

# Education, Children and Young People Committee

## 8<sup>th</sup> Meeting, 2024 (Session 6), Wednesday 6 March 2024

### Additional Support for Learning inquiry

#### Introduction

1. The inquiry will consider how the [Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#) (the 2004 Act) has been implemented and how it is working in practice. This inquiry will focus on the following themes—
  - the implementation of the presumption of mainstreaming
  - the impact of COVID-19 on additional support for learning
  - the use of remedies as set out in the Act
2. This is the third formal evidence session of the inquiry, in which the Committee will focus on the third theme as set out above, although issues related to the other themes may also be discussed. The Committee will take evidence from the following witness—
  - May Dunsmuir, President of the Health and Education Chamber of the First-tier Tribunal for Scotland

#### Background

3. SPICe has produced a background briefing note which is attached at **Annexe A**. The SPICe briefing notes for our previous meetings on the 21 and 28 February 2024 are also published on the Committee's [website](#).

#### Participation

4. The Committee was keen to speak to people with lived experience of how the 2004 Act is operating in practice. On 19 February 2024, the Committee held two participation sessions, one with young people and one with parents and carers. The Committee then held a further session with teachers on 4 March 2024. A note of these sessions will be published on the [website](#) in due course.

5. Members are welcome to refer to these sessions in Committee, as long as comments are not attributed to specific organisations or individuals.

## Evidence

### Oral evidence

6. At its meeting on 21 February, the Committee took evidence from the following panel of witnesses—
  - Susan Quinn, Convenor the EIS Education Committee, EIS
  - Mike Corbett, National Official (Scotland), NASUWT
  - Peter Bain, President, School Leaders Scotland
  - Mathew Cavanagh, ASN Committee, Scottish Secondary Teachers' Association
  - Sylvia Haughney, Education Convener at Glasgow City UNISON branch UNISON Scotland
7. At its meeting on 28 February, the Committee then took evidence from the following panel of witnesses—
  - Deborah Best, Director, DIFFERabled Scotland
  - Suzi Martin, External Affairs Manager, National Autistic Society Scotland
  - Glenn Carter, Head of Scotland Office, Royal College of Speech and Language Therapists
  - Dr Dinah Aitken, Director of Development and External Affairs, Salvesen Mindroom Centre
  - Irene Stove, Deputy Head Teacher and Committee Member, Scottish Guidance Association
8. A transcript from those meetings will be published on the [website](#).

### Written evidence

9. Written evidence provided by the following witnesses is attached at **Annexe B**—
  - Health and Education Chamber of the First-tier Tribunal for Scotland

### Call for views

10. The Committee issued a call for views on 25 October 2023 which included a BSL version and which ran until 31 December 2023. The Committee received [589 responses](#) to the call for views and [29 responses](#) to the BSL version, all of which can be read on the website. SPICe has produced a summary of the responses

received to the call for views which is published on the [website](#).

## **Local authority position**

11. In advance of launching the inquiry the Committee wrote to all local authorities across Scotland seeking a response to several questions.
12. Responses have been received from 25 local authorities. These are available in full on the website. SPICe has produced a summary of these responses, which includes a list of those who responded, and this summary is published on the [website](#).

## **Next steps**

13. The Committee will continue to take evidence on the inquiry at its meetings on 13 March and 20 March.

**Committee Clerks**  
**March 2024**

## ANNEXE A



# Education, Children and Young People Committee

**6 March 2024**

## Additional Support for Learning

### Introduction

This briefing is for the Committee’s third formal meeting in its inquiry on Additional Support for Learning.

The Committee agreed to focus on the following themes during this inquiry—

1. the implementation of the presumption of mainstreaming
2. the impact of COVID-19 on additional support for learning
3. the use of remedies as set out in the Act

This week the Committee will take evidence from May Dunsmuir who is the President of the Health and Education Chamber of the First-tier Tribunal for Scotland. Prior to that she was the president of the Additional Support Needs Tribunals for Scotland before it transferred into the Health and Education Chamber in 2018. While the Tribunal’s name has changed it is still commonly referred to as the ASN Tribunal or ASNTS and members will have seen this name being used in submissions and elsewhere.

The intention is that this meeting, the Committee will be focusing mainly on theme 3, and particularly the role of the Tribunal.

## Health and Education Chamber of the First-tier Tribunal for Scotland

Tribunals are specialised bodies which adjudicate on disputes or claims, often in relation to governmental decisions taken in respect of a specific area of law or policy. In comparison to courts, their processes and procedures are often intended to be relatively informal, and they are generally less adversarial. The [Tribunal publishes details of its decisions](#).

One of the aims of this inquiry is post-legislative scrutiny [of Section 15 of the Standards in Scotland's Schools etc. Act 2000](#) (Requirement that education be provided in mainstream schools) and the operation of the [Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#) with a particular focus on access to remedies. The Additional Support Needs Tribunals for Scotland was initially established by the 2004 Act. The Tribunal can hear cases in relation to certain duties under the 2004 Act (known as references) and disability discrimination claims (known as claims) under [Schedule 17 of the Equality Act 2010](#). The Tribunal's submission commented on the operation of a number of legislative provisions.

