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Giving Children the Right to Appeal to the Special Educational Needs Tribunal for Wales

The Administrative Justice and Tribunals Council (AJTC) and its Welsh Committee have considered this consultation and have asked me to pass on their comments.

The AJTC and its Welsh Committee

The AJTC is an advisory Non Departmental Public Body set up under the Tribunals, Courts and Enforcement Act 2007. It has a statutory duty to:

- keep the overall administrative justice system under review; and
- keep under review the constitution and working of the tribunals listed as being under its oversight, including the Special Educational Needs Tribunal for Wales.

The Welsh Committee of the AJTC takes the lead in overseeing administrative justice and tribunals in Wales.

The AJTC's overarching strategic objective is to focus, first and foremost, on the needs of the users of the administrative justice system.

Further information is available at www.ajtc.gov.uk

General Comments

The AJTC and its Welsh Committee are broadly supportive of the proposal to give children, in certain circumstances, the right to appeal to SENTW. This is particularly so in relation to 'looked-after' children, who are especially vulnerable.

The success of the proposal will depend on it being implemented carefully, in close consultation with key stakeholders. The AJTC is aware, from its membership of the 'Giving Children the Right to Appeal Working Group', of some concerns around the practical operation of the proposal. Given the pioneering nature of the proposals, there might be some benefit in piloting the scheme with a discrete group, such as 'looked-after' children, or in a particular geographical area.

Unless a child has adequate help and support, it is felt that they would be unlikely or unable to exercise their right of appeal. Thus, adequately resourced advocacy, support and representation services are essential to ensuring that the rights created are not paper based only. A large determinant of the success of the policy will hinge on the quality and accessibility of the independent advocacy service.

The current Welsh Assembly Government review of the statutory assessment and statementing framework, including the SEN Code of Practice, presents an important opportunity to improve first-instance SEN decisions, including increased meaningful participation by children in SEN processes (as outlined in Chapter 3 of the SEN Code of Practice). This could lead to more consensual SEN decisions, and result in a lower number of appeals (by both parents and children).

Responses to the consultation questions

Question 1. Do you think we should consider extending the right so that children can make claims of disability discrimination themselves?

If children are given the right to appeal to SENTW regarding special educational needs, there seems to be no reason why they should not also have the same right relating to claims of disability discrimination in education.

See response to 'Voices and Choices – Part 2' for further information.

Question 2. In determining a child's ability to exercise their right of appeal, (a) what should the competency test for children with special educational needs consist of? (b) should a test for competency be set at a lower threshold than that applied for Legal Aid (in short, that a child is able to give instructions)?

- An elaborate formal competency test would potentially rule out many vulnerable children and act as a deterrent, thus, any test of a child's competency (if such a test is thought to be warranted) should adopt a 'light touch' approach.
- The concept of competence should centre around whether the child is competent to form an opinion and understand the issues they wish to appeal, in line with Article 12 of the UN Convention on Rights of the Child.
- Any competency test should be tailored to the individual needs of the child. For example, by taking into account the child's individual needs in relation to communication, or how they may demonstrate their understanding.
- In this instance, a competency test based solely on age could be seen as discriminatory and arbitrary.
- The test for competency should be set at a lower level than that applied for Legal Aid.

Question 3. Are there other aspects of competency for children with special educational needs that we should consider?

At this early stage, it is difficult to determine other aspects of competency that should be considered. Other issues may arise once further details of the exact nature of the competency test are determined.

Question 4. Who should determine competency, and at what stages of the appeals process?

- To ensure that the process is appropriately independent, the assessment of competency should not be undertaken by the LEA.
- Key participants in the assessment process are likely to be the child's teacher, other childcare professionals, parents, and the independent advocate.
- Multiple 'tests' of competency are not helpful, as they may be confusing to the child, and introduce unwarranted additional bureaucracy.

- Generally, competency should be determined at the beginning of the process, once a child has indicated that they wish to exercise their right of appeal.

Question 5. If there is a disagreement before an appeal is submitted to the SENTW, about whether a child is competent, who should make the final decision?

At this early stage, it is difficult to suggest an appropriate dispute resolution option, as the consultation paper does not outline the exact nature of the competency test, or the key people who would be involved in assessing competency. It may be that, in the event of disagreement about a child's competency, SENTW could make the final decision.

Question 6. How might LEAs best ensure a child with special educational needs is made properly aware of their right to appeal?

- Conventional communication strategies, such as leaflets, posters etc, would be of limited value on their own, and should be complemented by a proactive independent advocacy service. The Children's Commissioner may have an important role in promoting awareness.
- One possibility would be for the LEA, on making a SEN decision, to inform the parents / guardians of the decision, and of their right of appeal, and the child's independent right of appeal. An employee of the LEA, or an independent advocate could also inform the child, and explain to them the meaning and implications of the SEN decision, their separate right of appeal in certain circumstances, and potential to access independent advocacy and other services.
- Any communication strategy would need to recognise the difficulties of communicating with children with special needs, and also Welsh language issues.
- The current time limit for appeals is two months after receiving a decision letter. Thus, any communication with the child would have to take place quite soon after an appealable decision is made, especially as the competency assessment process could take a significant amount of time.

Question 7. What else could be done to ensure the greater participation of children with special educational needs in decisions that affect their lives?

More emphasis on involving children in every stage of the SEN process, as outlined in Chapter 3 of the SEN Code of Practice, could lead to more meaningful participation in SEN decisions by children and young people.

Question 8. What are the main obstacles to the involvement of children in dispute resolution, and how do you think these could be resolved?

Some of the main obstacles to involving children in the dispute resolution process are:

- The potential inequality in power and information between the LEA, parents/guardian and the child.
- Ensuring that the child properly understands the dispute resolution process.
- The complexities of the dispute, in that it is possible that the LEA, the parents/guardian, and the child all have different views.

