Health and Education Chamber
First-tier Tribunal for Scotland

The Bulletin

Edition 3

November 2019

Contents

Foreword

May Dunsmuir

President

Dear members,

I want to begin by thanking each of you for your considerable investment to our Chamber and to the work of the Additional Support Needs jurisdiction. I have called on you more than ever in the past 6 months, some of you for your specialist knowledge and others, to increase your capacity to sit. Thank you for your continuing commitment and for your support as we grow. You will read in Paul Stewart's article of the growing volume of cases, which is now far greater than we have ever experienced. This includes a growing number of child parties.

Progress in the last 6 months

We have much to be proud of - in the past 6 months our Judicial Decision Writing Toolkit has been introduced, as has new guidance on the production of documentary evidence and more specialist guidance on the child. I am about to issue a final guidance note this year on the child and the hearing, which will complete this.

Glasgow Tribunals Centre – Sensory Hearing Rooms

We have also begun to use the specialist hearing facilities on the sensory floor of the Glasgow Tribunals Centre (GTC) and I have been delighted to see the commitment of members in using this to its fullest potential. My thanks to those members who have provided very helpful feedback following their own hearings. I was delighted to read one member's comments, who had been particularly pleased to be able to use her specialist skills so well in the 1-2-1 room. We have now two visual guides for the use of these hearing facilities, one for the GTC and one for the hearing room. These will shortly be uploaded to the website for use by anyone coming to the GTC.

I had a very positive meeting with the children's service, My Rights, My Say **(MRMS)**, who know to personalise these for the child and for the particular hearing room being used. My thanks to our speech and language members who assisted in

the development of these.

We now have a library of colours and *needs to learn* images which may be used on the sensory wall. These will be added to the visual guides. Paul Stewart, our Operations Manager, has worked hard to provide as wide a range of colours and suitable images as possible.

The sensory room is almost complete and ready for use by any child attending a sensory hearing - although visitors to the floor are keen to remain in the room as long as possible for its positive benefits!

Most, if not all of you will by now have seen our new facilities. Anyone who has not and wishes to visit can contact Lynsey. I draw to your attention a comment in feedback from a member who had recently visited, which I think captured all that we had hoped to achieve:

> *"Absolutely brilliant to see the new accommodation and a big congratulations to all involved. I have a cousin who is care experienced and at the age of 74 is overwhelmed by the notion that young people's views and opinions are being actively sought in determining future services. "Nobody thought to ask us." "*

The child's experience

At a recent meeting with MRMS they reported that the child's experience of the sensory hearing rooms has been very positive. They found the end to end experience really good, helpful and enabling. The capacity and wellbeing assessment process has also been a very positive experience. The children who have made applications to the tribunal through the MRMS service have found the process a positive and enabling one. MRMS also commended the use of a letter to the child following the decision, explaining the decision and their involvement.

Toolkit

The Toolkit is proving popular and has been shared with other FtT Chambers and with our equivalent jurisdictions in England (SENDIST) and Wales (SENDW), so much so, that I will be delivering training on this to English tribunal judges in 2020. The toolkit remains an evolving document and I plan to revise it annually to capture new learning from the year. Each of your decisions will enrich this.

Member retiral

Case volume remains higher than it has ever been and I am grateful to those of you who have been able to offer more days to help us through this busy period. We have felt this more keenly in light of recent member retiral and resignations. I must add to that the recent resignation of Rick Mill. Rick has been with us since

2007 and became a member reviewer in 2014. We will miss his humour, wit, expertise and pragmatism.

I thank each of the departing members for their investment in our jurisdiction/ Chamber and I wish them good health and happiness in all their future endeavours.

Articles

This edition of the Bulletin offers rich learning, from information on Foetal Alcohol Syndrome to the Equality Act. I commend each of the articles to you for your interest and learning. I know Deirdre, our Editor, will be happy to hear from you if you have an article of interest for any of our future editions.

Early Festive Wishes

This will be our last edition for 2019 so let me take this opportunity to wish you all the very best over the festive season when it comes. I hope you are all able to enjoy family, friends and a much needed rest. I look forward to working with you in 2020.

With my best wishes,

President
Health and Education Chamber, First-tier Tribunal for Scotland

Health and Education Chamber Update

Paul Stewart, Operations Manager

Scottish Courts and Tribunals Service

Paul Stewart, Operations Manager for Glasgow with the Scottish Courts and Tribunal Service, updates members on volume of casework within the chamber, staffing changes and the new facilities within the 6th Floor of the Glasgow Hearings Centre.

Since my last update in May 2019, the caseload of the ASN jurisdiction has continued to increase and we have received 107 applications between 1 April 2019 and 15th November 2019. This suggests that we will surpass the number of applications received last year (113) which was the highest number of applications received in a single year since the former Additional Support Needs Tribunal for Scotland was established in 2005.

The HEC administrative team are continuing to seek efficiencies in order to meet this increased demand. This includes working closely with the President and In-House Convenor on process changes within the jurisdiction, including changes in relation to the President's guidance note to the Tribunal's administration and parties on documentary evidence which was implemented on 30 September 2019.

Since my last update there has also been a couple of staffing changes within the casework team. Katie Irvine has left the Scottish Courts and Tribunals Service and has recently taken up a promoted post within the Scottish Government. Meg Orr has also left the team to work full time in the Housing and Property Chamber. We wish Katie and Meg all the best in their new roles and wish to welcome Duncan Millar and Sarah Tracey who have both joined the casework team. I also wish to thank Amanda Rees for providing temporary casework support during this period.

In September 2019 we held the first hearings in the 6th floor hearing facilities of the Glasgow Tribunals Centre. Overall, the feedback on the use of these facilities has been very positive and the capabilities of these rooms were well utilised. Both children attended their respective hearings via the separate 6th floor entrance to the Glasgow Tribunals Centre where they were greeted by a member of staff. This member of staff accompanied them to the 6th floor where they were introduced to the hearings clerk and shown the hearing room and other facilities available to them.

