

Scottish Government Consultation on the Education (Additional Support for Learning) (Scotland) Act 2004 – Amendment Bill 2008



A response by Govan Law Centre (Education Law Unit)

19 June 2008

Q1. Should the legislation relating to an ASNTS's jurisdiction regarding placing requests be amended to allow an ASNTS to consider any placing request appeal where a CSP is involved or is being considered, at any time before the final determination by the appeal committee or sheriff?

Q2. Can you foresee any problems with amending the legislation as suggested in Q1 above? If so, what are they?

There is some sense to ensuring that all placing requests where there is (or will shortly be) a CSP are resolved by the ASNTS. However, GLC has some concerns with this proposal.

- a) In order to ensure consistency with references which currently have jurisdiction by virtue of s.18(4)(c), it would be necessary to amend s.19(5)(c) accordingly.
- b) However, GLC is concerned that a system that allows jurisdiction for placing request appeals to remain contingent on the outcome of an assessment process or of a related appeal reference may result in unnecessary and unreasonable delays. This is especially so where the appeal may have transferred from the appeal committee in the first place.
- c) We are also concerned that the criteria for determining whether the case is heard by an education appeal committee or an Additional Support Needs Tribunal are complex and confusing for parents; and that it does not necessarily lead to the most complex and testing cases being heard by the Additional Support Needs Tribunal. GLC is aware that many education appeal committee members do not feel they have the necessary knowledge or training to allow them to hear complex placing request appeals where additional support needs are involved.
- d) Further, for the circumstances relating to a CSP to be capable of bringing appeal processes to an end and recommencing them before the ASNTS "at any time before .. final determination" is unreasonable. Appeals before the sheriff court in relation to placing requests for children or young people with additional support needs can take many months (or even years). To allow a change of circumstances (which might be initiated by either side) to nullify a lengthy court procedure and require parties to begin again at square one would be simply intolerable.

e) Therefore, it is suggested that:

- i. *either*, only circumstances where it has been decided that there is or definitely will be a CSP should indicate that a case is heard by the ASNTS, *or*, that where a case has transferred to the ASNTS that it should remain there, regardless of the outcome of the CSP process / related reference;
- ii. the basis for deciding which cases are heard in which forum be reconsidered – possibly allowing the education appeal committee to surrender jurisdiction to the Additional Support Needs Tribunal in cases where it is felt to be too complex; and
- iii. in any event, that a cut-off point be implemented beyond which a case would not transfer (or would transfer only at the discretion of the court / with the consent of all parties) to the ASNTS – it is suggested that an appropriate cut-off would be at the lodging of an appeal with the Sheriff Court.

Q3. Do you agree that the parents of children, with ASN, with or without CSPs, should have the same rights in respect of making out of area placing requests as parents of children without ASN?

GLC agrees with this proposal.

Q4. If you do not agree with Q3 above, why not?

N/A

Q5. Are you content that in instances where a CSP is involved or is being considered, an appeal against a decision to refuse an out of area placing request should be referred to an ASNTS?

GLC agrees with this proposal.

Q6. Do you agree that in instances where a child or young person is attending a school outwith his/her home authority area, as a result of a placing request, responsibility for providing mediation and dispute resolution should rest with the host authority?

GLC agrees with this proposal. Parents and young people should be able to access mediation and dispute resolution with the authority or authorities which is/are responsible for the child or young person's school education, whether that authority is the "host" or "home" authority.

Q7. In the situation described in Q6 above, do you agree that a contribution in respect of a host authority's provision to parents or young people of mediation

or dispute resolution services should not be recoverable from the home authority under section 23(2) of the Education Scotland Act 1980?

GLC agrees with this proposal in principal, but is concerned that this potential additional cost to authorities in accepting placing requests from out of authority would lead to fewer such placing requests being allowed.

Q8. Do you think that the CSP process would be streamlined by amending the legislation to provide that, following the acceptance of an out of area placing request for a child/young person who has a CSP, the host authority assumes responsibility for reviewing the CSP, and that such a review should be conducted immediately?

GLC agrees with this proposal.

Q9. Do you agree that the best time for the transfer of education authority responsibility to take place is at the time the child starts at the new school?

GLC agrees with this proposal. Concerns regarding smooth transition to a new placement should be met by more consistent compliance with the provisions of the Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005.

Q10. Should the ASL Act legislation be amended to allow references to the ASNTS regarding the following education authority failures?

- A parent or young person requests the education authority to establish whether a CSP is required and the education authority simply fails to acknowledge his/her request.
- The education authority has issued its proposal to establish whether a child or young person requires, or would require, a CSP but fails to decide either way.

GLC agrees with this proposal.

Q11. Should a new ASNTS document based process be introduced to expedite those references in which an education authority has failed to meet a relevant timescales?

Assuming that reference to the ASNTS is to be the remedy for a failure to meet a deadline, then GLC agrees that there ought to be an expedited process for such references.

