



## Tribunal (Additional Support Needs) Forum

16 September 2021, Virtual Platform

Each year the Tribunal hosts a forum which provides an opportunity to meet the President and her staff and to discuss topical matters in relation to the Tribunal. The Forum is a valuable information sharing event.

The fourth Health and Education Chamber (HEC) Tribunal Forum was held on Thursday 16 September 2021 via Cisco WebEx. The Forum was the highest attended, with 77 attendees. This year we had representatives from across Scotland and from a number of agencies, including family, parent and child groups, legal representatives, the Faculty of Advocates, mediation, advocacy, education authorities, health, including allied health and health specific agencies, the CYPCS, the EHRC and Tribunal members.

### President's Update

Attendees heard how the Tribunal has been journeying through the pandemic, with updates on progress and planning. The President touched on remote hearings, updates to President's Guidance and Information Notes and co-ordinated support plans (CSPs) – conceptions and misconceptions.

### Scottish Government

Mr Jerry O'Connell (of the Workforce, Infrastructure and Reform Division in Learning Directorate for the Scottish Government) provided an update on the current situation regarding the proposed transfer of the Education Appeal Committees to the HEC, which began in 2019 but was delayed due to the pandemic. The team are working with local authorities, relevant sector bodies and will engage with parents on the proposed transfer. The team expect an average of 1000 appeals per year.

## **Casework Update**

The Operations Manager, Miss Elaine Forbes, provided statistics over the last reporting year, but due to the pandemic these are not a true reflection of the growing number of applications usually received. School closures may have had an impact on volume. The figures recorded YTD for 2021/2022 provides a closer comparison to applications received pre-pandemic. Placing requests continue to be the highest volume of case types and autism remains the principal additional support need.

## **Documentary Evidence**

Casework Team Leader, Miss Sarah Tracey, explained that caseworkers continue to work remotely. She provided an update on the use of electronic bundles.

## **Case Law Update**

The In-House Legal Member, Professor Derek Auchie, provided a case law update covering three types of cases received by the Tribunal, including: the definition of a school, the use of restraint / seclusion in schools; and CSPs – appropriate agencies and third sector support purchased by social work.

## **Child Participation in a Remote Hearing**

Specialist Member, Dr Jane Laverick, shared experiences of conducting a remote hearing involving a child party.

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*Below is a flavour of some of the questions and topics discussed at the event.*

## **Remote Hearings**

92% of our hearings have been conducted remotely, since the pandemic began, using telephone or video conference. This equates to 33 remote hearings.

All of our hearings are presently conducted using video conference or a hybrid version of video conference and telephone.

## **VC Test and Guidance**

The best way to prepare for a remote hearing is to read the President's guidance on [Remote Hearings](#) - and to arrange for a VC test before the hearing if unfamiliar with Cisco WebEx, the video conference platform.

## **Witnesses**

It is important that witnesses are prepared for the remote hearing. Witnesses should be reminded to dress as they would for an in-person hearing and to be situated in a room where no-one is present and where they cannot be overheard. Arrangements should be made for the relevant areas of the bundle to be made available to the witness. It is helpful to explain to witnesses that they may be asked to refer to specific pages.

Witnesses should be reminded that they are there to assist the tribunal and not to advocate one course or another - or to support one party's position over another.

## **E-Bundle**

The E-bundle allows us to work efficiently on a paperless basis during a time when a paper bundle would be difficult to organise.

## **Dress Code**

The usual dress code expected at an in-person hearing should be maintained by all participants, in remote hearings. This is an important display of respect for the nature of the proceedings and an important marker which demonstrates that the remote hearing is not a second rate version of justice. We must make every effort to ensure that the remote hearing is an effectively visible representation of a just process.

## **Identifying the Tribunal members**

Attending a hearing can be daunting, whether in-person or remotely. Identifying who the Tribunal members are is important and less easy to do in a remote hearing. To address this the President has introduced virtual backdrops for the members, which uses one of our sensory colours, together with our coat of arms and one of our *needs to learn* images.