The 1-2-1 room was used to try and seek the views of one of these children. Feedback after the hearing suggests that the child felt comfortable in this environment, and had not been stressed by coming into the building, or waiting in the adjoining room for the proceedings to begin.

Both hearings were recorded using the built-in AV equipment instead of our usual portable recording devices. Again, feedback has been very positive. The recordings themselves are clear and the clerk was able to use the control panel discreetly during the proceedings.

Following these hearings, a debrief session was held in which we analysed how the hearings had went, and whether there was any scope to further improve the facilities on the 6th floor. With that in mind, we will be making several changes to how these facilities should be used which include repositioning the round table in the hearing room, creating default seating plans to help preserve the privacy of judicial note taking, taking short breaks before and after the 1-2-1 room is used to allow the room to be reconfigured, and providing visitor passes to tribunal members and attendees, amongst other things.

DATES FOR YOUR DIARY

Thursday 19 March 2020

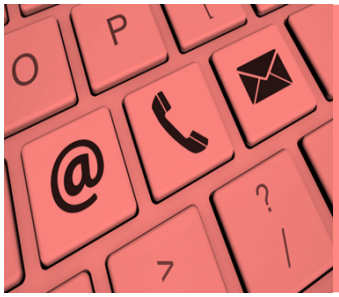
All Members' Conference

Marriott Hotel, Glasgow

Thursday 1 October 2020

Legal Member Evening Training

Glasgow Tribunals Centre



Health and Education Chamber

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Fetal Alcohol Spectrum Disorder Awareness

Kathleen MacKinnon, Health and Education, Ordinary Member *(Speech and Language Therapy)*

Fetal Alcohol Spectrum Disorder awareness day took place on 9 September 2019. Kathleen MacKinnon, Ordinary Member within the Health and Education Chamber, outlines some of the features of this life-long condition as well as highlighting recent guidance and support resources which are now available.

The term Fetal Alcohol Spectrum Disorder ("FASD") describes the range of physical, emotional and developmental delays that may affect a child or young person as a result of exposure to alcohol during pregnancy; it is a lifelong condition. This condition is the most common cause of neuro-disability in the developed world and presents around three to six times the rate of Autism Spectrum Disorder in the UK. The UK has the fourth highest level of prenatal alcohol use in the world, and around three quarters of looked-after children are considered to be at risk of developing this disorder. Within Scotland, FASD is thought to affect up to 6 per cent of children and young people. Nevertheless, children and young people with FASD are often misdiagnosed with similar or co-morbid conditions, or not diagnosed at all.

Diagnosis of FASD involves assessment by a Paediatrician, Clinical Psychologist, Occupational Therapy and Speech & Language Therapist. This assessment process considers the following nine brain functions that can potentially be impacted by alcohol during pregnancy:-

Executive Functioning: including planning, sequencing, organisation, transitions and change, controlling emotions.

Sensory and Motor Functioning e.g**.** make sense of what is going on around them and reacting appropriately to sensory input, for example, light, noise, touch, smell and/or taste and movement.

Academic Skills including difficulty in school particularly with maths, reading, time and money, comprehension, organisation and planning.

Brain Structure: Brain and head circumference may be small.

Living & Social Skills e.g. may be socially vulnerable and easily taken advantage of or may have difficulty seeing things from another's point of view.

Focus & Attention e.g. can be easily distracted, over-stimulated or impulsive or may have difficulty paying attention and be over- active.

Cognition (Reasoning & Thinking) e.g. difficulty with attention, learning, memory, planning and organisation but there is a wide range of IQ levels.

Communication there may be difficulties with comprehension, following instructions and language delay.

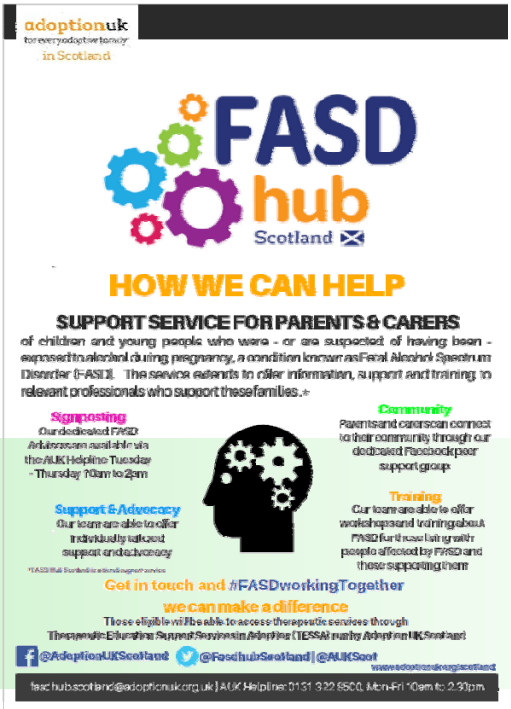
Memory e.g**.** difficulty with long and short-term memory – may seem forgetful and can easily forget steps in normal daily routines.

This wide range of difficulties can have a significant impact across all aspects of the child or young person's life including at home, school and work. In addition, the impact of late diagnosis or misdiagnosis adds to the long-term impact of FASD on outcomes for affected children and their families.

This year, The Scottish Intercollegiate Guidelines Network (SIGN) published new guidance for practitioners working with affected children and young people. This is an evidence based clinical practice guideline for the National Health Service (NHS) in Scotland https://www.sign.ac.uk/sign-156-children-and-young-people-exposed-prenatally-to-alcohol.html

A specialist team was also established to support practitioners in Scotland. The Fetal Alcohol Advisory and Support Team based in NHS Ayrshire & Arran is funded by the Scottish Government. They aim to work with multidisciplinary teams in Health Boards across NHS Scotland to improve access to diagnostic services and improve clinician confidence. https://www.nhsaaa.net/services-a-to-z/fetal-alcohol-spectrum-disorder-fasd/

Newly established support is also available from a service for parents and carers of children affected by FASD. The FASD Hub has been set up by Adoption UK Scotland for people who look after young people been exposed to alcohol during pregnancy. https://www.adoptionuk.org/fasd-hub-scotland



Kathleen MacKinnon has been a member of the Additional Support Needs Tribunal/ jurisdiction for nearly 10 years. She currently works as a Speech and Language Therapy Manager with Renfrewshire Health and Social Care Partnership.

