

Technical Note from Tribunal (Additional Support Needs) Forum 08 May 2019

1. CSP Test and Practical Problems

A number of concerns were raised about the practicalities of making a CSP following the clear message that when the statutory test is met, a CSP requires to be provided.

Ultimately, it is the responsibility of the education authority (EA) to make a CSP where the statutory tests are met and to populate it with the elements of required support, whether or not with the cooperation of the appropriate agency.

Assistance in the 2004 Act – section 23

Where there are difficulties with securing the commitment of an appropriate agency, section 23 of the 2004 Act, entitled '**Other agencies etc. to help in exercise of functions under this Act**' provides some assistance.

This section permits EAs to make a formal request to an appropriate agency for assistance, including assistance on input into a CSP. The appropriate agency may only refuse a section 23 request where: (1) it is incompatible with its own statutory or other duties; or (2) it unduly prejudices the discharge of any of its functions (section 23(3)). To date, there is no case law defining these exceptions, but it is clear that they are only intended to apply in exceptional cases. Where neither applies, the appropriate agency **must** comply with the request.

Where a request is made under section 23 and the appropriate agency refuses to respond, this does not change the obligation on the EA to make (or amend) a CSP and to include in it an indication of the input needed from the appropriate agency.

Even where the appropriate agency responds to the request refusing to comply on the basis of one of the section 23(3) exceptions, this does not remove the duty of the EA to make a CSP and include an indication of the input needed from the appropriate agency where the EA does not accept that section 23(3) has genuinely been triggered. In other words, the EA need not follow the appropriate agency's assessment of section 23(3), and must not if it does not agree with it.

It is accepted that where an appropriate agency refuses to respond to a request under section 23, or refuses to comply with that request, this places the EA in a difficult position. Where a parent (or child) makes a reference to the Additional Support Needs jurisdiction, the EA may be in the position of simply pointing to the appropriate agency as the barrier. In that case, a tribunal has the power to insist that the relevant appropriate agency professional attends as a witness in order to explain their position.

The powers of a tribunal on CSP content

In addition, a tribunal on a CSP reference has the power to order the EA to alter, add to or remove parts of the CSP. It may only do so where there is relevant and suitable evidence to support the change; but where there is, a tribunal can order changes to the wording of a CSP, or even order that one is drawn up on certain terms. Its powers are not limited under the relevant provision (section 19(4) of the 2004 Act).

Conclusion

Any failure by an appropriate agency(ies) (including health agencies and another part of the EA, such as the social work department) to cooperate with the preparation of a CSP does not change to any extent the duty on the EA to make, maintain, alter and review a CSP. The EA is the focal point for the purposes of the statutory obligations and as the party in Tribunal proceedings, but it need not be the focal point of the evidence in such a case.

On a practical level, the issue of a section 23 request may resolve the situation, avoiding the need for a reference to the Tribunal.

2. Placing Requests and EA Panel Allocation Decisions

Most EAs have an internal system for the annual allocation of places in Additional Support Needs (ASN) education facilities within its geographical area. Such systems usually stand apart from processes to deal with placing requests.

Background to a recent decision on the competency of an application for a placing request

In a recent competency decision taken by a legal member sitting alone, consideration had to be given to whether or not a refusal of a particular style of application was, in law, a refusal of a placing request. The EA had not treated the request of the parent as a placing request as it did not follow their usual internal procedures.

The parent had assumed that in making this application, he had made a placing request, and so once it was refused, he made a reference to the Tribunal.

After considering submissions, the legal member decided that the parent had made a placing request.

The reasons for that decision are summarised.

The term 'placing request' in the 2004 Act is defined, for the purposes of a reference, as:

“..a request to an education authority to place the child in the school specified in the request, being a school under their management..”

(2004 Act, Schedule 2, para 2(1) and 2(3); section 29)

Also relevant is section 28(1):

“References in this Act to a “request” are to a request which-

(a) is in –

(i) writing, or

(ii) another form which, by reasoning of its having some permanence, is capable of being used for subsequent reference (as, for example, an audio or video recording), and

(b) contains a statement of the reasons for making the request.”

The main points from this decision are as follows:

(a) The written, reasoned request made by or on behalf of the parent to the school to place the child in the school specified in that written request, is a placing request under the 2004 Act, unless the parent indicates at the time or later that he/she does not wish the request to be treated as a statutory placing request;

(b) The request did not have to expressly state that it was a placing request; the sole question was: does it meet the statutory definition?

(c) The request did not have to be regarded by the education authority within its processes as a placing request; the sole question was: did it meet the statutory definition?

(d) The threshold in relation to reasons is contextual, but is low; as long as the education authority can investigate the request (albeit that further information may be required from the parent), adequate reasons will have been provided.

Where a request is treated as a placing request, there are four main practical consequences:

(1) there is a duty on the education authority to comply with the request except where one or more of the statutory grounds of refusal exist(s);

(2) the statutory time limit for responding to the request applies;

(3) the risk of an unrepresented parent going through two consecutive processes (internal education authority process followed by the placing request process) without intending to will be reduced; and

(4) where a request to place is refused, the requesting parent has a right to challenge that decision via a reference to this Tribunal.