

The Implementation of Dispute Resolution Required by The Education (Additional Support for Learning) (Scotland) Act 2004

A Report by the Senior Independent Adjudicator on the First Three Years

1. Applications for Dispute Resolution

1.1 The process of dispute resolution commenced on 14 November 2005. In the three years since then, councils accepted 38 applications for dispute resolution and requested the Scottish Government to nominate independent adjudicators. Two of these requests were later withdrawn. Almost all of the cases have related to Specified Matter 2(a): a failure by an education authority *to provide, or make arrangements for the provision of, the additional support (whether relating to education or not) required by the child or young person*. In only two cases, applications concerned the decisions made by an education authority.

1.2 Of the 36 cases reviewed and reported on by adjudicators, five applications were made in calendar year 2006, 16 in 2007 and 15 in 2008. The applications have been accepted by 17 of the 32 Scottish councils: five to one (Highland); four to one (North Lanarkshire); three to four (Glasgow City, North Ayrshire, South Ayrshire and South Lanarkshire); two to six (Aberdeen City, City of Edinburgh, Comhairle nan Eilean Siar, East Dunbartonshire, East Lothian, Renfrewshire); and one case to five authorities (Aberdeenshire, Angus, East Renfrewshire, Moray, and Stirling). The independent adjudicators do not assume that councils receiving a higher number of applications are unsuccessful in resolving disputes on their own. It is possible that such councils are more effective than others in informing parents and carers about their rights in respect of making an application for dispute resolution, or that there is well-developed advocacy in the area to support parents and carers in making an application. As indicated in 1.5 below, many parents/carers, young people and council staff are not aware of the dispute resolution process.

1.3 All of the applications referred to the Scottish Government for the appointment of an adjudicator were initially made by a parent or parents. However, in two instances parents were making an application for a young person and, in one, the young person went on to make the application. Some education authorities did not appear to recognise that young persons over the age of 16 years, unless they lacked the mental capacity, should make their own applications. Independent adjudicators have been disappointed by the failure of education authorities and parents to seek and provide the views of the child or young person whose additional support needs were the focus of the applications. In a few instances, parents have refused to allow their child to be asked for their views. In good practice one authority psychological service has produced practical guidelines and a toolkit for staff on seeking the views of children and young people. It is the view of the adjudicators that much more needs to be done to help children and young people to express their views and, particularly, to inform and assist young people to understand their rights in terms of dispute resolution and to be supported in seeking dispute resolution.

1.4 Anecdotal evidence suggests that some parents and carers, in making an application, have triggered the education authority into making further efforts to resolve the dispute. In some good practice, independent adjudicators found that education authorities continued efforts to resolve the dispute while the adjudication process was in progress. Independent adjudicators often reported that cases were the result of long term entrenched disagreements between the parents and the education authority as to what should be done to meet the additional support needs of the child or young person. In these cases it was apparent that neither party trusted the other to such an extent that one of the independent adjudicator's recommendations was that a disinterested person be appointed to help re-establish trust. It would be helpful to obtain from councils their views on the demand for and results of applications for dispute resolution.

1.5 Evidence indicates that the relatively small number of applications for dispute resolution being made is, in large part, due to lack of awareness of the process and its purposes. HM Inspectors of Education in their report, published in November 2007, on the implementation of the 2004 Act concluded the following.

Few authorities had received enquiries about involving independent adjudication. Most parents and a few school-based staff including headteachers were unclear about the role of independent adjudicators. A few voluntary agency staff felt that independent adjudication was a valuable and effective means of ensuring that authorities clarified and focused their provision.¹

Independent adjudicators have found that, in several instances, officers, especially but not solely when dealing with their first experience of an application, did not know about the adjudication procedures and were even unaware of the Regulations² and that the Scottish Government had published guidance for education authorities.³ That officers were not sure of the processes indicates that they were not in a position to advise parents and carers, far less young people.

1.6 The experience of independent adjudicators supports HM Inspectors' recommendation to the Scottish Government and all services for children and young people:

Improve the quality and extent of local authorities' communication with young people and their parents, and engage young people and parent more fully in decisions which affect their future support, including communicating about services for resolving disputes.

¹ HM Inspectors of Education (2007) *Report of the implementation of the Education (Additional Support for Learning) (Scotland) Act 2004* HMIe (page 23)

² Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005
www.opsi.gov.uk/legislation/scotland/ssi2005/20050501.htm - 26k

³ The Scottish Government *Guidance for education authorities on dispute resolution procedures under the Education (Additional Support for Learning) (Scotland) Act 2004*
<http://www.scotland.gov.uk/Publications/2007/06/12110116/5>

The Scottish Government has taken a number of steps to disseminate information and encourage understanding of the dispute resolution process, among which are the following.

- An ASL Act Implementation Officers' Seminar was held in June 2007.
- Children in Scotland was funded to run, during March and April 2008, four seminars called 'Routes to resolution' on mediation and dispute resolution. They were held in Glasgow, Edinburgh and Aberdeen. Staff from Resolve and independent adjudicators took part in these seminars which were designed to help participants understand, and to consider how to apply, mediation and dispute resolution procedures.
- The Scottish Government also funded Govan Law Centre to run an extensive training programme for advocates to support parents and young people in exercising their rights in respect of the 2004 Act. This programme has trained over 30 advocates from across Scotland.