Education Appeal Committees

May Dunsmuir, President

Current provision – pre-transfer

There are 32 education authorities in Scotland. Every education authority has a duty to set up and maintain education appeal committees **(EAC)** to hear references on exclusions and placing requests, which cannot be made to the Additional Support Needs jurisdiction **(ASNT)**. The duty arises from section 28D of the Education (Scotland) Act 1980 **(the 1980 Act)** and paragraph 5 of schedule 2 of the Education (Additional Support for Learning) Scotland Act 2004 **(the 2004 Act)**. The same defences to a placing request which appear in schedule 2 to the 2004 Act apply to placing requests heard by the EAC.

Composition

An EAC can consist of 3, 5 or 7 members nominated by the authority from among persons appointed by the authority[1] and sufficient persons may be appointed to enable 2 or more EACs to sit at the same time. The persons appointed comprise:

- elected members of the authority[2];
- parents of children of school age;
- persons who have experience in education;
- persons who are acquainted with educational conditions in the authority area.

Members cannot include:

- any person employed by the authority as director of education or in an administrative or advisory capacity as respects the discharge of their education functions[3];
- any person who was among those who made the decision or took part in or was present at discussions as to whether the decision should be made[4];
- a teacher at the school which is the subject of the reference;
- a pupil at such a school;
- a parent of a pupil at such a school;

[1] Schedule A1, para 2, 1980 Act
[2] Elected members shall not outnumber the other members of the EAC by more than one
[3] Schedule A1, para 3, 1980 Act
[4] Schedule A1, para 6, 1980 Act

- a member of a Parent Council or Combined Parent Council in relation to such a school[5].

Process

Placing request references must be made within 28 days after the placing request has been refused, which starts from the date of receipt of the refusal letter. There is no deadline for exclusions, but references are likely to be sent promptly. The end to end process can take several weeks.

There are no single consistent rules of procedure which apply to EACs. Appeals from the EAC may be made to a sheriff. The education authority (but not the EAC) is a party to an appeal.

Volume

The number of placing requests made to education authorities amounts to approximately 2000 each year, with around 1000 of these resulting in references to the EACs. There are far fewer exclusion references.

Going forward – post-transfer

On transfer, the EACs will sit under the umbrella of the First-tier Tribunal for Scotland **(FtT)**. The effect of this is that members of the FtT - in this case members of the Health and Education Chamber, will hear EAC references.

Law

The law is already very familiar to our members – the 1980 and 2004 Acts sit at the core of our present work. The same defences which apply in a placing request reference to the ASNT apply to references from the EAC. We are also well versed in exclusions.

Process

Composition

I would wish to see a reduction in the potential number of members. I envisage a maximum of 3 and I would hope to have the power to reduce this to one legal member sitting alone in certain cases (as we have in ASNT), and to two member panels (always with a legal member); the 3 member panel being maintained for cases of complexity.

Listing (allocation) of cases

EACs can be heard with far more efficiency as the complexity surrounding a child's

[5] Schedule A1, para 7, 1980 Act

additional support needs is not present. The bundle of productions is likely to be far less and there will be the potential to hear a number of these without the need for an oral hearing. With this in mind I expect to be able to list more than one case each day.

Rules of Procedure

There will be a single set of rules of procedure which apply, regardless of the education authority involved. These would be consistent with our current rules for the ASNT.

Appeals

An appeal from the HEC is made to the Upper Tribunal, rather than to the sheriff.

Conclusion

The work of the EACs is familiar ground to our members. I would hope therefore to draw on your current levels of expertise. Those members with an interest in sitting across more than one jurisdiction will have the opportunity to be trained to sit on EACs.

NHS Tribunals

Joseph Hughes, Health and Education, Legal Member

The National Health Service Tribunal is listed to transfer to the Health and Education Chamber (HEC) in the future. Joseph Hughes, HEC, legal member outlines the role of the Tribunal.

The NHS Tribunal was constituted under Section 29 and Schedule 8 of the **National Health Service (Scotland) Act 1978**. Each panel is made up of three members: a legally qualified Chair; a lay member; and a professional member. The professional member will be a representative of the profession of the practitioner appearing before the panel: optician, dentist, pharmacist or general practitioner. The Tribunal has a legal clerk, appointed by the Chair, who performs all of the administrative functions of the Tribunal. In this jurisdiction the clerk acts as a legal adviser and secretary.

The Tribunal considers any representations made against a practitioner on the NHS approved providers list, or who is seeking entry to that list. The Tribunal must deal with any representations made by a Health Board but it has a discretion whether to hear or not hear the matter if made by a third party. The relevant practitioner is expected to lodge answers to the representations and is usually represented by their professional body.

The Tribunal must determine whether or not any of the statutory conditions for disqualification of the practitioner have been met. The conditions are set out within Sections 29(6), 29(7) and 29(7A) of the 1978 Act. There are three conditions: (i) Efficiency, (ii) Fraud and (iii) Suitability.

The **Efficiency condition** is that the inclusion, or the continued inclusion, of the practitioner concerned in the list, would be prejudicial to the efficiency of the services which those included on the list perform or undertake to provide.

The **Fraud condition** is that the practitioner concerned has, by act or omission, caused, or risked causing, detriment to any health scheme by securing or trying to secure for themselves, or another, any financial or other benefit to which they knew they were not entitled.

The **Suitability condition** is that the practitioner concerned is unsuitable, by virtue of personal or professional conduct, to be included, or to continue to be included, in the list.

