

Response to Scottish Government consultation on Draft Regulations to Transfer the Functions and Members of the ASNTS to the Scottish Tribunals and Repeal Existing Regulations

August 2017

The Education (Additional Support Needs) (Scotland) Act 2009¹ (section 8) amended earlier legislation to establish that every looked after child is considered to have additional support for learning needs, unless the education authority, following an assessment, concludes that the child does not need additional support to benefit from education services. The 2009 Act and accompanying guidance also states that an education authority must consider whether a looked after child or young person in their care (regardless where the child attends school) requires a coordinated support plan (section 8(2)). In practice, such a decision can only be taken following a comprehensive assessment of the child's additional support for learning needs. Unfortunately, as data released by local authorities via Freedom of Information requests shows, such duties towards looked after children are being unevenly implemented across Scotland, with some councils only assessing a tiny proportion of eligible children.²

The adequacy of, and speed of access to, appropriate additional support for learning services for Scotland's looked after children has been a matter of considerable concern to many individuals and organisations, over a number of recent years. The Scottish Children's Services Coalition³, among others, has made improvement in the provision of additional support for learning services central to their national advocacy and campaigns.

Through our own work in schools and education authorities, and wider consultation with individuals working with children (teachers, carers, social workers, advocates, etc.), we understand that it is very rare for cases relating to looked after children to be referred to the Additional Support Needs Tribunal. This is surprising, given the complexity of the individual circumstances of looked after children, and the fact that every looked after child is considered to have additional support needs (and must be assessed for a coordinated support plan). Indeed, it is reasonable to expect that, on this basis, looked after children would be significantly over-

¹ <http://www.legislation.gov.uk/asp/2009/7/contents>

² Iain Nisbet (2016) *Looked After Children: Additional Support Needs data by local authority*, Govan Law Centre, p.2 [<https://www.celcis.org/knowledge-bank/search-bank/education-forum-additional-support-learning-asl/>]

³ <https://www.thescsc.org.uk/campaigns/additional-support-needs-asn/>

represented in Tribunal statistics (in relation to the proportion the 'looked after child' population represents of all children).

We therefore strongly encourage Scottish Ministers, the Scottish Tribunal service and other relevant parties (such as local authorities) to take appropriate steps to draw children, parents, carers, teachers and other professionals' attention to the rights of looked after children in respect of additional support for learning law, including their right to request that a tribunal considers their case where there is a disagreement with the local authority decision.

Consultation Questions and Responses

QUESTIONS ON ASNTS

1. Do you have any comments on the draft transfer of functions and members Regulations?

Having consulted with stakeholders, we are not aware of any reasons why looked after children and the carers and professionals who support them would be adversely affected by the proposed transfer of functions of the Tribunal or of the transitional arrangements.

QUESTIONS ON THE FIRST-TIER HEALTH AND EDUCATION CHAMBER RULES OF PROCEDURE

1. Do you have any comments on the draft regulations on the first-tier Health and Education Chamber Rules of Procedure?

We appreciate the rationale for reducing the time parties have in order to request a review of a Tribunal decision from the present 30 days to 14 days in order to provide a 'quicker route through the review and appeal process overall.' We have concerns, however, that this timescale may be too short in the case of looked after children for whom the number of interested parties (i.e. parents, carers, professionals, and advocates) is typically greater. We think 21 days may be more realistic.

2. Do you have any comments on the revised provisions regarding review of decisions and allowing parties to be accompanied by a supporter?

We applaud this proposal. In the case of looked after children, having an advocate who supports the child to prepare for the Tribunal, to provide moral and practical support in respect of their attendance and intervention at a Tribunal, and to take notes of the proceedings is good practice.

3. Do you have any comments on the amendments allowing a legal member to sit alone in certain circumstances?

We do not think this is a wise proposal. First, it is a very fine judgement to assess legal capacity of a child and we think professionals, of whatever background and qualifications, should always have access to another point of view in making such a decision. Second, we have concerns that the very appearance of such a clause in the Regulations would invite the view that having a legal member sitting alone could be regarded as not unusual.

QUESTIONS ON ELIGIBILITY REGULATIONS

1. Do you have any comments on the proposals regarding the eligibility criteria for ordinary members with health and education experience?

We do not have any comments to make about the wording of the Regulations in respect of the eligibility for appointment as an ordinary member of the Tribunal. These seem specific to knowledge of additional support needs and disability and are at the same time broad enough to allow appointment of parents, carers and professionals. We would encourage those making appointments to consider seeking people with experience of looked after children, and to represent this appropriately in marketing material and through the appointment processes.

Thank you for providing us with this opportunity to respond. We hope the feedback is helpful; we would be happy to discuss any aspect in further detail.

CELCIS Contact:

Dr Graham Connelly
Education Programme Advisor
g.connelly@strath.ac.uk
0141 444 8500

About CELCIS

CELCIS is Scotland's Centre for excellence for looked after children. Based at the University of Strathclyde in Glasgow, we exist to make positive and lasting improvement in the wellbeing of Scotland's children living in and on the edges of care, through a unique approach to system and practice improvement, drawing together the best academic and professional evidence.