### *Who accesses the Tribunal and representation*

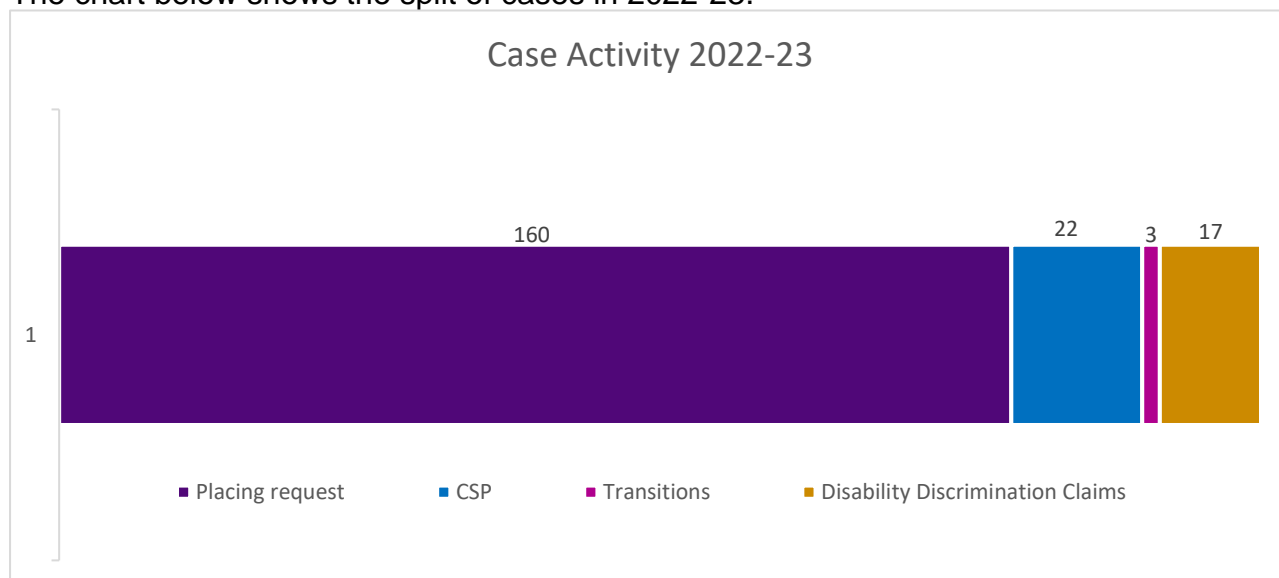
The Tribunal publishes bulletins twice a year on its work and developments within its jurisdiction. The latest was published in October 2023 and this reported that—

“During the first half of this reporting year, the Chamber has again experienced a rapid increase in the receipt of applications. Between 1 April 2023 to 30 September 2023 we have received 151 applications. This can be broken down into 147 references and 4 claims.”

The [Scottish Tribunals Annual report for 2022-23](#) said that in that year, this Tribunal “saw a sharp rise in applications with a total of 202, the highest in any reporting year”. The report continued—

- 193 applications were submitted by a parent or guardian. Eight were submitted by a child, the highest in any reporting year. One was submitted by a young person.
- Nine applications involved a child or young person who is ‘looked after’ by their local authority.
- The majority gender remains male.
- Autistic Spectrum Disorder (ASD) remains the highest single additional support need reported (in a total of 134 applications).
- Disposals of applications have increased month on month - with a total of 183 applications with an outcome in this reporting year

The chart below shows the split of cases in 2022-23.



The [equivalent Tribunal in England](#) covers a wider range of topics. Its case load is over 10,000 a year.

The Commissioner for Children and Young People Scotland’s submission said that it has heard evidence that it is “parents with the most resource who can make use of the [redress] system” and this contrasts with the data which shows that “pupils who experience social deprivation have a greater likelihood of being identified as having an additional support need”.

On [21 February](#), the committee was told by Matthew Cavanagh from the SSTA and a teacher in a special school that “parents’ limited ability to access the available resources, their lack of confidence in relation to the language that is used and their capacity to understand what is available are massive issues in terms of inclusion.” (Col 12)

Last week, Deborah Best from DIFFERabled Scotland said that her organisation has heard that parents who do not have access to legal aid found that costs of legal representation is a barrier to challenging local authorities’ decisions. Local authorities will typically be represented by lawyers at the Tribunal.

### *References under the 2004 Act*

Under the 2004 act, the Tribunal can hear references around:

- placing request refusals
- coordinated support plans
- school transitions

In addition, the Tribunal can consider a reference in relation to the local authority's assessment of a child's capacity or wellbeing, which is undertaken when the child seeks to exercise one of the rights available under the 2004 Act.

The types of placing requests the Tribunal can consider are where a placing request to a special school (or unit) has been refused and a placing request to a mainstream school has been refused for a child who has a CSP (or if a CSP is being prepared, considered, or a decision not to have a CSP is being appealed).

The Tribunal can consider a wide range of issues around the assessment, contents and delivery of a CSP. In all cases, it is the local authority (more precisely, the education authority) that would respond to the case.

School transitions are around the duties to exchange information with appropriate agencies and consider what support the local authority will be providing to the young person when they leave school.

## *Claims under the 2010 Act*

The Tribunal's submission explains—

“Since 2010, the HEC has heard claims from parents, children and young people against responsible bodies [e.g. a local authority] in relation to alleged disability discrimination in school education. Examples of types of claim include exclusion, expulsion, the use of restraint or seclusion, classroom provision and assessment process. Any aspect of the provision of school education can attract a 2010 Act claim.”

## *Children and young people's engagement*

The Education (Scotland) Act 2016 amended the 2004 Act and since 2018, children aged between 12 and 15 years are able to make references to the Tribunal in relation to CSPs and assessment of their capacity. These rights are subject to them having the capacity to make a reference and their wellbeing not being adversely affected by doing so. For claims under the 2010 Act, there are no comparable 'capacity and wellbeing' tests for children and young people to make a claim.

The Tribunal has undertaken work to support children and young people to access its processes. This includes the [needs to learn](#) website and the development of sensory hearing suites. The Tribunal's submission also highlighted the [My Rights, My Say](#) website which provides advice and advocacy for children. The Committee received a joint submission from Enquire and My Rights, My Say which stated it had “worked collaboratively with the Tribunal to ensure that the process is accessible and child-centred”.

The Tribunal has a duty to seek the views of the child during its work. Its submission stated—

“A child/young person may express their views either directly to the Tribunal (at the hearing) or through a report from advocacy services. It is very common for a child/young person who has the capacity to express a view to have that view represented in one of these two ways (or both). In addition, children/young people who do not have the capacity to express their views to an advocacy professional can benefit from a report based on Non-Instructed Advocacy.”