The Tribunal has the power to disqualify a person from inclusion in the list either conditionally or unconditionally:

(a) An **unconditional** disqualification results in the removal of the person's name from the approved providers list - or the inability of that person to have their name included in the list;

(b) A **conditional** disqualification only takes effect if certain conditions which are imposed by the Tribunal are not met.

All disqualifications can be reviewed and removed. Conditions can be varied. The Tribunal also has the power to make an Order for interim suspension pending an inquiry, where such an Order is necessary for the protection of the public or in the public interest.

The procedure of the Tribunal is governed by the **National Health Service (Tribunal)(Scotland) Regulations 2004**, as amended. These Regulations make provision for the constitution of the Tribunal and the procedures for dealing with representations as well as applications for review and interim suspension.

The Regulations are fairly prescriptive about how matters should be dealt with in respect of initiation of inquiries, but they allow a broad discretion to the Tribunal as to the procedure which the Tribunal adopts at an Inquiry (see Schedule 1).

In addition to the Regulations, there is also a Practice Note which sets out the way in which the Tribunal proposed to deal with representations. The Note was designed to try and short circuit what had become a very convoluted practice and to deal with the business of the Tribunal in a manner more akin to the way professional regulators dealt with their hearings, as opposed to the way in which a Court might conduct litigation.

Joseph Hughes was appointed as legal member to the Additional Support Needs Tribunal in 2005. He has retired from the Health and Education Chamber following his appointment as a Sheriff at Greenock Sheriff Court. We wish him well in his new role.

Mediation from the perspective of parents

Sophie Pilgrim, Kindred Advocacy

In the second of our articles on the mediation process, Sophie Pilgrim from Kindred Advocacy considers the process from the perspective of parents who have been children involved in mediation seeking to resolve disputes with education authorities.

Children with complex needs require significant statutory resources for their care and education. Not surprisingly, there can be tensions between local authorities who allocate resources and parents who want the best for their child. Mediation can foster understanding and help to establish the facts. Is the local authority providing too little, or is the parent asking too much? Cold-hearted bureaucracy, or demanding parents? In our experience mediation is always useful. In some cases, mediation can be very powerful and lead to resolution of disputes which seem acrimonious and intractable.

The following personal account shows how a parent was able to use mediation to manage interactions with school over a number of years. In this case, mediation was not a 'quick fix' but it was one of the ways in which the parent was able to build up the confidence to ensure that her child had support in school:-

"We have used the mediation service three times over the years whilst our son has been in primary school. Our son has learning difficulties and a serious health condition.

The first time we used the service was when our son was in primary 1. We had made a formal complaint regarding a decision the school had taken that compromised his safety. The council got in touch with us and said that this incident could be disability discrimination and we would need to make a claim to the Tribunal if we wanted to proceed with the complaint. The letter also mentioned that mediation was available. We did not know what going to a Tribunal meant, but the

prospect of this was very intimidating. The school management became increasingly defensive, and there were several other incidents that caused us concern. The fraught relationship between ourselves and the school was having an impact on our son's learning and management of his health condition. We requested mediation to foster a positive relationship with the school so we could work as partners in our son's education.

The mediator contacted us within a week and set up a meeting at our home. She listened intently to our concerns and established what we hoped to gain from the mediation process. This was the first person who seemed interested in what had happened and did not try to dismiss our concerns. The mediator said she would talk to the school staff involved and try to set up a meeting in a neutral location.

We were informed sometime later that one of the key members of staff at school had refused to be involved in the mediation process (they were too angry with us). Mediation went ahead with one member of staff but the school refused to meet in a neutral location, (the meeting occurred in the school). We discussed issues that needed to be decided for my son's care that week and agreed a plan which was very helpful. The mediator kept in touch for a few weeks and eventually the second member of staff agreed to meet with us, but again the school refused to meet in a neutral location. This meeting ended with that member of staff walking out of the meeting and leaving us and the mediator in the room not knowing what to do. Unfortunately we were later informed the school no longer wanted to be involved in the mediation process.

The second time we used mediation was 4 years later when the school refused to implement a reasonable adjustment. The same mediator as before came to our house and listened to our concerns, they also went into the school to chat to the relevant members of staff. A meeting was set up and again we were told it would be in a neutral location, unfortunately it again took place in an office in the school. Things were agreed at this meeting but unfortunately, they were not implemented. We did not feel we had any recourse.

In our opinion mediation can be useful but only if both parties agree to engage with

the process in good faith. Time and resources must be made available to facilitate a mediation process and a neutral location is of utmost importance. The mediator must be skilled and independent, and ideally not financially remunerated by either party. Being listened too can be a powerful tool in resolving disputes and misunderstanding on both sides, but if actions are agreed then they must be implemented, or the process of mediation is pointless.

Ultimately we were forced down the route of an ASN Tribunal, a finding of disability discrimination against the local authority was proven and the council were ordered to document and implement the reasonable adjustments we had requested during mediation. In retrospect we cannot help feeling that if the school and local authority had fully engaged with the mediation process our son would have received the required support sooner and a great deal of stress and work could have been avoided on both sides."

Some parents are confident in engaging with mediation. Other parents can find the process quite intimidating. Mediation meetings often last two or three hours. As advocates, we usually get to know the mediators and local authority staff over the years, and of course we are familiar with the process.

We can prepare the parents before the mediation meeting and help them to relax so that they are able to tell their side of the story. Sometimes, when there is a lot at stake, and emotions are running high we can offer to speak for a parent.

Perhaps mediation is perhaps most powerful where there is a straight forward decision to be made such as a decision on placing request for a special school. Here are the impressions of a parent after one such mediation:

"I found the mediation process I went through with the help of Kindred was invaluable. It allowed me to meet directly with the person/persons who would be making very important decisions regarding my daughter's education. This also gave me the opportunity to represent my daughter properly and not just as some information on a report."

As an organisation, Kindred has learned a lot from our involvement with mediation.

In the most effective mediations, people are prepared to have an open-minded discussion and to change their minds. Hopefully, mediation can be become more readily available for families of children with complex needs who require care packages. This will certainly help to make better decisions about scarce resources.