2. The Independent Adjudicators

2.1 Seventeen independent adjudicators were appointed by Scottish Ministers in November 2005 and the panel now comprises 13 whose term of office has recently been extended until November 2010. The roles and responsibilities of independent adjudicators are to review each case and provide a report with recommendations on how the dispute should be resolved. Adjudicators work in accordance with guidelines, *Dispute Resolution (Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005): Guidance for Independent Adjudicators*. Each independent adjudicator acts in accordance with the principles of openness, fairness and impartiality and respects the confidentiality of the parties in the dispute and the process itself. They are expected to take part each year in the two days of staff development run by the Support for Learning Division, the Scottish Government, as well as keeping up to date with the principles and practices which underpin effective provision for additional support needs. At their training day in October 2008 the independent adjudicators reviewed the factors which underpinned their approach and emphasised the following:

- working within the frameworks of the 2004 legislation, the Regulations and the Code of Practice
- keeping the child or young person as the focus of the case
- being just and fair to all parties
- being objective in weighing up arguments and evidence
- reaching a clear understanding of the matters in dispute and related issues and seeking further information when in doubt
- addressing and commenting only on issues relevant to the specified matter(s) being adjudicated and avoiding being distracted by peripheral issues
- clearly arguing cases taking full account of current national advice and good practice and being accurate in presentation
- making recommendations that should resolve the dispute and move matters forward for the child or young person and his or her parents/carers.

2.2 Independent adjudicators have no role in assessing the child or young person and must rely on the information in the papers provided. The Regulations specify that

reviews of cases are normally based on the documentation supplied to the independent adjudicator by all parties and that face to face contact would not normally be made. Independent adjudicators have not yet found a need to make visits to an authority. Independent adjudicators have 15 working days in which to conduct their review and send the report with recommendations to the council. The 15 days start on the day following receipt of all papers which appear necessary to conduct a review. In a few cases independent adjudicators have found that key papers have been missing after embarking on the review and this can hold up the process. Where the 15 days is likely to be exceeded, independent adjudicators write to parents stating that they require more time and indicating when the report will be submitted to the council. Independent adjudicators have delivered most cases within the specified time frame.

2.3 The conduct of the review and the report with its recommendations are the responsibility of each independent adjudicator. A senior independent adjudicator acts as a critical friend offering advice and comment when requested by an independent adjudicator. The senior independent adjudicator also works with the Support for Learning Division in planning and chairing the development days. The role of the senior adjudicator was extended in 2008 to include a quality assurance overview of all reports.

2.4 The Scottish Government nominates an independent adjudicator for a case but the council to whom the application has been made appoints the independent adjudicator. This arrangement safeguards the independence of Ministers in the event that they may be called on to respond to later requests such as a section 70 complaint⁴. The council is also responsible for sending the documents for all parties in the case to the independent adjudicator. Normally the independent adjudicator's contacts with parents/carers/a young person are through the council, usually the education authority. In a number of cases it has been brought to the attention of the independent adjudicator that parents have been concerned that all the papers they submit to the education authority are in fact passed on to the independent adjudicator. In these cases the independent adjudicators were able to check the documents against a list supplied by the parent and give reassurance that all papers had been considered.

2.5 Where an independent adjudicator requires further legal advice, he or she seeks this from the council to which the application has been made. Such requests have been made in a small number of cases largely to do with areas which lack clarity in the law and which are being interpreted in the courts. An example would be the definition of the parameters of school education.

2.6 The fee for the work of independent adjudicators is specified in Circular 6/2005⁵. The assumption is that an independent adjudication would require around one and one half days of work. In practice, most independent adjudicators have found that they took around four or more days to complete the review and write the report. The time is extended particularly where one or both parties have not been able to present their arguments and supporting evidence clearly and where the independent adjudicator has had to ask for further evidence. In some instances, authorities appeared confused

⁴ Section 70 of the Education (Scotland) Act 1980

⁵ The Scottish Executive Circular 6/2005 *Education (Additional Support for Learning) (Scotland) Act 2004 Section 27: Dispute Resolution Arrangements Appointment and Payment of Independent Adjudicator – General Direction Number 1.*

about responsibility for paying independent adjudicators who had to draw their attention to Circular 6/2005.

3. Experiences of Independent Adjudicator and the Challenges in the Procedures

3.1 As may be expected with a new procedure, independent adjudicators have found variation in the ways in which councils handle dispute resolution. It is taking time for councils to understand the processes involved and establish procedures. In very good practice officers at relatively senior levels in education authorities work with legal staff and ensure that they adhere to the procedures and time lines. In one authority adopting such an approach, officers have built up considerable expertise and developed insights into the implications of the processes and how to make them more effective. For example an appropriate professional who has had no experience of the case undertakes a review to identify where the authority may be at fault and what should be done to resolve the situation. This complements the work of the independent adjudicator and appeared to help the council to decide how to move forward with the recommendations. In contrast in some authorities relatively junior members of staff were given responsibility for the case without any legal support. It is worth listing some of the problems which have resulted as they are still appearing in some cases. They are largely the result of officers not understanding or adhering to the guidance.