The Tribunal’s submission also noted that where a children or young person is not a party to a hearing, they have no right of representation. It continued—

“Some children and young persons cannot be parties since they have no right to be, for example a child under 12, or a child between 12 and 15 who wishes to challenge a placing request refusal. Others have a right to be, but may not realise that they can be a party or how to go about becoming one. In both instances, the lack of legal representation for children acts as a barrier. Many children have the ability to instruct a solicitor. There are no barriers to doing so in a claim to the [Tribunal] under the Equality Act 2010, where there are no age or subject matter restrictions on who may be a claimant, as long as they have the capacity to instruct a lawyer ...

“Serious consideration ought to be given to the provision of free legal advice to children and young people with additional support needs on their 2004 and 2010 Act rights. One issue with allowing a child to enforce certain rights only through a parent is that the interests of parents and children do not always align.”

## *An “adversarial” process?*

A theme from some local authorities’ submissions has been the view that the Tribunal can contribute to an adversarial relationship between the local authority and their staff and parents/carers. For example, Glasgow City Council’s submission stated—

“Tribunal process can be perceived as adversarial at times by the Local Authority. It is extremely time consuming and stressful for families, officers and practitioners. Professionals and families can leave the process with fractured and unhelpful, working relationships. Partnership working beyond Tribunal is essential to ensure we keep children’s needs at the centre.

“The Tribunal process could perhaps benefit from processes which would allow the revisiting of outcomes and impact on children, families and local authority staff to improve partnership working and support earlier resolution of conflicts.”



Moray Council's submission stated—

“There is often a perception that statutory remedies are the default position rather than following due process through staged intervention. Places like Govan Law Centre often have the unintended consequence of undermining relationships to the benefit of the young people. Sometimes the processes can cause conflict. The Tribunal system does not appear to be balanced as there would appear to be a bias towards parents/carers rather than LA and encourages confrontational approach rather than resolution. Due to the availability of the processes, reduced officer capacity is often diverted to conflict resolution rather than proactive support. However we do recognise the need for processes in some instances.”

Last week, Deborah Best from DIFFERabled Scotland said that she had challenged a local authority around the support for her child and that this was “one of the most distressing journeys”. Enable's submission said—

“It is also important that there is an awareness of the right to advocacy for those parents and young people taking cases to an Additional Support Needs Tribunal, but also that further action is taken to ensure these often stressful processes can be avoided through positive engagement between local authorities and parents on the specific needs of children with additional support needs.”

Govan Law Centre said that the Tribunal is working well and the “expertise of the Tribunal is invaluable in terms of determining decisions in relation to children and young people with additional support needs.”

## **Implementation of the presumption of mainstreaming**

The Committee has heard that there is broad support for the principle of an inclusive education where all children are educated together, at least to the greatest degree possible. This approach is considered to have the potential to provide educational and social benefits for all, and to support a more inclusive society in the long run.

Equally, a very common theme was that, in practice, these benefits are not being realised for everyone. Some of the reasons highlighted in submissions are: lack of resources, in school; and specialist services in both the public sector and the third sector; training for school staff; culture; and inappropriate physical environments.

### *Placing requests*

The Tribunal will regularly consider issues around the settings where children and young people are educated and supported. In 2022-23, 160 of the 202 applications to the Tribunal were in relation to placing requests.

Section 15 of the [Standards in Scotland's Schools etc. Act 2000](#) provides that education authorities will provide school education to all pupils "in a school other than a special school" unless one (or more) of the following circumstances arises—

- (a) would not be suited to the ability or aptitude of the child;
- (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or
- (c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,

The 2000 Act says that "it shall be presumed that those circumstances arise only exceptionally". If one of the circumstances listed above is true, the education authority may provide education to child in mainstream education, but it "shall not do so without taking into account the views of the child and of the child's parents in that regard".

The submission from the Tribunal explained that local authorities commonly rely on this to refuse placing requests. The Tribunal noted that there are twelve other grounds for refusing a placing request of a pupil with additional support needs set out in [schedule 2 of the 2004 Act](#). The Tribunal's submission stated—

The 'presumption of mainstream education' should not be a ground for the refusal of a placing request. Mainstream education is right for some children and young people with additional support needs. For others, education in a special school (as defined in section 29(1) of the 2004 Act) is required to meet their needs. Some recent research undertaken in this area suggests that the type of provision (mainstream or special) is not, in itself, influential on pupil success.<sup>1</sup> A default bias in favour of one or the other is, in principle, therefore, wrong.

...

"The addition of a mainstream presumption ground [to those set out in Schedule 2 of the 2004 Act] not only creates a bias in the mainstream-special school question, it clutters an already crowded field of grounds for refusal of placing requests. It also adds duplication: the three circumstances in which the requirement in section 15(1) [of the 2000 Act] does not apply refer to suitability, impact on other pupils and resources, all of which are already catered for within the other twelve refusal reasons."

The Tribunal also commented on the interpretation of the 2000 Act's provision that the circumstances where a presumption of mainstreaming should apply only

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<sup>1</sup> See the papers [Waddington and Reed Comparison of the effects of mainstream and special school on National Curriculum outcomes in children with autism spectrum disorder: an archive-based analysis, Journal of Research in Special Educational Needs 2017 Vol 17 132-142](#) (full text of article available at the link) and [Shaw, Inclusion: the role of special and mainstream schools, British Journal of Special Education 2017, Vol 44 pages 233-369](#) (article abstract linked).

exceptionally. It said that the exceptions in the 2000 Act “are tightly defined already, and another overall test seems misplaced ... it is not clear how to apply the exceptionality requirement.”

Overall, the Tribunal argued—

“An inclusive education for those who have additional support needs would be best served by the removal of a bias in favour of a particular type of education. A bias of this type is the reverse of an inclusive approach.”