Sophie Pilgrim has been Director at Kindred Advocacy for 10 years. She was previously Policy and Campaigns Manager for the MS Society and works in a voluntary capacity with Enable Scotland as Director and is also Chair of Shakti Women's Aid.

Kindred Advocacy provides support to parents of children and young people with disabilities and long term conditions. Their seven advocacy staff support around 750 parents each year, of whom over half have a child with very complex needs.

Equality Act 2010 Update on Section 15

Muriel Robison, Health and Education, Legal Member

Muriel Robison, Health and Education Chamber, Legal Member, in the second article in her series focussing on section 15 of the Equality Act 2010, considers the second stage of the test within this section.

Introduction

In the first article in this series considering section 15 of the Equality Act 2010 ("the Act") and its application in cases in the Additional Support Needs Tribunal, I considered the first element of the four step test, that is identifying whether the claimant has been subject to unfavourable treatment. I now turn to analyse the second stage of the test, which requires the claimant to show that the identified unfavourable treatment was "because of something arising in consequence of [their] disability".

The difference from direct discrimination

Unlike direct discrimination, the reason is not the disability itself. For example, if a school were to refuse to take a child on a school trip because they have diabetes, that would be less favourable treatment because of the disability itself. Section 15 is concerned with other reasons related to or connected with the disability.

If the reason was because the child had previously had hypoglycaemia on a school trip[1]; or was refused admission to an independent school because they did not meet the entry requirements because of a social communication disorder[2], that would be argued to be unfavourable treatment because of something arising in consequence of their disability.

Note too, that while discrimination by association, that is where a claimant is treated less favourably not because of their own disability but because of the disability of someone they associate with, is a form of direct discrimination, there is no possibility of such a claim in this context because of the language of the section, which refers specifically to the claimant's disability.

[1]White v Clitheroe Royal Grammar School unreported Preston County Court 6 May 2002

[2]Tribunal Decision DDC/03/02/2016 (See Nisbet, I "Inclusion and Disability: the claim against School A" [2017] ED law 36

Guidance from case law

When considering this stage in the employment context, the then President of the Employment Tribunal, Mr Justice Langstaff, in the case of *Basildon and Thurrock NHS Foundation Trust v Weerasinghe*[3] explained the need to identify two separate causative steps. One is that the disability had the consequence of "something"; and the other is that the claimant was treated unfavourably because of that "something"[4].

Referring to *Weerasinghe* and other relevant authorities, Mrs Justice Simler, by then President of the EAT, in *Pnaiser v NHS England and Anr*[5] summarised the proper approach to establishing causation under section 15 at [31]:

> (a) A tribunal must first identify whether there was unfavourable treatment…..
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it…...
> (c) Motives are irrelevant….
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That….could describe a range of causal links….[which] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

Mrs Justice Simler provided further guidance on the second step in *Sheikholsalami v University of Edinburgh*[6], finding that the Employment Tribunal had erred in describing the critical question as being whether the claimant's refusal to return to her previous role was "because of her disability or because of some other reason". The critical question was whether, on the objective facts, her refusal to return arose "in consequence of" (rather than being caused by) her disability. That was a looser chain of connection that might involve more than one link in a chain of consequences.

The first step

So how should this guidance be applied in the additional support needs context? The first question to ask is: "Did the respondent treat the child unfavourably because of an identified something".

The tribunal must determine the "something" that allegedly caused the unfavourable

[3] Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305

[4] Note that Mr Justice Langstaff, and subsequently Mrs Justice Simler in Pnaiser, discussed below, confirmed that it does not matter precisely in which order these questions are addressed.

[5] Pnaiser v NHS England and anor [2016] IRLR 170

[6] Sheikholsalami v University of Edinburgh [2018] IRLR 1090

treatment or what was the reason for it. In order to establish that the unfavourable treatment was "because of" the identified something, the tribunal will require to consider what reason the respondent had in mind. This may require an examination of conscious or unconscious thought processes, just as in a direct discrimination case.

In the example above, the relevant "something" may be the fact that the child is behind in her schoolwork. The question whether the unfavourable treatment (not allowing the child to go on the school trip) was in fact because of the child was behind in her schoolwork involves an examination of the putative discriminator's state of mind.

Note that, at this stage, knowledge of the disability is irrelevant. Liability can be established even though the respondent does not know that the "something" arose from the claimant's disability[7]. A teacher may advise that a child should not attend a school trip because she was behind in her schoolwork without knowing that was related to her disability.

The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have been a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it. Motives are irrelevant. In the example where the unfavourable treatment is refusal to go on a school trip, the teacher says that it is not because of the risk of hypoglycaemia, but because the child is behind in her schoolwork. If the tribunal considers that the unfavourable treatment was in fact influenced by the risk of hypoglycaemia, then the refusal will be "because of" that reason, and the benevolent motive would be irrelevant.

The second step

The next question to ask is: Did that "something" arise in consequence of the child's disability? This is an objective question, whether there is a causal link between the child's disability and the relevant something. This is an objective question which does not depend on the thought processes of the alleged discriminator.

This means that there must be a connection between whatever led to the unfavourable treatment and the disability. There could be a range of causal links, so that more than one relevant consequence of the disability may require consideration. It will be a question of fact to determine in each case.

[7] Note that this is a different point to the question whether the respondent had knowledge of the disability itself, discussed in the next article in this series.

How close a connection is needed?

Perhaps the most difficult question is now close the connection needs to be[8]. What is clear is that the more links there are in the chain between disability and the reason for unfavourable treatment, the harder it is likely to be to establish the requisite connection as a matter of fact[9].

In the scenario being considered, it might be that only children who had satisfactorily completed a particular module of course work could go on the school trip. The child in question however was absent when the course work was being assessed. The reason she was absent was related to her diabetes. The claimant will argue in that case that the reason she is not able to go on the school trip is because she has not completed the course work, and the reason for that is because she was absent, and the reason she was absent was because of disability. Depending on the circumstances, this is likely to be a sufficiently close connection to establish the failure to complete the module arose in consequence of the child's disability. Should we comment on the likely success of this argument by the claimant?

