

## **ASPEP DISPUTES RESOLUTION AND ASNTS Seminar – 30 March 2016**

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### **PREPARING FOR ADDITIONAL SUPPORT NEEDS TRIBUNALS – MARCH 2016**

#### **The Tribunal**

The Education (Additional Support for Learning) (Scotland) Act 2004 made provision for the setting up of Additional Support Needs Tribunal for Scotland. A Tribunal is a Panel of 3 people, a Convenor who is legally qualified, and two people who have an educational or social work or health background which can include Educational Psychologists.

The Tribunal considers references or appeals made to them by parents or young persons challenging a decision or omission made by the Education Authority about a child or young person with additional support needs. Since March 2011 the ASNTS also considers disability discrimination claims against the EA.

#### **What can be referred ?**

Essentially all matters related to Co-ordinated support plans:-

A decision to prepare a CSP

A decision not to prepare a CSP

A decision to continue a CSP following a review

A decision to discontinue a CSP following a review

A failure to meet the statutory timescales for preparing the CSP

A decision not to comply with a request to establish whether a child or young person has additional support needs requiring a CSP

A failure to respond to a request to establish whether a CSP is required

Failure to comply with duties in terms of post-school transitions (whilst the child is still at school and the EA is still responsible for his education)

i.e. no later than 12 months before the date any child or young person is expected to cease receiving school education or as soon as reasonably practicable after the EA becomes aware the child is going to leave school, to request information from appropriate agencies, if any, which are likely to be involved with the prospective school leaver on leaving school. The information relates to the provision likely to be made for the leaver by such agencies which the EA can then take into account in helping the leaver make a successful transition. Code of Practice, Chap 6, paras 27 to 37.

In terms of section 13 of the Act every EA must no later than 6 months before the date on which any child or young person leaves school provide appropriate agencies with

information as to the date of leaving and such other information as the EA considers appropriate. These duties only apply if consent is given.

**Where a CSP exists:-**

The contents of the CSP

A failure of the EA to review the CSP within the statutory timescales

A decision to refuse a request to review the CSP

A failure by the EA to provide the additional support contained in a CSP

**Placing requests**

Where a CSP exists

Where the CSP does not yet exist but it has been established by the EA that a CSP is required

Where the CSP does not yet exist but the EA has issued its proposal to establish whether a CSP is required

Where the EA have decided that the child or young person does not require a CSP and that decision has been referred to the Tribunal

Whether or not a CSP exists, a placing request for a special school

**ASNTS Statistics**

Annual report published every year - 2014/15

50 placing request references

11 Contents of CSP

5 CSP not required

2 Implementation of CSP

1 Deemed refusal of CSP

1 Timescales (Issue CSP)

2 transitions

Of the last 10 placing request decisions uploaded to the ASNTS website, in 6 out of the 10 cases, an EP appeared as a witness and in one case there were 2 EP's for the Authority. In 2 of the other cases EP's had provided a Report. In only 2 of the 10 cases did there not appear to be direct input from an EP .

## **ASNTS Procedure**

The Additional Support Needs Tribunal for Scotland (Practice and Procedure) Rules 2006

The Additional Support Needs Tribunal for Scotland (Disability Claims Procedure) Rules 2011

The ASNTS has two sets of procedural rules, one set for disability claims and one set for references under the ASL Act. These are mostly identical and in particular rule 3 sets out the overriding objective of the rules which is to enable a Tribunal with the assistance of parties to deal with references fairly and justly which includes:-

- dealing with the reference or claim in ways which are proportionate to the complexity of the issues and to the resources of the parties
- seeking informality and flexibility in the proceedings under the rules
- ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of their case without advocating the course they should take
- using a Tribunal's special expertise effectively and
- avoiding delay, so far as compatible with the proper consideration of the issues

A Tribunal must seek to give effect to the overriding objective when it exercises any power under the rules or interprets any rule. In particular a Tribunal must manage claims actively in accordance with the overriding objective.