Some local authorities expressed disappointment with some of the decisions of the Tribunal on placing requests. Fife Council stated

“We have an increasing number of parents, supported by advocacy services, who make Placing Requests to independent educational provision, which often results in a reference to an Additional Support Needs Tribunal. Being involved in the process of an ASN Tribunal is enormously expensive to local authorities in terms of officer time and can be expensive in terms of ongoing costs if the ASN Tribunal decision is to place the child in the independent provision. In our experience this decision can often be costly to the child’s education if the placement does not then go well and the child returns to an educational placement in the local authority, having had their education significantly disrupted and interrupted by this process.”

The City of Edinburgh Council said—

“Within Local Authority budgets additional support for learning costs cannot be predicted and are often outwith the control of officers leading to significant financial risk and pressure. The increasing demands for [out of area] provision and the inclination of the ASN Tribunal to support parental placing requests to independent schools is increasingly adding additional pressure; costs associated with out-with placements is the main budget overspend in most local authorities alongside transport. Independent school placements can cost anywhere between £70K to £180K per year with children and young people often remaining in placement for over 8 years. These placements cannot be predicted or planned.”

Later the City of Edinburgh Council’s submission said—

“It is unclear what quality assurance is carried out on these decisions to see if the child’s experiences and outcomes are improved as a result. Whilst there can be learning for local authorities from the ASN Tribunals, it is often the case that the child would be better served within their local authority with a review of their needs and supports and in line with the principles of inclusion set out in legislation.”

## Special Schools and Units

As noted above, the Tribunal can consider cases where there has been a refusal of a placing request to a special school (or unit) or to a mainstream school (where there

is involvement with a CSP). The [statutory definition of a](#) “special school” includes either a school or “any class or other unit forming part of a public school which is not itself a special school” but is especially suited to the additional support needs of pupils. Enquire’s submission noted that the [interpretation section of the 2004 Act](#) which includes ASL units as part of the definition of a special school. This can lead to complexity when considering the legal position around, for example, placing requests. Enquire said—

“Using [the legal] definition, some of the [ASL units] are legally special schools. However, some would not meet this definition, for example if a pupil would not need to be ‘selected for attendance’ at the unit, but rather has access to it by nature of being a pupil at the mainstream school which has the unit on site.

“This leaves complicated scenarios to unpick when considering the legislation on the presumption of mainstreaming, and on other legislation that it interacts with, such as the provisions on placing requests for pupils with additional support needs. ... There are differences in the ways that such units are established and operated across local authority areas. Each may draw different conclusions in how they are legally defined.”

## Co-ordinated Support Plans and multi-agency working

The only statutory plan in school education is the Co-ordinated Support Plan under the 2004 Act and associated regulations. Local authorities have a statutory duty to put in place a CSP if the statutory conditions are met. These are that a child has longstanding ASN arising from one or more complex factors or multiple factors which require significant additional support to be provided by more than one service. The [statutory guidance on the 2004 Act states](#) that local authorities must “seek and take account of the views of children and their parents, and young people themselves” throughout the process of determining whether a CSP is required and then developing the CSP. CSPs must contain (among other things):

- the education authority’s conclusions as to the factor or factors from which the additional support needs of the child or young person arise
- the educational objectives intended to be achieved taking account of those factors
- the additional support required to achieve these objectives
- details of those who will provide this support.

After concerns that CSPs are under-used in local authorities, a short life working group was established and this [reported in November 2021](#). This found “variations in awareness and understanding of the legislation, support and planning process” including in the purpose and statutory requirements on local authorities.

In 2022-23 the Tribunal heard 22 cases in relation to CSPs. The Tribunal can consider a range of issues in relation to CSPs, including—

- Assessment
- The need for a CSP
- The contents of the CSP
- Providing the support indicated in the CSP in full
- Review of the CSP

The Tribunal has a wide range of remedies open to it when considering cases in relation to CSPs; the Tribunal can determine that a local authority—

- Make a CSP;
- Discontinue a CSP;
- Change the content of a CSP;
- Review the CSP; and
- Provide the additional support specified in the CSP.

The Tribunal's submission described the criteria for CSPs as "very narrow and restrictive". It noted [a decision of the Upper Tribunal](#) (appealing the decision of the ASN Tribunal) in September 2023. The submission explained, "it has been confirmed that it is not enough for the child or young person to require significant additional support overall for a CSP to be required; they must require significant additional support of an education type and significant additional support of a non-educational type". The submission indicated that there is a case for relaxing the statutory criteria for CSPs.

Peter Bain from SLS told the Committee on 21 February that there are two factors which can influence the use of CSPs. These were "the strength of expertise in [local authorities'] central teams" and the "the strength of the partnership arrangements that sit in each local authority area and which work in each school community". He continued—

"CSPs are dependent on different agencies working together to support the implementation of the actions within them. If there are regular meetings with strong partnership working in a school community—for example, with education staff, health professionals, social workers and educational psychologists; at times, the police come in, too— there is likely to be a more effective success rate for establishing CSPs, because they almost always require interagency support. If strong local partnership working is going on, CSPs are more likely to happen and to be progressed more effectively at the practical level. If such working is not happening locally, CSPs are often not

progressed as they should be, because authorities cannot get partners to agree who will do what.” (Col 19)

[Section 23 of the 2004 Act](#) also provides that education authorities may seek assistance from other agencies (e.g. a local health board) in supporting pupils with ASN, examples of this could be Speech and Language Therapy or Occupational Therapy. Those other agencies must comply with such a request unless it “is incompatible with its own statutory or other duties” or “unduly prejudices the discharge of any of its functions”. The Tribunal considers disputes with education authorities, not with other agencies.

Last week the panel noted that CSPs are useful in that they allow for greater accountability and potentially recourse to the Tribunal. However, the panel also noted that planning is in the service of creating better outcomes. Susan Quinn from EIS told the Committee on 21 February—

“There needs to be some simplification, with consideration given to where the value is in doing something that takes people away from working directly with young people. It is important to have records and the like, so that people know what support has been provided and what support is needed, but that cannot happen to the detriment of actually working with the young person. We cannot have staff saying, “I can’t work with you today because I’ve got to have a meeting with everybody to decide whether you need support.” We know that the person needs support and that we need to work together to get them that support, and having a bit of paper does not necessarily address that. That sort of situation comes through a lot from our members across the country, and there is a need to address it.” (Col 22)

## Other remedies and advocacy

The Committee is exploring the statutory support and remedies available to families and young people in relation to ASL. These are: access to a supporter, advocacy, mediation, adjudication, and recourse to the Tribunal.