In a similar scenario, a tribunal made obiter comments that the reason a child was not permitted to go on a ski-trip was stated to be because of the weather forecast (which would be the identified something); this was argued to be "in consequence of" to the claimant's disability because cold wet weather was understood to be a trigger for her asthma[10].

This step can be illustrated by reference to cases decided in the Employment Tribunal. For example in *Houghton v Land Registry*[11], employees received a formal warning after a certain number of absences, which led to them being automatically excluded from a corporate bonus. Here, a number of the absences were disability related, and the Tribunal rejected the respondent's argument that the non-payment of bonus was too remote. In comparison, in *McGraw v London Ambulance NHS Trust*[12] a paramedic who had a history of ethanox abuse, on sick leave with depression, went to his place of work and was witnessed removing a canister of ethanox and was subsequently dismissed. He argued if he had not been depressed he would not have been absent from work and if he was not absent he would not have stolen the ethanox. The Employment Tribunal found no evidence of a link between the depression and the attempted theft.

[8] There is a very interesting analysis of the remoteness question in the case of Malcolm v London Borough of Lewisham 2008 UKHL 43, which remains relevant although decided under the predecessor legislation. Note that the Supreme Court judges did not agree, which is an indication of how difficult the remoteness question can be to determine.

[9] As highlighted by Mrs Justice Simler in Pnaiser.

[10] Tribunal Decision DDC 20 06 2017

[11] Houghton v Land Registry 2014 EqLR 182

[12] McGraw v London Ambulance NHS Trust 2012 EqLR 292

Conclusion

This stage in the test can throw up some difficulties on the facts in a particular case. However, often, for example in cases involving exclusions, there will be no dispute that the unfavourable treatment arose in consequence of disability[13]. In many cases then, the focus will be on the question whether any such unfavourable treatment can be objectively justified. The issue of the respondent's defences will be considered in the next in this series of articles considering section 15.

[13]see eg F-T v Governors of Hampton Dene Primary School [2016] UKUT 468 (AAC)

Provision of education and the presumption of mainstream

Donna Morgan, Health and Education, Legal Member

Donna Morgan, Health and Education Chamber, Legal Member, considers the Scottish Government's guidance published earlier this year on the presumption to provide education in a mainstream setting.

Provision of Education and the Presumption of Mainstream

Guidance on the presumption to provide education in a mainstream setting (the Guidance) was published in March 2019 to further develop and support the Scottish Government objective of excellence and equity for children and young people educated in Scotland.

This follows the recent publication from Children in Scotland, the National Autistic Society and Scottish Autism named: 'Not Included, Not Engaged, Not Involved.' This report heavily criticised the experience of children with additional support needs in the mainstream environment[1].

The Guidance is a practical guide to inclusion written for educationalists across local authority provision in Scotland. This article looks at the legal position in relation to the presumption of mainstream education and the exceptions thereto.

The Presumption

The Standards in Scotland's Schools etc Act 2000 (the 2000 Act) provides for the presumption of mainstream in education. Section 15(1) of the Act requires an education authority, in carrying out their duty to provide school education to a child of school age, to provide that education in a school other than a special school unless one of the exceptions mentioned in subsection 15 (3) of the 2000 Act arises. This is a positive duty.

There may be a criticism that this presumption has the effect of depriving children with significant additional support needs from the specialist education that they might require to achieve their full potential[2]. The balance of rights and responsibilities are very fine and must remain under review at every stage of a child's life to ensure that education authorities 'get it right for every child'.

Section 15(3) of the 2000 Act- The Exceptions

There are three statutory exceptions to the 'presumption of mainstream'. If any of these exceptions apply, then this negates the requirement on the education authority to place the child in a mainstream school. These are detailed and

[1]This report is based on children on the autistic spectrum.

[2]Evidenced within the publication from Children in Scotland, the National Autistic Society and Scottish Autism: 'Not Included, Not Engaged, Not Involved.'

explored below.

1) ***Education within a mainstream classroom would not be suited to the ability or aptitude of the child (Section15(3)(a) of the 2000 Act)***

The curriculum for excellence (CofE) provides planning for children and young people from early learning and childcare, through to school and beyond. In simple terms, the CofE details the age at which children ought to be able to achieve specific outcomes.

The object of the CofE is that each child will be a successful learner, confident individual, responsible citizen and effective contributor.

Although all children will progress through the CofE, those with additional support needs may progress outwith the intended trajectory and the correlation between age, ability and aptitude may require to be broken down.

Age
Age is an important factor to be considered. Although a child or young person may have ability and/or aptitude in line with a certain peer group academically, consideration requires to be given to the adequacy of the peer group with whom the child is to be educated to ensure all the wellbeing indicators are satisfied[3].

For example, a 12 year-old with the ability and aptitude of a seven year old academically may require to learn with seven year old peers, however will still require contact with age related peers for the purpose of social engagement. This will balance each of the CofE outcomes.

Ability
The Oxford English Dictionary defines ability as 'possession of the means or skill to do something'.

The Guidance describes ability and aptitude as 'narrower than achievement.' Whereas achievement and progress may be viewed as markers of a successful placement, the two concepts are quite different. Ability cannot be measured in relation to achievement only. For example, an academically gifted child may be paralysed by anxiety in social situations, in which case they may not have the ***ability*** to attend a busy mainstream school where their academic needs would ordinarily be met.

Aptitude
The Oxford English Dictionary defines aptitude as 'a natural ability to do something'. This ties in with the education providers responsibility to ensure learners reach their full potential.

[3] Safe, Healthy, Active, Nurtured, Achieving, Respected, Responsible, Included (SHANARRI)

Looking again at the example of a gifted child, in order to achieve a fully rounded and suitable curriculum, access to specialist teachers in a mainstream high school may be suited to the child's aptitude, however some creative thinking may be required to allow the child to access this due to difficulties, or the ***ability***, to access a particular learning environment.