## Planning and Recovery

The remote hearing model has been effective in allowing us to address the backlog introduced following the suspension of Tribunal business between March and June 2020 and to allow us to continue to deliver justice without any further delays. It has also provided some children and young people with an opportunity to attend their hearing, where an in-person hearing would be difficult.

Once we are able to return to in-person hearings, the option of a remote hearing will remain. The decision on the type of hearing is a judicial one, which will be decided after considering the views of the parties.

We are not yet able to return safely to in-person hearings. The President will review this at the end of October and provide an update on the HEC website. It is unlikely there will be a return to in-person hearings before the start of 2022. When this recommences it will be on a phased basis, initially limiting the number of persons present and working with a hybrid model of in-person and remote.

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## Information and Guidance Notes

The President has been revising a number of guidance notes:

### [Information Note 01/2021: Parties, Representatives, Witnesses and Supporters](#)

This Information Note has been revised. The note will be sent to these tribunal participants in every case (including witnesses).

[PGN: The child, young person and the Tribunal](#) – this will combine the four existing guidance notes into one. It includes a new section on child parties and the importance of recognising their equity with adult parties.

[PGN: Documentary Evidence](#) is being updated to maintain the e-bundle, with provision for a paper bundle to be made available to members on request. This will be issued to stakeholders for consultation in October/November.

[PGN: Case Management Call](#) has been updated the change the naming convention from case conference call to case management call.

[PGN: UNCRC](#) – this is a new guidance note, which will address the incorporation of the UNCRC into domestic law, once the Bill proceeds. At the moment the judgment of the Supreme Court is awaited.

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## Co-Ordinated Support Plans (CSPs)

The Scottish Government has created a short life working group (SLWG) to look at CSPs, following on from the [Morgan Review](#).

It remains the case - despite the rise in Scotland of the number of children with additional support needs - that the HEC does not receive a high volume of CSP references (this figure halved last year and presently remains lower than previous years). Many of the CSP references that are received do not proceed to a hearing, which means the Tribunal is not able to generate much case law.

There remains a lack of understanding on the statutory nature of the CSP. A reminder of the criteria for a CSP can be found here:

# Co-ordinated Support Plans

(the only statutory education plan in Scotland)

Statutory tests in [section 2](#) must be applied (nothing else):

- (a) Is an education authority responsible for the child or young person's education?
- (b) Does the child or young person have additional support needs arising from one or more complex factors or multiple factors which has or is likely to have a significant adverse effect on the child or young person's education?
- (c) Are the needs likely to continue for more than a year?
- (d) Do those needs require significant additional support from the education authority as educator and in another education authority function (e.g. social work) **OR** from the education authority and one or more appropriate agencies (e.g. health)?

*2017 Code of Practice is useful: (1) flowchart at p.74; (2) CSP template with guidance at pp.157-162; and (3) case studies at pp. 165-176 on elements of the test.*

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## **Casework Update**

See 2021 Forum Presentation for statistics.

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## **Documentary Evidence**

[Guidance to Tribunal Administration and Parties No 01/2020 Documentary Evidence and the Covid-19 Outbreak](#) was revised in January 2021. The casework team has created bundles in Adobe and overcome issues along the way; including a change to page numbers, introducing inventories; and how bundle updates were communicated. This introduced a number of benefits which saw a quicker turnaround of case files, secure delivery of bundles, a reduction of storage requirements of physical bundles and the ability to display the case file on screen during remote hearings. The e-bundle will remain alongside in-person hearings and can be displayed on a projection screen during the hearing.

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## **Case Law Update**

### **Definition of 'school'**

#### [\*Aberdeen City Council v LS 2021 UT 1\*](#)

A preliminary issue on the definition of a school was decided last year by a legal member sitting alone. This was appealed by the respondent to the Upper Tribunal (UT). The appeal was refused by Lady Poole.

The preliminary issue considered whether a particular specialist further education college in England was a school under the 2004 Act. If so, the placing request specifying the college was a valid one, if not it was not. The legal member decided that the college in question was a school; and this decision was upheld by the UT.

## Restraint

A significant case was decided in this area in February 2021. The decision is published on the HEC website with the reference [ASN D 14 01 2021](#).