However, we question whether a reference to the Tribunal is the most appropriate remedy for a failure to meet a deadline. In such cases, the Tribunal's typical remedy is to impose a fresh deadline. This effectively legitimises the failure, without

penalising the defaulter, and leads to further delays. There is also no remedy where the authority fails to meet the deadline imposed by the Tribunal.

It is suggested that action in the Court of Session or a reference to the Scottish Ministers may be the more appropriate remedy. Indeed, where a Tribunal receives a reference and is satisfied that the deadline has been missed, a duty or power could be given to refer the matter to the Scottish Ministers (analogous to the power contained in s.137 of the Antisocial Behaviour etc. (Scotland) Act 2004) – either instead of the existing powers of the Tribunal or as additional powers.

Q12. Are you content for an ASNTS to be given the power to review its decisions?

GLC has concerns about this proposal. In some circumstances this would be appropriate, such as for example where there is agreement among all parties (appellant, authority and Tribunal) that there has been an error. However, we would have grave concerns with a power to review in relation to new evidence. Due to the nature of the cases considered by the ASNTS, there would in almost every case be the possibility of obtaining new evidence which might be relevant to the outcome. Allowing Tribunal decisions to be reopened on those grounds would lead to uncertainty and, potentially, unfairness (as authorities would be more able to access fresh reports, assessments etc.).

There is a general concern in any event about an authority's ability to delay implementation of a Tribunal's decision pending the outcome of an appeal to the Court of Session. In cases where the Tribunal has ordered placement at an independent special school, then the Tribunal's decision can be frustrated by the authority by lodging an appeal (even if the appeal has no merit) and delaying the process beyond the stage that the independent school is able to keep a place open. Given the high costs of some of these schools, this never becomes uneconomic for the authority, despite the high costs of litigation. The Scottish Government should consider alterations to mirror the situation in England & Wales, where the decision of the SENDIST must be implemented pending the outcome of an appeal, unless the court exercises a discretionary power to "stay" the decision of the Tribunal.

Q13. Do you agree that the legislation should be amended to:

- **introduce a criminal offence punishable by a fine for anyone in breach of a restricted reporting order under Rule 35 of the Rules?**
- **enable enforcement of an award of expenses under Rule 39 of the Rules as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff court?**

On the assumption that Tribunal exercises its powers to impose restricted reporting orders or awards of expenses, these should be enforceable and therefore, GLC agrees with this proposal.

Views and suggestions relating to any aspect of the Education (Additional Support for Learning) (Scotland) Act 2004 and the Amendment Bill 2008:

Additional Support Needs

The consultation document states that the Scottish Government does not intend to change the “thrust or ethos” of the 2004 Act. However, the decision of Lord Wheatley in the case of *SC v. City of Edinburgh Council [2008] CSOH 60* drives a coach and horses through the central feature of the Act – the definition of “additional support needs”.

In paragraph 29 of his decision he states: “The whole burden of the test of what constitutes additional support needs clearly refers to educational support, and further to education support offered in a teaching environment. This in turn must refer to the educational needs of the child, and not to anything else. It cannot refer to the social and environmental needs of the appellant herself, or indeed of the child.”

GLC has already experienced one sheriff court case where this case has been relied upon by the sheriff and, as a result, respite provision (despite recognition that it served an educational purpose) has been disregarded as a relevant consideration in that placing request appeal. We also understand, from information provided by other agencies, that some local authorities are already disengaging social work services from the ASL and CSP processes.

One possible legislative solution would be:

- to underline the point that additional support includes provision that might be made outwith the classroom, delete:
 - “educational” from “educational provision” in s.1(3)(a) & (b); and
 - “schools (other than special schools) under the management of the education authority for” in s.1(3)(a).

Obstacles for parents

The duty to make provision for under 3’s in terms of s.5 only arises in relation to disabled children with additional support needs. However, the Act specifies that the authority only has such a duty where formal notification has been made by the Health Board and formal assessment carried out by the authority. These obstacles to provision are unnecessary and could simply be removed by the repeal of s.5(3) of the 2004 Act. To meet the possible concerns of local authorities, it could be specified that the duty only applies where the child or young person “comes to the attention of the authority as having, or appearing to have, additional support needs” – the same wording as in s.6(5).

Similarly, the right to make an assessment request in s.8 of the Act is one which parents can take advantage of only where there is also a process of determination occurring in relation to a CSP or additional support needs. This is unduly restrictive

of parental rights. The right to make an assessment request should be available at any time. Lest authorities have concerns that this would open the floodgates to a deluge of assessment requests that they would not be able to fulfil, it should be noted that assessment requests are very rare in some areas (see below) and that they would still be subject to the caveat that the authority only require to comply with “reasonable” requests.