2) Education within a mainstream classroom would be incompatible with the provision of efficient education for the children with whom the child would be educated Section15(3)(b) of the 2000 Act)

This test recognises the rights of children and young people more broadly in education and generally relates to behaviours arising from additional support needs. However, it is often argued that these behaviours arise most commonly because the child or young person is subject to an educational placement that is not suited to their age, ability or aptitude.

Where the education of a child is apparently incompatible with the education of the other children, education authorities will require to work closely with all concerned to ensure the rights of *all* children are respected. That is the right of the child with additional support needs to be educated in a mainstream environment and the rights of the children with whom they are to be educated.

It must be noted that there are benefits to all in learning in a diverse education environment. However, the appropriate balance might be difficult to achieve, and the most appropriate outcome will be determined by the facts and circumstances of each respective case.

3) Education within a mainstream classroom would result in unreasonable public expenditure being incurred which would not ordinarily be incurred (Section15(3)(c) of the 2000 Act)

What is reasonable public expenditure will be subject to varying interpretation across the country. A number of factors will require to be considered and weighed up. Resources should be used efficiently and effectively in line with the education authority's responsibilities to promote equity and equality. Expenditure will also require to be in line with each education authority's improvement priorities.

Burden of Proof

Each education authority requires to place children in accordance with a parent's request unless exceptions apply. It follows logically therefore that the burden of proof rests with the education authority to establish that any of the foregoing exceptions might apply. That is to say, that it is for the education authority to evidence and establish that education within a mainstream classroom would ***not*** be incompatible with the provision of efficient education for the children with whom the child would be educated.

Types of Provisions

The Guidance refers to placement at mainstream school provision, special school provision, mixture of provision or flexible provision.

This may create confusion. A child or young person is placed at a school that is either a special school in terms of section 29 of the Education (Additional Support for Learning (Scotland) Act 2004 (2004 Act) Act or a school that is not a special school; that is a mainstream school. Although mainstream school is not legally defined, it is anything that is not a special school.

'Special School' means (a) a school, or (b) any class or other unit forming part of a public school which is not itself a special school, the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs (s29(1) 2004 Act).

A stand-alone special school is often easily identified, these may be state schools, grant aided or independent special schools.

There is frequent debate in relation to special schools that are a class or unit forming part of a public school which is not itself a special school, the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs. Such placements are detailed as full-time placements, albeit that much of the support provided to the children in attendance occurs within mainstream classes. It is not sufficient to state that a class or unit is not a special school because children placed there are supported to attend mainstream classes and are able to do so as a result of the specialist input available to them from being placed within the special school. The provision cannot be defined as a mainstream school simply because the children placed there accesses the mainstream curriculum a large proportion of the time.

These types of provision are based on a model of social inclusion with pupils integrating into the community of the school. This does not detract from the legal position that classes and units of this sort are special schools within the meaning of the 2004 Act.

Pupils of such classes and units will regularly be selected for placement as a result of their particular barriers to learning and will be clearly identifiable. Were the term 'special schools' only to relate to stand alone special schools, the legislation would not use the terminology 'class or other unit forming part of a public school.'

When determining whether a provision is a special school or not, the focus requires to be the purpose of the unit itself and placement rather than the proportion of time spent in the mainstream environment as a consequence of the support of the special school. The duty to provide school education in a school which is not a special school is a positive presumption to mainstream, however it is not a duty to avoid providing school education in a special school where that is appropriate in all the circumstances.

The guidance refers to 'flexible provision'. Whereas flexibility is important in ensuring that learners needs are met and responsibilities fulfilled, it is not legally defined and could lead to further confusion when it comes to placement disputes. It

is important to recognise and be aware of the clear legal position when advancing legal argument in a judicial forum. This is relevant in ensuring that the action is referred to the correct jurisdiction[4].

Equality and Equality for all
The guidance looks at four key areas intended to allow the Scottish Government to achieve their goal of equality and equity for all:

Present - Participating - Achieving - Supported

Present
Presence is a fundamental requirement of inclusion. This can be evidence by increased attendance and a reduction in exclusion and part-time timetables. Where there is a high prevalence of low attendance, exclusion and part-time timetables, there requires to be reflection on the suitability of the provision and the adjustments required to support presence. Compliance with the principles of reasonable adjustment[5] within the Equality Act 2010 is a key consideration to ensure maximum benefits for pupils while ensuring compliance for education authorities.

Participating
Participation means taking part in the curriculum but also in all areas of school life. Peer inclusion and friendship are key. Appropriate support is required to allow children with additional support needs to engage. A failure to plan for and provide such support can result in a disability discrimination action against an education authority.

Children and young people are entitled to have their views heard and considered when decisions are made in relation to their education and school life. This includes decisions on where they learn and the support they require and receive. Children with additional support needs, aged 12-15, have new rights in relation to assessment of and planning for their additional support needs[6]. These provisions are complex and beyond the scope of this article.

Achieving
All children and young people should be placed and supported to achieve their full potential whatever that may be. This may be secured by exposing children to a varied curriculum with appropriate planning and support.

Supported
Children and young people are best supported in an inclusive learning environment with strong leadership and positive relationships reinforcing this approach

[4]Additional Support Needs Tribunal, Education Appeals Committee, Sheriff Court for an example.

[5]Section 20 Equality Act 2010

[6]Section 3, 3A, 3B and 3C of the 2004 Act

throughout the learning environment. Appropriate support is required to achieve positive participation.

Appropriate support is essential to reduce barriers to learning and to allow pupils to progress to their full potential. Early intervention is key. Focussed intervention, when matters arise, should improve presence, participation and achievement. Failing to take positive steps at an early stage can become costly, literally and metaphorically, for all those involved.

Conclusion
The Guidance provides a practical overview of the presumption of mainstream for educationalists.

Legal matters arising from the presumption of mainstream education are not detailed or explored sufficiently to allow the guidance to be a sole reference for decision makers who may find themselves subject to a judicial action involving these issues. It will be for each tribunal to determine these issues in terms of the merits of each case.

