

Govan Law Centre: Education Law Unit  
Presentation on Education (Additional Support for Learning) (Scotland) Bill

The Bill is generally good but there are 3 areas of concern:

### **Children's Rights**

The Bill places the rights conferred on children with additional support needs in the hands of their parents. This reverses the move toward recognising the child as the focus of the educational system begun in the Standards in Scotland's Schools Act 2000.

In seeking to improve educational provision for children, the child is rightly placed at the centre of that process. Article 12 of the UN Convention on the Rights of the Child obliges the government of Scotland to treat the views and opinions of children seriously. The Standards in Scotland's Schools Act 2000 took the first steps to do that, and was praised by the UN Committee for doing that.

However, the ASL Bill provides for information and advice, but only to parents. It allows access to mediation and appeal tribunals, but only for parents. It confers rights to request assessment of needs, co-ordinated support plans, and reviews; but not for the child.

Groups with rights throughout the Bill are:

- (a) in the case of a child, the child's parent;
- (b) in the case of the young person -
  - (i) the young person, or
  - (ii) if.. the young person is incapable, the young person's parent

Could easily add a group:

- (a) in the case of a child, the child's parent;
- (b) in the case of a child with legal capacity, the child;
- (c) in the case of a young person –
  - (i) the young person, or
  - (ii) if.. the young person is incapable, the young person's parent

If not done, then what happens to the children whose parents do not wish to exercise these rights on their behalf, or are unable to do so? Will Parliament deny these children access to their legal remedies?

I understand that parents may be concerned that to give the child a right to appeal of other such rights would be to erode their own rights. This is not so. Parliament can and should enact co-existent rights for children with legal capacity (i.e. roughly age 12+) which would sit side by side with their parents' rights. This is what currently happens with exclusions. Both parent and child have rights of appeal and either, or both, can exercise them. This is no more confusing or contradictory than allowing both parents a right of appeal (as the Bill currently does).

The CSP, or the assessment of whether or not someone has ASL, is a document or a decision all about the child, so why make the child the one person who is excluded from being able to affect the outcomes?

This leads to serious discrepancies in treatment. Children are afforded rights regarding discrimination in schools, education records, and exclusion from school.

But here, if it were determined that a child does not have additional support needs there is no right of appeal for either parent or child. The only route of legal challenge is by way of judicial review – the child's right, **not** the parent's.

In actual fact, the Bill is not removing the right of challenge. If there were a child who disagreed with a decision of a CSP, with absent parents, or parents who did not wish to appeal, the child with legal capacity is not left without remedy, but would have to go by petition for JR to the Court of Session. The parents route of challenge is through an expert tribunal relatively informal and inexpensive. Whereas the child's right is to Court of Session, daunting, time-consuming and extortionately expensive.

### **Disability Discrimination**

Part 4, chapter 1 of the Disability Discrimination Act 1995 covers discrimination in schools. The main part of this, the school's duties, do not apply to the Record of Needs. This is covered by the "residual duties". However, the 1995 Act defines the scope of the residual duties by reference to an exhaustive list of three statutes:

- Education (Scotland) Act 1980
- Education (Scotland) Act 1996; and
- Standards in Scotland's Schools etc. Act 2000

The problem is that the Additional Support for Learning Bill is not one of the three. This problem could be averted by enacting the changes to the system by way of amendment to the 1980 Act; or by arranging for Westminster to amend the DDA to include this 4<sup>th</sup> Act.

Otherwise, the Bill will inadvertently legalise discrimination against disabled children in relation to the assessment and recording of their needs. As it would have this affect on a reserved matter (equal opportunities) it would place virtually the whole Bill (in it's present form) out with the legislative competence of the Scottish Parliament.

### **Financial Considerations**

Section 3 (1) (b) states that the authority has a duty to make adequate and efficient provision for such additional support as is required by children and young persons with additional support needs.

Section 3 (2) (b) however says that the authority are not thereby required to do anything which would not be reasonable at practicable cost.

At present, the legal position (following the House of Lords case of *Beth Tandy v. East Sussex Council*) is that a lack of resources is an irrelevant consideration in providing for children's special educational needs.

When considering what provision is to be made for children with ASN, the only considerations should be educational ones, not budgetary ones.

As Lord Browne-Wilkinson, in the *Tandy* case said:

*"The argument is not one of insufficient resources to discharge to duty but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power."*

Do we want a duty to help children and young people with ASL, or for it to be left to the discretion of each authority?

*"Once the reasonableness of the actions of a local authority depends upon its decision how to apply scarce financial resources, the local authority's decision becomes extremely difficult to view."*

This is not to say that Parliament can't do this. Of course the Scottish Parliament has the power to enact this financial restriction.

This was recognised in *Tandy*:

*"If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament to so provide."*

But to do so would:

- Reduce the legal rights of children with ASN;
- Place Scotland's school pupils in a worse position than pupils south of the border;
- Prioritise financial considerations over the needs of disabled children;
- May very well lead to reduced public expenditure on meeting the needs of children with additional support needs.

The restriction on cost should be removed.

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**Main Points**

**Children's Rights**

- Art. 12 of the UN Convention on the Rights of the Child requires that the government give effect to the child's right to have their voice heard
- Standards in Scotland's Schools Act 2000 was praised by the UN Committee for doing so.
- In the ASL Bill, parents are given rights to:
  - request assessment of additional support needs;
  - request assessment for a co-ordinated support plan;
  - be informed, advised & consulted re: content of CSP; and
  - access mediation services and the appeal tribunal.
- Children are afforded none of those rights.
- A co-existent right for older children would not interfere with parent's rights

**Disability Discrimination**

- "Residual duties" under Disability Discrimination Act 1995 cover the Record of Needs.
- These duties would not cover the Co-ordinated Support Plan.
- This could effectively legalise discrimination against disabled pupils in the assessment and recording of their needs
- That would place the Bill out with the legislative competence of the Scottish Parliament
- The problem could be resolved by enacting the changes as amendment to the 1980 Act, rather than as a discrete piece of legislation.

**Budgetary Considerations**

- The Bill limits the duty to provide for a child's additional support needs by reference to financial considerations.
- At present, the law does not allow this; looking only to educational factors.
- The Bill would therefore mean reducing children's legal rights
- It would place Scotland's children in a worse position than children in England or Wales.
- Prioritises budgets over the needs of disadvantaged children.

Govan Law Centre's full response to the Bill can be found in the "information" section of our website [www.edlaw.org.uk](http://www.edlaw.org.uk) - or you can contact us on 0141 445 1955/ [advice@edlaw.org.uk](mailto:advice@edlaw.org.uk)