In terms of cases at the Tribunal, advocacy services may support parents/carers or the children and young people. The Tribunal’s submission also stated—

“Mediation is common in HEC proceedings and cases are regularly suspended (paused) to allow mediation to take place. Where mediation is successful, that will usually lead to the withdrawal of the reference/claim; where not, the case will resume and move to a hearing.”

**Ned Sharratt, Senior Researcher (Education, Culture), SPICe Research  
29 February 2023**

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP [www.parliament.scot](http://www.parliament.scot)

**ANNEXE B**

Scottish Parliament Education, Children and Young People  
Committee: Additional Support for Learning, Call for Views  
Health and Education Chamber, First-tier Tribunal for Scotland  
Response

### Background: Additional Support Needs jurisdiction

1. The Additional Support Needs (**ASN**) jurisdiction sits within the Health and Education Chamber of the First-tier Tribunal for Scotland (**HEC**). It decides different types of cases in relation to school education. Parents, young persons and children make applications to the Tribunal under the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**) and the Equality Act 2010 (**2010 Act**). These types of application (references and claims) are now summarised.

### References: the 2004 Act

2. The ASN jurisdiction has always been able to hear references from parents and young people <sup>2</sup> against decisions of education authorities regarding the provision of educational support around placing request refusals, coordinated support plans and school transitions. Since 11 January 2018, children aged between 12 and 15 years who have capacity to make a reference and where their wellbeing will not be adversely affected by doing so, have been able to make two types of references. These are: (1) A reference in relation to a coordinated support plan; and (2) A reference appealing the education authority's assessment of the child's capacity or wellbeing (which is undertaken when the child seeks to exercise one of the rights available under the 2004 Act). Children<sup>3</sup> have no right to make a placing request reference, whereas young people do.

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<sup>2</sup> Young people are those aged 16 years and above, who remain within school education - the upper age limit (previously 17 years), was removed by the Education (Scotland) Act 2016.

<sup>3</sup> Children are those aged up to and including the age of 15 years.

## Capacity and Wellbeing References

3. These are considered below.

## Claims: the 2010 Act

4. Since 2010, the HEC has heard claims from parents, children and young people<sup>4</sup> against responsible bodies<sup>5</sup> in relation to alleged disability discrimination in school education. Examples of types of claim include exclusion, expulsion, the use of restraint or seclusion, classroom provision and assessment process. Any aspect of the provision of school education can attract a 2010 Act claim.

## UNCRC

5. The United Nations Convention on the Rights of the Child (**UNCRC**) is the most complete statement of children's rights<sup>6</sup> ever produced and is the most widely ratified international human rights treaty. Wherever possible, Chamber President's Guidance is read in a way which is compatible with the terms of the UNCRC. At the time of writing, the UNCRC has not yet been incorporated into Scots law.
6. The UNCRC is already being used in HEC decisions (including in one of the restraint decisions in a claim), since even before it is brought into full force in Scotland, it carries weight in assessing the current domestic law.

## Consultation Response

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### **Question 1: Implementation of the presumption of mainstreaming**

**The presumption in favour of 'mainstream education' strengthened the rights of pupils to be included alongside their peers, with the four key features of inclusion identified as: present, participating, achieving, and supported.**

- a. To what degree do you feel the presumption of mainstreaming successfully delivers on inclusive education for those pupils requiring additional support?**

**And/or**

- b. What impact, if any, does the presumption of mainstreaming have on the education of pupils who do not require additional support?**

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<sup>4</sup> Where the child or young person has the capacity to make the claim - there are no comparable 'capacity and wellbeing' tests in the 2010 Act.

<sup>5</sup> The responsible body will be the education authority, the proprietor of an independent school or the managers of grant-aided school: 2010 Act, section 84(8) and section 84(9)(c)-(e).

<sup>6</sup> For the purposes of the [UNCRC](#), a child means a person aged up to 18 years: Article 1.



**For children with additional support needs, in your experience:**

- **Can you provide details of how these additional support needs were recognised and identified initially? Was there any delay in the process which followed the identification of additional support needs and formal recognition which leads to the accessing of the additional support? If so, what was the delay?**
- **Where the child is being educated in specialist settings can you give examples of where their needs are being met, and examples of where they are not being met?**
- **What specialist support does the child receive and what support do you get in accessing this support? Are there any gaps in the specialist support provided either because the prescribed support is not available or extra support not formally prescribed is not being provided?**
- **On balance, do you view the presumption of mainstreaming as having been a positive or negative development for your child or in general, and on balance, do you view the presumption of mainstreaming as having been a positive or negative development for other children in Scottish schools?**

**a. To what degree do you feel the presumption of mainstreaming successfully delivers on inclusive education for those pupils requiring additional support?**

#### **HEC RESPONSE (part a. only)**

1. The HEC commonly decides whether or not the ‘mainstream presumption’ applies to a child/young person with additional support needs.
2. One of the grounds of refusal commonly relied upon by education authorities is that placing a child/young person in the school specified in a parental placing request would breach the requirement to educate the child/young person in a mainstream school.<sup>7</sup>
3. The requirement to educate a child/young person in a mainstream provision does not apply where one (or more) of three circumstances arise:
  - (a) providing education in a mainstream environment would not be suited to the ability or aptitude of the child;
  - (b) providing education in a mainstream environment would be incompatible with the provision of efficient education for the children

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<sup>7</sup> Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**), Schedule 2, paragraph 3(1)(g).