This was an Equality Act 2010 claim and the responsible body was found to have discriminated against the claimant under section 15 of the 2010 Act (discrimination arising from disability).

A. The case is important from a general perspective:

1. The tribunal discusses the components of s.15, including the terms 'behaviour' and 'unfavourably'.
2. Whether restraint of a vulnerable child is intrinsically unfavourable was also covered. The tribunal indicated that there are some situations where exceptionally, physically restraining a child is necessary, but otherwise it will most likely be 'unfavourable'.
3. On the question of whether the distressed behaviour was something 'in consequence of' the child's disability, this was examined and it was held that medical evidence is not necessary.
4. The use of non-statutory material is instructive, for example the 'No Safe Place' report of the CYPCS.

B. On restraint, a number of points are discussed including:

- Recording of restraint incidents
- De-escalation
- Triggers
- Type and duration of restraint
- Restraint as a last resort
- Restraint reduction policy

## CSPs: legal test and delegated support

This case led to a legal member decision (on the written evidence) issued in February 2021. The decision is published on the HEC database on its website, reference [ASN D 10 12 2020](#).

The legal member decided that the test was met for a CSP. This decision is useful more generally on a number of points:

1. The tribunal held that school education is part of a child's health and development – here, social work support assisted with 'supporting relationships, parent nurturing and family routines' and this was connected with 'homework, attendance and time-keeping' (para 50 of the decision).
2. Where the social work department manages and funds support offered by other third sector agencies, this was held to be support provided by social work for the purposes of section 2, even where (as here) the agencies employ their own staff, and are not themselves 'appropriate agencies'. This is since the funded resource is an extension of the work of social work.

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## **Child Participation in a Remote Hearing**

Dr Laverick provided a case study on a remote hearing involving a child party. Here, the tribunal created a personalised social story, which is particularly helpful for children with autism spectrum disorder (ASD) to help them to prepare for a situation in advance, manage their expectations and assist in understanding. This was circulated in advance of the hearing.

At the outset, the tribunal also communicated when planned breaks would take place, lunchtime and the end time of the day so the child understood what would happen. The child also designed a 'stop sign' which could be used for an unscheduled break request.

The tribunal also discussed how they would take the child's evidence. Questions were agreed in advance with the parties and one tribunal members asked these.

This advance planning allowed the child to comfortably participate in the two day hearing.

## Enquires to the Tribunal

The following advance enquiries were received (the HEC response is set out in blue):

### **1. Children's rights and the Tribunal process.**

#### Children as parties

Children aged 12-15 inclusive have the right to make a reference to the Tribunal in certain circumstances, as provided for in s.18 of the 2004 Act, namely:

- any reference relating to a CSP (making, amending, reviewing, ending)
- a reference relating to a decision by an education authority on the capacity or wellbeing of the child

These references may only be made where the Tribunal is satisfied (a) that the child has the capacity to make the reference and (b) that the wellbeing of the child would not be adversely affected by making the reference (s.18(2A)). The test for capacity is found in s.3 of the 2004 Act, and is, in general terms, whether the child has sufficient maturity and understanding to make the reference. The test for wellbeing is found in s.3B of the 2004 Act.

Children of any age have the right to make a claim to the Tribunal under the Equality Act 2010. However, the Tribunal as a judicial body would require to be satisfied that the child has the capacity to make the claim. Unlike under the 2004 Act, there is no specific test for capacity under the 2010 Act.

A child in any of the above situations is called a 'child party'.

#### Representation of children

A child party may instruct representation (as may any party – rule 4 of the Tribunal rules), including legal representation. As with other judicial bodies, the Tribunal would require to be satisfied that the child has the capacity to instruct a representative. This is covered under the Tribunal rules, rule 50(1) (references) and rule 96(1) (claims), both containing a general power on the part of the Tribunal to regulate procedure.

#### The child as a witness

A child may be a witness in a reference or claim of any kind (whether the child is a party or not).

### The views of the child

A child's views may be taken by the tribunal. This is not the same as the child giving evidence. The tribunal is obliged to seek the views of the child where the parent is the appellant/claimant (rule 44 (references); rule 90 (claims)).