The Guidance can be accessed on https://www.gov.scot/publications/guidance-presumption-provide-education-mainstream-setting/

Further reading for educationalists
Included, Engaged and Involved – Part 1: Attendance in Scottish Schools
Included, Engaged and Involved Part 2: A Positive Approach to Preventing and Managing School Exclusions
The How Good is Our Early Learning and Childcare? and How Good is Our School? (4th edition)
Curriculum for Excellence
Getting it Right for Every Child approach the Wellbeing Indicators
The National Improvement Framework driver of Parental Engagement

Further legal reading
The Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) ("the 2004 Act")
Article 12 of the United Nations Convention on the Rights of the Child
The Children and Young People's Commissioner Scotland: The 7 Golden Rules
Standards in Scotland's Schools etc. Act 2000
Equality Act 2010
Technical guidance for Schools in Scotland
Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002
Children and Young People (Scotland) Act 2014
The Supporting Children's Learning Code of Practice (third edition) 2017 - the statutory guidance for the Education (Additional Support for Learning) Act 2004
Guidance on Education for Children and Young People unable to attend school due to ill health.

Peripheral Thinking: Beyond the Usual Provisions: Part 1

Derek Auchie, Health and Education Chamber, Legal Member and In-House Convener

Derek Auchie, HEC In-House Convener and Legal Member brings to our attention some less commonly used provisions of the Education (Additional Support for Learning) (Scotland) Act 2004.

When Tribunal members are allocated to a hearing and think about the issues in a case, attention usually focusses on the directly relevant provisions of the 2004 Act[1]: sections 2 and 9 (CSP references), section 18 (both main reference types) and schedule 2 (placing request references).

This can, however, lead to a 'blind spot' in relation to other provisions of education legislation (in the 2004 Act and elsewhere) which can be important when considering the issues before the tribunal. There is also some relevant guidance and recommendations which exist in official reports or other official publications. Then there are international instruments which can be relevant.

In this series of bulletin articles, I will deal with this subject in four parts:

1. Provisions in the 2004 Act;

2. Provisions in other relevant Scottish/UK legislation;

3. Material in official documents; and

4. Provisions in (or deriving from) international instruments

In this article, I will summarise some of the less commonly used 2004 Act provisions, so that in future relevant cases they might be engaged to assist the tribunal to make a fuller decision than one narrowly focussed on only the obviously applicable tests. I do so in the context of recent member training and case law which indicates that where an authority is 'relevant, significant and material' to the tribunal's decision on a reference, it should be brought to the attention of the parties for their comment[2].

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[1] Education (Additional Support for Learning) (Scotland) Act 2004.

[2] Albion Hotel (Freshwater) Ltd v Maia e Silva & another 2002 IRLR 200, EAT, para 35 (as approved by the Court of Appeal in Clark v Clark Construction Initiatives Ltd & another [2009] ICR 718 at para 11).

2004 Act, section 4

Respondents as education authorities have a general duty to 'make adequate and efficient provision [for the child's additional support]'[3] as well as to keep such matters under consideration[4]. This is subject to the education authority having the power to take the step and where it would not result in unreasonable public expenditure[5].

This provision will be relevant in almost all CSP and placing request references. It would influence, for example, whether or not a CSP should be made, reviewed or discontinued as well as the content of a CSP. It should also have a bearing on many of the grounds for refusing a placing request, as well as on whether (where at least one reason for refusal is found to exist) it is appropriate to confirm the refusal[6].

In a sense, section 4 represents the foundational duty which underpins the CSP framework and most of the reasons for refusing a placing request.

2004 Act, section 5

Under this provision, the respondent (as an education authority) must in exercising any of its functions take account of the additional support needs of children and young persons. Where a child or young person appears to have additional support needs arising from a disability, he/she will fall within this provision[7].

This provision seems more general and is probably aimed at policy and resource decisions of the education authority. Having said that, the obligation is only, in making decisions falling within s.5(1), to 'take account of' the needs of children falling within the terms of that provision.

A breach of this obligation could be relevant especially in a placing request reference at the second stage (whether appropriate to confirm the refusal)[8].

2004 Act, section 12

Under this provision, when determining what support to put in place for a child or young person, education authorities are under a duty to take account of any relevant advice and information in the authority's possession or control as a result

[3] 2004 Act, section 4(1)(a).

[4] 2004 Act, section 4(1)(b).

[5] 2004 Act, section 4(2).

[6] 2004 Act, schedule 2 paragraph 3 and section18(4A)/(5).

[7] 2004 Act, section 5(3)(c), one of three eligibility tests for the application of section 5.

[8] 2004 Act, section18(4A)/(5).

of exercising any non-education functions[9].

This means that there requires to be a collation of relevant advice and information from different local authority departments (such as social work or housing) when making decisions about the level of educational support required for a child with additional support needs.

The tribunal might be minded to ask the respondent in a suitable case to address its compliance with this duty. Where this duty is not complied with, it could have an impact in a CSP case. Non-compliance might also be relevant at the second stage of a placing request reference, which requires all circumstances to be taken into account in considering whether the placing request refusal should be confirmed.

CSP references

In such cases, it is important to consider the framework of obligations and rights which the Act sets out not just in sections 2 and 9, but also in sections 10 and 11 which deal with a range of matters related to CSPs.

[9] 2004 Act section12(1)(d) and 12(2)(d).

HEALTH AND EDUCATION CHAMBER GUIDANCE

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Member Contributions to the Bulletin

Members are encouraged to contribute to the Bulletin and should contact Lynsey Brown at HEChamberPresident@scotcourtstribunals.gov.uk if they wish to contribute in any way. Any contributions must be typed in Arial, font size 12, with justified margins, two spaces after each full stop and with all necessary references set out as a foot note. Please note that all contributions may be subject to editing. Our next publication will be in **May 2020** and any contributions must be submitted no later than **mid-March 2020.**

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