with whom the child would be educated; or

(c) providing education in a mainstream environment would result in unreasonable public expenditure being incurred which would not ordinarily be incurred.<sup>8</sup>

4. In a reference made to the HEC where this ground of refusal is relied upon by the education authority, the tribunal has to decide whether at least one of these circumstances arises. Where one of them does, the requirement to educate the child/young person in a mainstream provision does not apply, which usually means that the ground of refusal does not exist. This may lead to the child/young person being placed in a 'special school' (in an education authority or independent provision). Where none of the circumstances arise, this will usually mean that the ground of refusal relied on by the education authority exists, which may lead to the child/young person not being placed in a special school, and staying in a mainstream provision.
5. In many tribunal cases where this ground of refusal is argued by the education authority, the facts often indicate that the child/young person is being educated for part of the time in a special educational provision within a mainstream environment.
6. The 'presumption of mainstream education' should not be a ground for the refusal of a placing request. Mainstream education is right for some children and young people with additional support needs. For others, education in a special school (as defined in section 29(1) of the 2004 Act) is required to meet their needs. Some recent research undertaken in this area suggests that the type of provision (mainstream or special) is not, in itself, influential on pupil success.<sup>9</sup> A default bias in favour of one or the other is, in principle, therefore, wrong. This is especially the case as there are twelve other grounds for refusal of a placing request made for a child/young person with additional support needs. Any number of these grounds may be used to justify a particular placing request refusal decision. These other grounds of refusal relate to:
  - [Education authority resources](#) (Schedule 2, para 3(1)(a)(i), (a)(ii), (a)(vi) and (f));
  - [Capacity of the school](#) (physical or pupil capacity related) (Schedule

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<sup>8</sup> Standards in Scotland's Schools etc. Act 2000 (**2000 Act**), section 15(3).

<sup>9</sup> See the papers [Waddington and Reed Comparison of the effects of mainstream and special school on National Curriculum outcomes in children with autism spectrum disorder: an archive-based analysis, Journal of Research in Special Educational Needs 2017 Vol 17 132-142](#) (full text of article available at the link) and [Shaw, Inclusion: the role of special and mainstream schools, British Journal of Special Education 2017, Vol 44 pages 233-369](#) (article abstract linked).

- 2, para 3(1)(a)(vi) and (a)(vii));
- **Suitability of the school to meet the child/young person's needs** (Schedule 2, para 3(1)(a)(iii), (b), (d) and (f));
  - **Impact on other pupils at the school** (Schedule 2, para 3(1)(a)(iv) and (v));
  - **Gender requirements of the school** (Schedule 2, para 3(e)); and
  - **Prior exclusion of the child/young person from the school** (Schedule 2, para 3(c)).
7. The addition of a mainstream presumption ground not only creates a bias in the mainstream-special school question, it clutters an already crowded field of grounds for refusal of placing requests. It also adds duplication: the three circumstances in which the requirement in section 15(1) does not apply refer to suitability, impact on other pupils and resources, all of which are already catered for within the other twelve refusal reasons.
8. The basis of the need for the circumstances in section 15(3) only arising 'exceptionally' is unclear. Those circumstances are tightly defined already, and another overall test seems misplaced. Also, it is not clear how to apply the exceptionality requirement.
9. Looking to HEC published decisions in the last twelve years, HEC tribunals have adjudicated on the existence of this ground of refusal 27 times. In 19 of those cases, the ground of refusal was found to exist (effectively meaning that mainstream education is appropriate for the child/young person). In the remaining 8 cases, the ground of refusal was found not to exist (effectively meaning a special school education is appropriate for the child). Since April 2021, of the 10 grounds of refusal relied upon at the time when references are lodged with the Tribunal, the presumption of mainstream ground was the one most commonly used (in 156 of the 741 instances of grounds used). This illustrates the influence this ground of refusal carries.
10. An inclusive education for those who have additional support needs would be best served by the removal of a bias in favour of a particular type of education. A bias of this type is the reverse of an inclusive approach.

## **Question 2: Impact of COVID-19 on additional support for learning**

**In what ways has the pandemic impacted on the needs of pupils with additional support needs and the meeting of those needs, both positively and negatively?**

## HEC RESPONSE

1. Cases that have come before HEC tribunals demonstrate that the pandemic had a profound impact on pupils with additional support needs, their families, on school staff and on relevant health professionals. The noted impacts are, without exception, negative.
2. In the HEC's May 2022 edition of The Bulletin, this issue was discussed in an article [The COVID-19 pandemic and HEC decisions](#) (pages 16-19). The impact was noted across the curriculum, physical teaching changes, transportation, legal duties, educational impact, assessment and transitions. Across these categories, 35 examples of impact (some applying in more than one case) are provided. The pandemic was mentioned in 55% of decisions published by April 2022.
3. The HEC charted its own journey through the pandemic and its transition in the report, [JUSTICE DELIVERED HEC COVID-19 REPORT.pdf](#) ([healthandeducationchamber.scot](#)), which was published in 2022. The report notes that children and young people demonstrated remarkable resilience in the face of great adversity but emphasises the importance that this does not lead to a relaxation of standards and expectations.

'We have a responsibility to ensure that they can continue to access justice despite challenges. Remote hearings provided a solution during the pandemic and provides a future choice as we now transition. Our Chamber was the first Scottish Tribunal to use Cisco WebEx for video hearings (from July 2020). Since then, they have become well- embedded practice.' (paras 40-41)

4. The report also identifies the importance of choice when rights under the 2004 Act are being exercised.

'Participation is at its most effective with choice. Choice means looking at things through the eyes of the person accessing justice. In the HEC, we take a child or young person centred approach, which means looking through the eyes of the child or young person, not through the eyes of an adult. We remain on a continuum of learning, applying these principles:

a) [Listening and learning: from those with lived experience.](#)

b) [Authenticity: learning directly from children and young people who have the most authentic experience, expertise and understanding.](#)

c) **Credibility:** testing our learning and development to ensure that it provides a well-tested and credible route to access justice.

d) **Encouraging choice:** as early as possible in the process and as often as is needed.' (para 45)

**Question 3: How successfully have local authorities and schools adjusted to meet these needs?**

### HEC RESPONSE

1. As the HEC is an independent judicial body dealing with cases in which education authorities are parties, it is not appropriate for the HEC to comment on this question.

