



Additional Support Needs: Routes to Resolution

The Tribunal

Parents can view a Tribunal with trepidation, but it isn't an adversarial contest. The President of the Tribunal, *Jessica Burns*, explains why no-one should feel daunted

Like all tribunals, the Additional Support Needs Tribunals for Scotland (ASNTS) are entirely creations of statute to meet a requirement, or at least a perceived requirement, arising from the implementation of an Act of Parliament: in this case the Education (Additional Support for Learning) (Scotland) Act 2004.

Not all tribunals created find they can fulfil a projected requirement. In Scotland the Scottish Charities Appeal Panel has heard only one case since its creation in 2006. In the reserved system the Gambling Tribunal (now part of the General Regulatory Chamber), established at about the same time, has had no appeals at all. I mention this to scotch the myth that the existence of a tribunal system somehow provokes a litigation frenzy! The projected annual caseload for the Additional Support Needs Tribunals was initially 300 appeals a year with about 200 proceeding to a hearing, but the caseload has never exceeded 75 in any one year and seems to be levelling out at between 35 and 45 a year with many cases settling and only about a third proceeding to a hearing, as detailed in the 2008/9 ASNTS Annual Report.

The experience of the Tribunal is therefore very modest but so is the jurisdiction. Defined as the most severe end of the additional support needs spectrum, the jurisdiction currently depends on having or attempting to establish whether a coordinated support

plan is appropriate for the child or young person concerned. The figures disclose an increase nationally in the number of these plans from 2630 in 2008, to 3123 in 2009, but still only about a quarter of the more than 12,000 anticipated. The potential pool of appellants is therefore small.

Additionally the context of the legislation is within a culture where parents and children are taken into the decision-making process, if not as partners then as contributors whose views are valued, and where they may be assured that even without a coordinated support plan the level of support provided by the school and other agencies will be assessed carefully to meet the child's needs. The legislation lays great store by the ability of authorities to negotiate agreement with the parents in relation to this and other aspects of their child's education, without the need for recourse to any formal dispute mechanism. Where explanation and compromise do not achieve agreement and there is no provision to make a reference to the Tribunal, dispute resolution through independent adjudication is the remedy, and in all disputes the authority should offer (and pay for) access to mediation according to guidelines published by the Centre for Research in Education Inclusion and Diversity.

Even where the dispute is referred to the Tribunal, there are still opportunities for the matter to be settled before it proceeds to a

hearing. The conveners who chair the Additional Support Needs Tribunals are now adept at dealing with preliminary issues by a conference call. They can use this process to explore the potential for agreement once the parties have been able to assess the relative strengths of their case. This practice avoids the need for adjournments that can be costly and inconvenient for parties and their witnesses. Settling matters by conference call also ensures that where hearings are necessary, they can be focused and efficient. Feedback on the use of conference calls has been very positive and I am convinced this practice is valuable and consistent with the overriding objective to achieve dispute resolution that is proportionate.

It can be daunting to proceed to a hearing and as President one of my duties is to make the process as accessible as possible by issuing appropriate guidance and directions to all the parties involved. Of these, the most important is the revised *Presidential Guidance 2*, issued in every case. Addressed to all parties, witnesses and representatives, it has been developed to ensure consistent delivery of a Tribunal through active questioning by conveners and members that is designed to level out actual, or perceived, inequalities in the skills or experience of representatives. A Tribunal is never a contest between two adversaries where the Tribunal decides who performs best. There is, in any event, no correlation between legal representation and success before the Tribunal. The hearing is an opportunity for the Tribunal to scrutinise the decision reached by the authority, assisted by the evidence of the parties and witnesses, to determine if the decision is consistent with legislation in meeting the needs of the child or young person. A consistent approach establishes and develops the enabling ethos of the Tribunal.

There will always be cases that are not amenable to settlement and it is proper that in those cases the hearing that follows is able to deal proportionately with the dispute. Placing requests are

perhaps least likely to result in pre-hearing settlement as there is no option of a compromise agreement. But even here the parent may, after further consideration, decide that the chosen school is not, after all, the best option for their child or the authority may concede that the school can offer educational opportunities which they are unable to deliver. Other references unlikely to be settled pre-hearing relate to issues of judicial interpretation, where the relationship between the parties has completely broken down or where the parent wants the issue aired before a Tribunal regardless of the outcome.

Tribunals exist to provide a remedy in the few cases where other methods have been unsuccessful in achieving agreement. It is sometimes suggested that parents do not like to appeal against a decision of an authority as the school may take a dim view of this and it may rebound on the child, or that the parent does not know their right to appeal to a Tribunal or have access to representation, but there is no hard evidence to support these theories. It is equally possible that the continued modest caseloads indicate that in most cases parents are generally satisfied with the provision for their children. Where they are not, the Tribunal will continue to be there to deal with the disputes in an enabling, fair, proportionate and transparent way.

Jessica Burns is President of Additional Support Needs Tribunals in Scotland

For more information on Tribunals and how they work, or to access the guidance and directions documents referred to, visit www.asntscotland.gov.uk
The ASNTS Annual Report 2008/9 can be accessed at www.asntscotland.gov.uk/asnts/181.25.141.html and the Centre for Research in Education Inclusion and Diversity guidelines at www.creid.ed.ac.uk/adrl/index.html

How the Tribunal system works

Tribunals aim to:

- provide impartial, independent and expert decision making in accordance with Additional Support Needs legislation
- be user-friendly, through informal and flexible proceedings
- be accessible to users.

Parents, or young people aged 16 and 17, can refer a dispute to the Tribunals, who will consider if a hearing is appropriate. Hearings take place before a Tribunal of three members, consisting of a convener who is legally qualified and two members who have expertise in additional support needs. Parents and young people can present evidence and bring witnesses to support their case, and may appoint someone to represent them if they wish. Children and young people's views are welcome, in person, recorded, or in writing.