### **Tribunal powers under the rules**

The rules govern what happens from start to finish of a Tribunal case. The Tribunal has power e.g. to:-

- make directions under rule 15 e.g. direct a party to provide any further information or to produce a document.
- Dismiss a reference for various reasons – the reference has not been made in accordance with the rules, the Tribunal no longer has jurisdiction or the reference is frivolous or vexatious or for want of prosecution
- Extend the time period for something to be done
- Suspend proceedings or postpone or adjourn a hearing
- Issue a citation for the recovery of documents – failure to produce required documents is a criminal offence
- Issue a witness citation – failure to attend in response to a citation is a criminal offence
- Appoint an expert to enquire into and report on any matter

### **Hypothetical Tribunal reference- Placing request**

Primary 7 school child on the autistic spectrum and with a diagnosis of Attention Deficit Disorder. As a result of these conditions the child has difficulties with communication, social interaction and rigidity of thinking.

His educational needs have been assessed by an EA Educational Psychologist who has built up a good relationship with the child over a number of years and has been involved in multi-

agency meetings about the child and in transitions planning for the child moving to secondary school.

Parents are not satisfied with the school planned for the child which is a mainstream secondary school with support. They make a placing request for an Independent special school. The Educational Psychologist is familiar with the Independent special school as some of the pupils for whom she has responsibility have been placed there by the EA.

### **EA Decision on the placing request**

The placing request is refused on the ground contained in paragraph 3(1)(f), namely all of the following conditions apply:-

- (i) The specified school is not a public school
- (ii) The Authority are able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school
- (iii) It is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school and in the school referred to in paragraph (ii), to place the child in the specified school and
- (iv) The Authority have offered to place the child in the school referred to in paragraph (ii).

### **The Reference**

Parents are unhappy with this decision.

They have 2 months from the date of the EA's decision to make a reference to the Tribunal although the time can be extended in exceptional circumstances.

Parents approach Let'sTalk ASN, which as you may know is a free advocacy and representation service, and the ASNTS reference form is completed and submitted in time together with the decision letter refusing the placing request.

The Tribunal registers the reference and sends a copy of the reference form to the Education Officer who signed the decision letter together with the Standing Direction to EA's on information on the child – that is to provide by the end of the case statement period:-

- A copy of the child's attendance record at school for the last complete school year
- A copy of the child's most recent Individualised Education Programme (IEP) or equivalent document
- A copy of the most recent school report, or reports, for the past year

Also to advise of information on the reason additional support is required in terms of the agreed statistical return to the Scottish Executive consistent with the Pupil Census Return categories. The letter intimating the reference to the EA will also set a date for the hearing about 3 weeks after the end of the case statement period.

## **Case statement period**

The EA has 30 working days to provide their response to the reference, produce all relevant documents e.g. assessments, minutes of meetings, reports etc, advise who the representative and witnesses are going to be and provide the information in the standing direction. The Education Officer sends a copy of the reference to the EA's solicitor who advises the Tribunal that all future correspondence should be with the Solicitor.

Within the 30 day period, the Appellants have 20 days to produce their case statement and documents. The Appellant doesn't have to produce a case statement. It may be that the case has been stated fully and all the documents upon which the Appellant intends to rely are submitted at the start. The EA must submit a response failing which the EA is not entitled to take any part in the proceedings except in prescribed circumstances – rule 10(4).

So depending on how detailed the initial reference form is and how many documents are submitted at the outset, the remaining 10 days for the EA to complete their response can be tight. It is in our hypothetical case and the Appellants provide a detailed case statement on day 20 which is forwarded by the Tribunal secretariat to the solicitor for the EA.

During the case statement period the EA's Solicitor has been familiarising herself with the circumstances of the child, the background to the reference, ingathering relevant documents and speaking to potential witnesses including in this case the Educational Psychologist.