### The use of remedies as set out in the Act

- **How are parents/carers and young people included in the decisions that affect the additional support for learning provided to young people and could this be better?**

### HEC RESPONSE

1. The legal rights around consultation with children/young people with additional support needs before decisions are made about their education has, in recent years, been extended.

#### *Section 3 rights*

2. Sections 3 and 3A-C of the 2004 Act (sections 3A-C came into force in January 2018) introduced new rights to children aged 12 to 15 years to make a particular type of reference to the HEC and places obligations on an education authority to consult with the child.
3. A child cannot exercise these rights without satisfying two statutory tests (on capacity and wellbeing). These are explained below. These tests are unnecessary and do not align with the pace of legal reform which is based on a presumption of capacity. Article 5 of the United Nations Convention on the Rights of the Child (**UNCRC**) recognises the evolving capacity of children and Article 12 requires that children capable of forming their own views are given the right to express those views freely in all matters affecting them. A child may make a claim (under the Equality Act 2010) without the need to satisfy these tests. In other words, the presumption of capacity applies to 2010 Act cases but not to 2004 Act cases.
4. The trigger points for an education authority to consult with a child are an act,

decision, provision or view.<sup>10</sup> The test for capacity is whether or not the child has sufficient understanding to do something.<sup>11</sup> This test is broken down further, in each of section 3(1)(a)-(d), depending on whether the capacity question relates to an act, decision, provision or view.

5. Education authorities are obliged to carry out a capacity assessment in advance of something being done (by the child or the education authority) to determine whether or not it can be done.<sup>12</sup> In addition, they must carry out an assessment of wellbeing<sup>13</sup> in advance of the thing to be done to determine whether or not it may be done.<sup>14</sup>
6. Given the width of section 3(1) of the 2004 Act, these processes affect a potential act, decision or view by the child. In addition, they affect the provision of any information, advice or co-ordinated support plan (**CSP**) to the child.
7. In essence, this all means that whenever a child wishes to exercise a right or whenever the education authority wishes to exercise a right or duty under the 2004 Act in relation to a child (1) consideration must be given to the child's capacity to do the thing or understand the thing being done; and (2) the impact of the thing being done on the child's wellbeing must be considered.

#### *Making an application (reference) to the HEC*

8. A child (a person aged 12-15 years) or young person (a person aged 16 or 17 years) may make a reference to the HEC (for a child, a reference about a CSP; for a young person, a reference about a placing request, transition or CSP).<sup>15</sup>
  9. Where a child makes a reference, the tribunal must be satisfied that the two stage statutory test discussed above is met – that the child has capacity to make the reference and that the wellbeing of the child would not be adversely affected by making it. A special telephone case management call is held by the legal member in such cases, in order that the tribunal can be satisfied that the child meets these tests and that the decision on this can be taken promptly. This process is designed to ensure that the child is not prejudiced by any unnecessary delays.
- 10.A parent or child may make a reference challenging a decision by an

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<sup>10</sup> 2004 Act, Section 3(1)(a)-(d) respectively.

<sup>11</sup> 2004 Act, s.3(2).

<sup>12</sup> 2004 Act, s.3A(3)(a), (4)(a) and (5).

<sup>13</sup> 2004 Act, s.3B.

<sup>14</sup> 2004 Act, s.3A(3)(b), (4)(b) and (5).

<sup>15</sup> 2004 Act, see s.18(2)(aa) and (b).

education authority about the capacity or wellbeing of a child.<sup>16</sup>

**Question 4: Are you aware that there are statutory remedies around the provision of additional support for learning as set out in the 2004 Act, specifically:**

- **Right to have a ‘supporter’ present in discussions or an ‘advocacy worker’ make representations to the local authority, the local authority does not have to pay for this. (s.14)**
- **Right to an advocacy services, free of charge, for those taking cases to the Additional Support Needs Tribunal (s.14A)**
- **Independent mediation, free of charge (s.15)**
- **Independent adjudication, free of charge (regulations under s.16)**
- **A Tribunal for certain issues involving Co-ordinated Support Plans, placing requests and disability discrimination cases under the Equality Act 2010.**

## HEC RESPONSE

1. The HEC has a duty to seek the views of a child in a reference or claim.<sup>17</sup> A child/young person may express their views either directly to the tribunal (at the hearing) or through a report from advocacy services. It is very common for a child/young person who has the capacity to express a view to have that view represented in one of these two ways (or both). In addition, children/young people who do not have the capacity to express their views to an advocacy professional can benefit from a report based on Non-Instructed Advocacy.
2. Advocacy workers are very flexible in how they communicate with children and young people, their views can be taken in any form with which the child is comfortable.
3. The HEC takes a proactive approach to this duty. At procedural case management calls, the legal member will explore with parties whether a child/young person may wish to express their views and how they may do so. The tribunal prefers to hear directly from the child/young person where they are comfortable with this. There is detailed HEC President’s Guidance in place setting out how all of this is managed.<sup>18</sup>

<sup>16</sup> 2004 Act, s.18(3)(ea) or (eb).

<sup>17</sup> Rules 44 and 90 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018, Schedule to SSI 2017/366 (**Tribunal rules**) for references and claims respectively.