**2. *I'd like to hear how your virtual hearings have been going, I'm sure it's something that you'll be sharing.***

The President and the Casework team shared their thoughts on remote hearings during their presentations.

Overall, these are proceeding well. There are some technical issues, as would be expected, but these are usually minor in nature, and are becoming less and less common. There are some advantages and disadvantages over in person hearings. The President closely monitors how these hearings are conducted and a view will be taken in due course on the role that virtual hearings may play in the post-pandemic landscape.

**3. *Are all decisions now published on the database? In the past some of the disability discrimination decisions were not published.***

Almost all decisions are published on the decisions database. The Tribunal must wait until any appeal and review period has passed, then the decisions are anonymised and checked before they can be authorised for publication. This process is followed as quickly as possible.

**4. *Are there any proposals to update the decisions database to make it easier to search? For example, to search for terms within judgements.***

The Tribunal will consult with SCTS technical staff to review the functionality of the Publications Database, to see if improvements (including the one suggested) can be made.

**5. *There are 3 processes which can apply GIRFEC – Child plan, Looked after review and CSP annual review – with similar outcomes but different processes – how can this be supported to avoid repetition and pressures on resource?***

The Tribunal is an independent judicial body and therefore cannot make any comment on the resource implications for education authorities arising from any legal requirement to prepare and keep certain documents.

The Tribunal's only direct jurisdiction over statutory documents is in relation to Co-ordinated support plans (CSPs). Where the test for a CSP (in s.2 of the 2004 Act) is met, one must be prepared (s.9(1) of the 2004 Act), irrespective of any other documents which may or may not exist for the child.

A claim under the Equality Act 2010 may be made in relation to a CSP.

- 6. *The level of engagement with the CSP from the agencies out with education dilutes the impact of coordinating support. The quality of their response does not always reflect the needs outlined in the CSP itself. Are there plans to review the quality of the CSPs and identify the training needs arising at a national level?***

The Tribunal is an independent judicial body and therefore cannot make any comment on the quality of the response of appropriate agencies, the quality of CSPs generally or any training needs which may arise.

Education authorities are under certain duties in relation to CSPs, including a duty to seek and take account of relevant advice and information from appropriate agencies, (s.12(2) of the 2004 Act, 'appropriate agency' being defined in s.23(2): s.29(1)). Further, an appropriate agency has a statutory duty to comply with requests from education authorities for help unless that agency considers that the request is incompatible with its own statutory or other duties or it considers that the request unduly prejudices the discharge of any of its functions (s.23(3) of the 2004 Act).

- 7. *Where a challenge to the provision outlined in the CSP pertains specifically to an agency out with education and results in a reference being raised, what is the jurisdiction of the tribunal with the agencies? E.g. where the needs within the wider supports (respite & support in the home) are cited as insufficient.***

See the answer to the previous question.

The education authority is responsible for decisions on the making, review and discontinuance of CSPs as well as decisions on the content of CSPs. These decisions may be challenged in a reference to the Tribunal.

As noted above, the education authority is responsible for obtaining information from appropriate agencies.

The Tribunal may order any amendments to the content of a CSP as it considers appropriate (s.19(4) and s.18(3)(d)(i) of the 2004 Act). There is no restriction on the amendments which can be made, as long as they are considered appropriate, given the terms of the 2004 Act and regulations.

These amendments could relate to education, health or other relevant needs of the child or young person. They could include the addition of the persons by whom the support should be provided (s.9(2)(a)(iv) of the 2004 Act, as referred to in s.18(3)(d)(i) of the 2004 Act).

The Tribunal does not have any direct jurisdiction over appropriate agencies, since they may not be parties to a CSP reference. However, in a reference in which the appellant seeks certain amendments to a CSP, the appellant and the respondent may call (and if necessary seek a direction to cite – see rule 33 of the Tribunal rules) any witnesses deemed necessary to advance their case. A party to a reference may also seek a direction to cite any person to produce any document in that person's custody (rule 32 of the Tribunal rules). Criminal penalties may apply to any failure to comply with such citations (rules 32(2) and 33(4)).