Assessment Requests received by Authority (since November 2005)+

East Ayrshire	-	18
Highland	-	21*
Dumfries & Galloway	-	0
Perth & Kinross	-	27
Scottish Borders	-	6
Aberdeen City	-	1,753
Aberdeenshire	-	16
East Dunbartonshire	-	10
East Lothian	-	8
Falkirk	-	3
Glasgow City	-	424
Moray	-	1
North Ayrshire	-	24
Renfrewshire	-	18
Shetland	-	2
South Lanarkshire	-	35
Stirling	-	4

* figure includes requests to establish whether a CSP is required

+ in response to Freedom of Information request made by GLC on 20 May 2008

Public Expenditure

s.4 of the 2004 Act imposes a duty on authorities to make “adequate and efficient” provision for a child or young person’s additional support needs. However, that duty does not require the authority to do anything which “would result in unreasonable public expenditure being incurred”.

Therefore, the Act specifically allows for the situation where an authority can make provision for a child’s needs which is inadequate (and inefficient) solely on financial grounds. It is important to note that while this will not be a practical issue in all but a handful of cases, it does raise a question of principle: what should the approach be in relation to those children and young people for whom even “adequate” education will involve high levels of public expenditure? Should this minimum standard of adequacy be provided notwithstanding the cost?

It is only since the introduction of the 2004 Act that the answer to this question in Scotland has been “No.” – Prior to that in Scotland, and to this day in England & Wales, the position has been that the statutory duties in the Education Acts were just that – duties and could not be sidestepped due to expense (cf. *R v East Sussex*

County Council, Ex parte Tandy [1998] AC 714). It is unfortunate that some families with severely disabled children would find themselves best advised to move south of the border in order to secure the education they require.

Children with Capacity

Analogously with the provision in s.44 of the Standards in Scotland's Schools etc. Act 2000, the right to make requests (s.28) and references (s.18) under the 2004 Act could be extended to children with legal capacity. This would retain all the parents' rights to do so, but would be of benefit in particular to those children whose parents are unable or unwilling to act on their behalf (e.g. some looked after children). This would be consistent with the Scottish Government's obligations under the UN Convention on the Rights of the Child.

The Scottish Government may wish to retain the current position in relation to placing requests (s.22 & Schedule 2) so that children do not acquire the right to choose which school they attend until the age of 16.

Full-time Education

At present, the legislation guarantees children of school age a right to school education (s.1, 2000 Act) – whereas in England & Wales there is a right to “full-time school education”. This is of particular importance to children and young people with additional support needs for whom exclusions, absences due to ill-health and part-time schooling is all too common.

Following the example from England & Wales could be achieved by amending s.1 of the 2000 Act, providing a right to “full-time school education”. This term, as in England & Wales, would be further defined by regulations and/or guidance and can bear different meanings in different contexts / for different ages of pupil etc.

Post-18 Education

Many young people with additional support needs remain at school well past their 18th birthday. The legislation is currently worded such that there is no duty for an authority to provide any education to anyone aged 18 or over. The CSP also ceases to exist as a legal document on the person's 18th birthday. There ought to be some form of transitional protection (possibly similar to that set out in s.30 of the 2004 Act) for 18 or 19 year olds who remain at school (at the authority's discretion) so that the provision made for them is protected while they remain at school.

Additional Support Needs Tribunal

Following consultation with other agencies, we are concerned that there is an inconsistency of approach between Tribunals which makes it more difficult for (in particular) smaller advocacy organisations to provide effective representation for parents at Tribunal. It also makes the provision of training for such groups (such as that provided by Govan Law Centre) more complex.

In a majority of cases (55%) education authorities are legally represented (in 40% of those cases by counsel). This underlines the need for good quality representation to be made available to parents. This is a particular concern due to the possible imminent closure of ISEA (Scotland), which has undertaken the lion's share of all Tribunals for parents to date.

The Scottish Legal Aid Board already have powers to make payments to non-lawyers in respect of "legal" advice and representation, and it should therefore be possible to allow access to the Legal Aid Fund (either by block grant or on a case-by-case basis) to advocacy organisations working in this field. This would not necessarily require any additional funding to be made available and could be achieved administratively or by the introduction of regulations made under existing powers.

Govan Law Centre already fulfils a training role on an informal basis in relation to advocacy groups working in this field and plans to continue this. Equally we would be happy to work within a more formal structure if that encourages the increase of effective representation for parents.

References to the Scottish Ministers

By analogy to the provisions of s.137 of the Antisocial Behaviour etc. (Scotland) Act 2004, other bodies including the Additional Support Needs Tribunal for Scotland, education appeal committees and sheriff courts should be able to refer matters to the Scottish Ministers where there has been a *prima facie* breach of the authority's duties under s.14 of the 1980 Act (as amended) – this should apply to breaches of s.14(1)(b) as well as s.14(3).

General Points

GLC has a general concern that the ASNTS, associated procedure and applicable education law seems to be getting more and more complex.

As an over-arching principle, we should strive to make the law as simple and accessible as possible at all times. This is fundamentally important if parents, pupils and educationalists are to be able to understand and apply the law. The level of detail and complexity in this field of law is in danger of becoming beyond the reach of most people.

In the longer term, this may require a more radical approach, aimed at the simplification of the whole additional support for learning framework.

As ever, Govan Law Centre would be happy to work with the Scottish Government and any other interested parties to assist with proposed legislative solutions in this field of law.