<sup>18</sup> [Guidance to Tribunal Members No 01/2021 The Child, Young Person and the Tribunal.](#)

4. Children and young people who are parties have full party rights, without exception. This means that they are equal to adult parties. They can make representations and submissions and they can bring witnesses to tribunal hearings.
5. The HEC rules provide for a supporter to attend a hearing and accompany someone to provide moral support, takes notes, help to manage papers and quietly advise the individual.<sup>19</sup>
6. Mediation is common in HEC proceedings and cases are regularly suspended (paused) to allow mediation to take place. Where mediation is successful, that will usually lead to the withdrawal of the reference/claim; where not, the case will resume and move to a hearing.
7. There is a range of information available about advocacy and the right to make a reference/claim to the HEC, as set out on the [webpages of the Tribunal](#).
8. One area in which there is a barrier to accessing a remedy is in the definition of, and knowledge around, a CSP. The CSP is the only statutory education plan for the specification of support for a child with additional support needs. It is enforceable through the wide remedies available in a case before the HEC, as follows:
  - Power to order that a CSP is made;<sup>20</sup>
  - Power to order that a CSP is discontinued;<sup>21</sup>
  - Power to order that the content of a CSP is changed;<sup>22</sup>
  - Power to order that an education authority carries out a review of the CSP, or completes it in time;<sup>23</sup> and
  - Power to order that an education authority provides the additional support specified in the CSP.<sup>24</sup>
11. The criteria for entitlement to a CSP are set out in section 2 of the 2004 Act. These criteria are very narrow and restrictive. Following a recent Upper Tribunal decision on those criteria<sup>25</sup>, it has been confirmed that it is not

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<sup>19</sup> Tribunal rules, rule 5(1)-(2).

<sup>20</sup> 2004 Act, s.18(3)(b) or (c) and s.19(2) or (3).

<sup>21</sup> 2004 Act, s.18(3)(a) and s.19(2).

<sup>22</sup> 2004 Act, s.18(3)(d)(i) and s.19(4).

<sup>23</sup> 2004 Act, s.18(3)(d)(ii) and (iii) or (iv) and s.19(2) or (3).

<sup>24</sup> 2004 Act, s.18(3)(d)(ia) and s.19(3).

<sup>25</sup> [Aberdeenshire Council v CD 2023 UT 28](#), a decision of Lady Poole.



enough for the child or young person to require significant additional support overall for a CSP to be required; they must require significant additional support of an education type and significant additional support of a non-educational type. It is not obvious why this should be, or why Parliament intended this when framing the criteria (assuming that this was their intention).

12. The 'significant additional support' requirements are in addition to meeting the other CSP criteria<sup>26</sup> as well as meeting the definition of additional support needs.<sup>27</sup> In an Upper Tribunal (appeal) decision published in September 2023, Lady Poole notes:

'In 2022 there were over 705,000 pupils in Scotland. Just over 241,000 of those pupils had additional support needs (a little over one third). Of pupils with additional support needs, only 1401 had CSPs, which was said to be about 0.2% of total pupils. The appellant contrasted this 0.2% with an estimate given by the Scottish Executive at the time of the Parliamentary passage of the 2004 Act. The estimate was said to be that 1% of pupils would be entitled to a CSP once the Act was in force, although no document containing that figure was before me.'<sup>28</sup>

13. This highlights the case for a relaxation of the CSP eligibility criteria and for promotion of the right of recourse to the HEC for a CSP remedy.
14. Further, statutory protection of the support required for a child/young person with additional support needs hangs on that support coming from at least two source types (education and another type, such as health or social work). It is not clear why children/young people who have support only of (for example) an educational type have no statutory protection for that support, no matter how significant the support needed is.
15. Another important area affecting support for children/young people is the absence of a right of representation unless the child/young person is a party. Some children and young persons cannot be parties since they have no right to be, for example a child under 12, or a child between 12 and 15 who wishes to challenge a placing request refusal. Others have a right to be, but may not realise that they can be a party or how to go about becoming one. In both instances, the lack of legal representation for children acts as a barrier. Many children have the ability to instruct a solicitor. There are no barriers to doing so in a claim to the HEC under the Equality Act 2010, where there are no age or subject matter restrictions on who may be a claimant, as long as they have the capacity to instruct a lawyer.

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<sup>26</sup> 2004 Act s.2(1)(a), (b) and (c).

<sup>27</sup> 2004 Act, s.1.

<sup>28</sup> [Aberdeenshire Council v CD 2023 UT 28](#), paragraph 26.

16. *My Rights, My Say* (the national children's service) provides representation (and advocacy) to children aged 12 to 15 years. This service was developed following the introduction of new statutory rights under the 2004 Act. This is an important and valuable service but it does not extend to younger children or to young people.
  17. Serious consideration ought to be given to the provision of free legal advice to children and young people with additional support needs on their 2004 and 2010 Act rights. One issue with allowing a child to enforce certain rights only through a parent is that the interests of parents and children do not always align.
  18. With the UNCRC due to become part of domestic Scots Law in the near future, this issue will come into sharp focus. Article 12 on *The Right to Respect for the Views of the Child* applies to the provision of views of the child on 'all matters affecting the child' (Article 12(1)). This means that it applies not only where a child is a party to proceedings, and would clearly apply to all children with additional support needs when a decision is being taken about their education. This is important as Article 12(2) applies to judicial proceedings and expressly mentions the right for views to be expressed 'either directly or through a representative or an appropriate body'.
  19. While a child/young person can currently express their view directly and/or via advocacy, the question of whether a child has a right to be legally represented in order to be properly able to convey those views is bound to be tested soon after the UNCRC is incorporated. The key question is whether, in the context of a particular case, legal representation is needed to allow the child/young person to effectively enjoy their right to be heard.<sup>28</sup> Given the complexity of the legal tests in the 2004 and 2010 Acts, it could be argued that effective sharing of views in many cases would merit legal representation for the child/young person.
  20. Aside from the UNCRC incorporation, the absence (due to a lack of express provision, infrastructure and funding) of the right of a child/young person with capacity to instruct a lawyer to be legally represented in appropriate cases is an example of how children/young people, purely on the basis of their age, do not have equality with adults within the Scottish justice system. Such a disparity could represent discrimination based on age (as one of the protected characteristics under the 2010 Act).
- **If you have experience of any of these processes, do you have any comments on your experiences?**
  - **Any other comments?**