- Papers are sent to the nominated independent adjudicator before he or she is appointed. The independent adjudicator cannot take any action until formally appointed.
- Key information such as dates of birth and addresses are not supplied.
- The council does not check the age and legal status of a young person about whom the dispute is concerned and fails to engage them in the process.
- No reference is made to the views of the child or young person.
- No indication is given as to whether mediation has been offered to parents/carers or the young person.
- Time scales are not adhered to and no officer is given responsibility for monitoring the progress of the resolution of the dispute.
- Papers sent to the adjudicator are not presented in chronological order or numbered, some are incomplete, some are illegible because of poor photocopying, many are not dated and there is no list of documents.
- Key factors are missing, such as up-to-date reports of the assessment of the child or young person and clear statements of the child or young person's additional support needs or the child or young person's individualised educational programme.
- Insufficient information is provided on the curricular provision being made for the child or young person and/or the individualised educational programmes are poorly expressed or incomplete.
- Parties do not make it clear how they think the dispute may be resolved.

3.2 Independent adjudicators are well aware that dispute resolution presents parents/carers and the young person with some challenges. The first challenge for parents, carers and the young person lies in preparing the application and presenting the arguments and evidence. One parent, speaking on behalf of a group of parents of

children with dyslexia, had highlighted the problems for parents who may be dyslexic themselves in reading and collating the relevant papers. Some parents have sought assistance from the Govan Law Centre and it has provided advice and support on making an application on its web site. One officer in an education authority reported that he felt in a difficult situation in wanting to assist the parents while at the same time being responsible for the authority's case. Councils need to be clear about the advice that they give to parents/carers and young persons about where to get assistance in making their application. Such advice needs to be well understood and promoted by educational establishments and services. With the training of advocates for parents and carers, more support should become available.

3.3 Officers in councils have also reported that they have found the process of responding to an application onerous, particularly when they are not clear about the processes. There is evidence to suggest that they need training in dispute resolution processes and procedures and support in undertaking what can be highly stressful work. The independent adjudicators are of the view that dedicated staff development might be provided to groups of council staff. The Scottish Government is currently updating the advice to education authorities on dispute resolution.

3.4 Independent adjudicators have found that parties in disputes have difficulty with three aspects.

- The first is that of being precise about the essential issues being disputed and the specified matter(s) being disputed.
- The second lies in the applicant and the education authority each being clear about how they think that the dispute should be resolved.
- The third is determining which evidence is relevant to the arguments they are putting forward.

3.5 The applicant and the education authority each have their parts to play in providing the views of the child and in supporting a young person to make an application. In one example of good practice a school was able to produce documents in which the child had commented on what they felt about their own education. Seeking such views was integral to the pastoral care provided for children in that school.

3.6 Independent adjudicators have been surprised in some cases about the lack of clarity about the nature of the additional support needs of the child or young person. Sometimes assessments have not been updated or have been undertaken by different people in a fragmented way. Often there has been a need for school staff and support services and agencies to be much more rigorous and integrated in their conclusions about the strengths and additional support needs of the child or young person. They also need to learn from, and share their knowledge with, parents and carers and the child or young person.

4. The Report, its Recommendations and Follow-up

4.1 The informal feedback received by independent adjudicators is that councils regard the reports as being helpful. Councils may express any concerns about reports to the Scottish Government. However, there is no means for independent adjudicators

to obtain the views of parents. The independent adjudicators recommend that the Scottish Government obtain views of independent adjudication from all parties. While independent adjudicators are free to write the report in the way in which they think appropriate, all have, to date, followed the format agreed in the early stages of the process. This format appears to provide a well-structured means of presenting essential information and argument. As the reports are confidential, the recommendations are not collated. The senior independent adjudicator has identified some which recur in many reports. It is common to have a recommendation that assessment should be updated in order to identify strengths and additional support needs. Other recurring recommendations include improved approaches to individualised educational programmes, and arrangements to support parents and education staff to work together for the benefit of the child or young person. In some instances independent adjudicators have recommended that mediation services should be employed to support implementation of recommendations.

4.2 The process ends for the independent adjudicator when councils receive and accept the report, not necessarily the recommendations. Once reports are submitted independent adjudicators do not always hear if their recommendations are accepted. It would be helpful to learn from education authorities if that is the case and if not why not. Independent adjudicators return all papers to the education authority with the advice that copies are kept on file. Independent adjudicators destroy any copies of the report and erase them from computers.

4.3 Independent adjudicators rarely specify a timeframe for overtaking the recommendations, as they assume that all parties will wish them to be overtaken as soon as possible. In some instances, indications of urgency are given. There is an issue about whether there should be time scales for the implementation of recommendations. It has been brought to the attention of a few independent adjudicators that councils have not implemented recommendations that they have accepted. The ultimate remedy where the dispute concerns failures in relation to provision for additional support needs is for parents/carers or the young person to invoke section 70 of the 1980 legislation.

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