The Solicitor has taken precognitions from the Education Officer who refused the placing request, the Headteacher of the primary school who knows the child and the child's capabilities very well, the Headteacher of the secondary mainstream secondary school to which the child is meant to transfer in accordance with the transitions plan and the Education Psychologist.

Only 2 witnesses allowed (5 for disability discrimination claims) so if the Solicitor wants to have an additional witness she will need to seek the Convenor's permission. The Solicitor will want to lead the witnesses who can provide the best evidence about the facts and the issues.

It is usually best to lead evidence from those who have had direct involvement with child although this is not essential to a successful outcome.

A list of witnesses needs to be provided along with the case statement and a party can only call a witness who is not included in their list with the permission of the Convenor or the Tribunal at a hearing.

## **Recording Evidence**

A precognition is a written statement of a witness' evidence. Nobody sees it but the solicitor and the witness. It enables the solicitor to prepare questions for the witness based on what is in the precognition.

Witness statement is just what it sounds like - a statement of the witness' evidence which is submitted to the Tribunal. Rule 29 – the Tribunal may require the personal attendance of the maker of a written statement.

An affidavit is a written statement in which the evidence is recorded on the sworn oath or affirmation of the witness before a Notary Public and this can be lodged in proceedings. In Court affidavits are being used as evidence in chief in e.g. permanence order cases, which speeds up the questioning process. An affidavit carries more weight than a witness statement but not as much weight as a witness' oral testimony upon which the witness can be questioned.

Particularly in the case of an Educational Psychologist, a Report can be prepared by the EP and lodged with the papers.

Advantage of producing a report is that you can incorporate within it the results of assessments and observations and be accurate as regards detailed information which you would not be able to remember otherwise. The disadvantage is that it enables the cross examiner to prepare his questions in advance. The Report can be taken as examination-in-chief which speeds up the hearing.

### **The Case Statement**

Rule 10 of the procedure rules says that the response shall be signed and dated and state the name and address of the authority, the correspondence address, if different and the name of the representative. Also:-

- The response to the grounds stated in the reference
- The basis on which the reference is resisted
- Which facts as set out in the reference or in the statement of case are admitted and which are disputed
- Any further facts on which the authority propose to rely
- The views of the child concerning the issues raised by the reference or the reason why these views have not been ascertained e.g. because the child is too young or has communication difficulties.

The Solicitor will draft the case statement but will be looking to the witnesses to check it over for accuracy and for completeness. If any line of argument is not disclosed in the case statement it may not be possible to introduce it later. The Tribunal would have to be satisfied that it is fair and just to allow the EA to rely on grounds not specified in their response (rule 28(4)). Parties are expected to give 'fair notice' of their position on any matter in dispute.

The Solicitor will also be checking with witnesses that no important documents have been left out of the EA's bundle of documents as if anything is missing permission may not be given for it to be submitted late.

If an EP Report has been produced by the Appellant, the Solicitor will be looking to her EP to explain any psychological jargon, to address any opinions expressed and to challenge or indeed to accept any conclusions reached. The EP as a skilled or expert witness requires to give an objective unbiased opinion.

### **The Conference Call**

- The Convener will normally hold a telephone conference call with parties representatives prior to the hearing
- Attended to by Solicitor for EA with or without any instructing officers present
- Preliminary issues e.g. as to competency
- Arrangements for the hearing – what witnesses are to be called – running order
- How the views of the child can be obtained
- There may require to be more than one call especially if directions are issued

Between the submission of the case statement and the hearing itself, the Solicitor will meet with her witnesses to go over their evidence and seek to identify any areas of weakness and possible cross-examination questions the witness may have to face.

### **Hypothetical case**

Awareness of the legal context of the reference is important. Witnesses don't give their evidence in a vacuum. It has to be relevant to the case before the Tribunal and the issues upon which the Tribunal has to decide.

Placing request appeal so the EA has to satisfy the Tribunal that the ground of refusal upon which they are relying exists as at the date of the Tribunal hearing itself.

