking all for attending and adding that she is happy to hear from users at any time.