Appropriate support from an independent advocate could help overcome these obstacles.

Under the current dispute resolution system, there seems to be potential for different standards, resources and commitment to dispute resolution across LEAs. It may be beneficial to establish common standards and practices across LEAs, which specifically take into account the special requirements for dealing with children.

The Independent Panel for Special Education Advice (IPSEA), which operates in England, have indicated to the AJTC that they believe that there is currently little incentive for LEAs to resolve disputes via alternative dispute resolution mechanisms. They feel that often LEAs have limited resources, and consider that it is easier to pass a matter straight to the Tribunal, rather than negotiate. Also, they consider that there is an incentive for the LEAs to let a matter reach a tribunal, as the tribunal decision can provide a lever for obtaining additional funding to meet the SEN requirement.

Question 9. What are the implications for extending to children access to Partnership Services and Independent Supporters? How can we ensure the provision of effective services for children?

The needs of children are likely to be different from parents. Additional training and resources would be needed for partnership services and independent supporters, to be able to assist children as well as parents.

Question 10. How should the right of appeal be promoted by LEAs and the SENTW so that children *in general* are aware of the right?

As above, the Children's Commissioner may have an important role in promoting awareness. Children in general may be made aware of the right through general civil and legal education in schools. However, it would be necessary to explain that children 'in general' are not actually affected by this right, in that it is quite a narrow entitlement for a small number of young people.

Question 11. How could children with special educational needs best be supported before, during and after an appeal?

- In order for children to exercise their right of appeal, there is a need for proactive, well resourced advocacy, support and representation services.
- Different levels of 'competence' will require different types of support, which should be tailored to the child's individual needs.
- 'Looked after' children will require particular and specific support, since the Local Authority looking after them will be the body against whose decision the child is appealing, raising potential conflicts of interest.
- Continuity in support before, during, and after the appeal is important, to allow the child to build up a relationship with their advocate and support networks.
- Any advocacy service must act in the needs of the child as a whole, not just their educational needs (by considering the emotional and other impacts on the child and the impact on family unit). It may also be desirable to allow for family counselling.
- Before an appeal, a child may need help with understanding the SEN decision-making process, and understanding why the LEA has reached the decision that they have.

- During the appeal, as well as access to an independent advocate, the child may need additional legal, emotional and financial help and support. As well as technical help, such as preparing documents, it seems likely that many children will require a representative at the tribunal hearing, especially relating to any appeals to the Upper Tribunal.
- As mentioned in the consultation paper, after the hearing, children may need help and support to understand the decision made by SENTW, and what it will mean for them. They may also need ongoing emotional and other support to deal with the implications of the SENTW decision.

Question 12. What should we consider in ensuring advocacy provision is available for children making an appeal to the SENTW?

- The advocacy service should be appropriately independent from the LEA.
- Advocates should have the appropriate skills, experience and training (see below for further details).
- Children should be given choices about their advocate wherever possible, including where and how meetings take place and how contact is maintained.
- Advocacy provision should reflect the needs of the child, and be developed in close consultation with them.
- Appropriate ethical and confidentiality standards should be developed, in close consultation with the child.
- Continuity of support should be maintained as much as possible (discussed above).
- Advocates could play a significant role in developing the confidence and skills of the child, to enable them to advocate for themselves in the future.

Question 13. What do you consider to be the main training and resource requirements to support children's full access to and use of their right to appeal?

An appropriate training package should be developed to ensure that independent advocates possess both:

- General advocacy skills, such as listening, understanding, counselling, relationship building.
- Specialist knowledge and understanding of SEN decisions and SENTW and Legal Aid processes and procedures.

It could be beneficial for the training package for independent advocates to be accredited (similar to the accredited training required for Independent Mental Capacity Advocates appointed under the Mental Capacity Act 2005).

It may also be beneficial to implement a review system, such as a peer review system, to ensure that consistent and adequate standards of advocacy are maintained.

Special training for tribunal panel members on dealing with appeals initiated by children and young people would also be needed. The Judicial Studies Board is directly responsible for overseeing the training of chairs and members of tribunals. Chapter 4 of their 'Equal Treatment Bench Book', updated in March 2008, deals with 'Children and the Courts' and may provide useful guidance.

Question 14. What could be done to ensure that children know about, and are able to access, Legal Aid where this is needed?

The independent advocate should ensure that children know about Legal Aid, and guide them through the application process.

The system by which a child would need to apply for 'exceptional funding' and show that a decision not to provide funding would contravene their right to a fair trial seems quite cumbersome.

Question 15. If a child cannot be represented through Legal Aid, how should the child be represented and what, if any, funding issues should be taken into account?

Advocates and legal representatives have different roles, requiring different skills. There may be some cases that merit legally aided representation, such as where the appeal concerns complex legal issues or where the LEA is legally represented.

If a child cannot be represented through legal aid, the independent advocate might be able to take on the representation role, provided they were appropriately trained.

Question 16. Are there any additional steps that should be taken to reduce the prospect of 'proxy appeals'?

As stated in the consultation paper, it is difficult at this stage to identify a solution to reduce the risks of proxy appeals, without restricting the entitlement of children to seek independent representation.

Question 17. What information would need to be collected, how and from whom, to assess these three areas of review?

- In due course, it might be beneficial to conduct interviews with the users of the system - children, families and independent advocates – about their experiences.
- Initial cases could be 'tracked' through the system, with user experiences evaluated in conjunction with the parties involved.
- The President of SENTW could play an important role in monitoring the operation of the new right for children to appeal, and provide this information to the Welsh Assembly Government through her Annual Report.