In addition they have to satisfy the Tribunal that it is appropriate in all the circumstances that the decision to refuse the placing request should be confirmed.

Conditions 1 and 4 of ground (f) are factual – the specified school i.e. the Independent school – is not a public school and either a place has been offered at the mainstream secondary school to the child or it hasn't.

Condition 2 calls for evidence to be led that the EA is able to make provision for the additional support needs of the child in the mainstream school – both the secondary HT and the EP can give evidence about this but the secondary HT can explain what supports exist in his school for this child and how the child will be taught in practical terms, (subjects, pupil:teacher ratio) how his additional support needs will be addressed (e.g. autism accredited teachers, targeted support for children on the spectrum, special groups, buddies etc.) and how he will be supported to achieve his potential.

Condition 3 calls for evidence to be led about the respective suitability and the respective cost of the provision for the additional support needs of the child in the Independent school and the mainstream school. The Education Officer can give evidence about the respective costs but in this case the EP is best placed to carry out the necessary comparison exercise as to the suitability of the two schools because she knows what both schools have to offer.

The EP has identified a number of factors which leads her to conclude that the mainstream school is more suitable for this child given his additional support needs and his educational attainment levels. She has compared the qualification framework available at both schools, the content of the curriculum and the way it is taught considering whether the child would be sufficiently challenged in each environment, the way classes are configured in both schools, and whether an appropriate peer group would be available to the child at both schools.

The Tribunal's task is not to compare the two schools to decide which school is the best school but to decide which school is the most suitable for the provision of the child's additional support needs and that is the focus of the EP Report.

### **The Hearing**

- Venue – a location which is private and convenient for both parties.
- Neutral – not usually Council offices
- Timing – usually starts at 10am and finishes by 5pm
- Hearing is private although an application may be made to hear a case in public
- Witnesses – Information Note No 01/2014
- Para 8 – Usually, witnesses are admitted to the hearing room for the purpose of giving their evidence and asked to leave once their evidence has been heard.
- Para 12 – When entering the hearing room the case officer will direct the witness where to sit which is usually at the table with everyone else – no separate table or witness box
- Para 13 – Usually the party who called the witness will ask the witness questions first.
- Examination -in -chief, EA Solicitor – leading questions (which by their form suggest the answer) on matters in dispute should not be asked since it is important the witness gives such evidence in his own words.
- Cross –examination - Appellant's representative
- Re-examination – EA Solicitor on matters arising in cross or questioning from the Tribunal

### **Questioning Techniques**

- Guidance Note for Witnesses - ACC
- Know your evidence
- Body language
- Don't waffle
- Speak up
- Measured
- Don't rush
- Take some control
- Don't speculate
- Professional

## **Hypothetical case**

The Tribunal would hear the witnesses from the EA

The Tribunal would hear the Appellant usually and any witnesses for the Appellant

The Tribunal would ascertain the views of the child – directly either in the absence of parties or perhaps with a parent present or perhaps with the assistance of an independent advocate or if the child doesn't attend the hearing, from an independent advocate on the child's behalf.

Submission for the parties – summary of the facts, evidence heard and the law

The Tribunal will weigh up the evidence heard from each witness and in particular whether it found the witnesses credible and reliable

Credible in the sense of honesty and integrity

Reliable in the sense of consistency and accuracy. A witness who is not considered to be reliable is not necessarily dishonest but perhaps ill-prepared or mistaken.

## **The Decision**

Tribunal's powers – to confirm the decision or to overturn the decision and require the EA to place the child in the specified school by a certain date.

Decision may be given orally at the end of the hearing or decision letter issued.

Anonymised decision uploaded to the ASNTS website after at least a 3 month period.

May be a review – when the Tribunal itself is asked to reconsider its decision on the basis an error of fact or law has occurred or a party who did not attend the hearing had a good reason for non-appearance and the interests of justice require such a review or otherwise that the interests of justice require the decision to be reviewed.

May be an Appeal to the Court of Session on a point of law.