**8. *Failures to consider CSPs for care experienced looked after children and for those in conflict with the law.***

A child who is looked after by a local authority under s.17(6) of the Children (Scotland) Act 1995 is deemed to have additional support needs (s.1(1A) of the 2004 Act).

The test for a requirement for a CSP is the same for all children with additional support needs, including those children who are looked after, as defined above. That test is found in s.2 of the 2004 Act, giving rise to the duty to prepare a CSP in s.9 of the Act. Education authorities owe a duty to make adequate and efficient provision for providing the additional support required for all children and young people with additional support needs for whom they are responsible (s.4 of the 2004 Act).

This means that those children and young people who are looked after have exactly the same rights under the 2004 Act as other children with additional support needs.

The Tribunal may only deal with references which are made to it by children, young persons or their parents.

**9. *Following the Tribunal's decision earlier this year, the discriminatory use of restraint and seclusion in schools and potential violations of children's human rights in an educational and or residential setting.***

The decision referred to is available on the Tribunal's website. It has the reference [ASN D 14 01 2021](#). It is the first decision of the Tribunal which has examined in detail the meaning of restraint in the context of the Equality Act 2010. It was held that the responsible body had discriminated against the child under s.15 of the 2010 Act (discrimination arising from disability).

In addition, the decision makes detailed reference to the key publication No Safe Place: Restraint and Seclusion in Scotland's Schools, Report of the Children and Young People's Commissioner Scotland (2018).

**10. *Compatibility of the ASfL legislation, policy, practice and guidance with the UNCRC in preparation for the incorporation of the Convention into Scots law and what that might mean for educational providers.***

The Scottish Government has advised that it is committed to incorporating UNCRC into law and to improve outcomes for children and young people in Scotland.

**11. *Interested to hear helpful pointers from cases***

There are a number of sources which could assist with information on Tribunal law and practice, including cases:

- most decisions issued by the Tribunal are published on the HEC website. These can be used to understand how the Tribunal operates, as an indication of the law and practice of the Tribunal and can be referred to in future cases as a source of law.
- most decisions of the Upper Tribunal (UT) are published. Although there are only a few of these for the HEC jurisdiction, they can be useful. In addition, UT cases from other jurisdictions can be useful on general points of procedure or practice.
- the rules of procedure under which the Tribunal operates should be consulted on any practical points. The rules can be used to help to answer most practical questions and are to be interpreted in accordance with the overriding objective (rules 2-3).
- the President's Guidance and Information Notes cover many practical points on how Tribunal cases should be handled, before, during and after the hearing is over.
- attendance at the Tribunal Forum, as you are doing, can also assist with practicalities, and the material from each ASNTS/HEC Tribunal Forum meeting since 2016 can be found on the HEC website.

***12. Any update in relation to the possible transfer to the First-Tier Tribunal of placing in school appeals for mainstream provision, including any intended consultation by Scottish Government/FTT with education authorities as to the transition of these, any funding which may be made available by Scottish Government to families to support their appeals, and any further recruitment of Tribunal members to support the volume of appeals which are likely to follow?***

Reference is made to the update at the Forum.

On recruitment of Tribunal members (should the transfer take place), that will be kept under review, as the consultation process is still being developed.

**13. In relation to virtual hearings, does the FTT HEC intend to continue to use this mode of hearing for the remainder of 2021?**

Reference is made to the President's presentation.

**14. Can some update be provided in relation to the feedback sought from users of virtual platforms for substantive hearings?**

There are user survey results for 2018-19 on the website: <https://www.healthandeducationchamber.scot/chamber/news/298>

All Tribunal participants are provided with a feedback form to complete following a hearing. We are looking into the use of other means, including Survey Monkey.

**15. Whether the Tribunal would consider adopting some form of neutral citation system for their published decisions? It would assist in making reference to cases where that was needed e.g. [2021 HEC 1]. The current system can be confusing, and cases are not labelled with the ASN/D/etc. number on the pdf of the case itself.**

Please see the response to the previous question. As part of a review of the Publications Database, this suggestion will be considered.

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*The President thanked the speakers, enquirers and those in attendance today, for their valuable engagement and input.*