

The Additional Support Needs Update

Children's Rights | Equality | Inclusion



Issue 3 Winter 2018

Welcome back!

What a difference three months makes – out with the unusually hot summer, in with the dark nights and rain. My last edition aimed to provide advice for parents and carers on preparing for and settling into the new school year. It's now time to review how the school year is going so far.



In this edition, I focus on exclusion from school, be it on a formal basis or informally (e.g. part-time timetables or being regularly sent home early). Children with additional support needs are more than four times as likely to be excluded from school than those without. The situation is even worse for looked after children, who are more than six times as likely to be excluded. Exclusion has well documented long-term detrimental impacts on children and their families, extended well beyond the educational sphere.

So, what can be done? Calling out informal exclusions for what they are, rather than sweeping them under the carpet would be a good start. Properly resourced supports for both the children threatened with exclusion and those who work with them would also help. Removing children from school is not the right answer and will not build an inclusive education system.

The good news is that there are examples of good practice out there, and organisations willing to raise awareness. DIFFERabled Scotland hosted an exclusions seminar this October in Bishopbriggs. The event was aimed at parents, carers and families of children and young people with additional support needs and brought together an impressive line-up of speakers.

Charlene Tait of Scottish Autism spoke of recent research into exclusions affecting pupils with autism, the conclusions of which are relevant to all pupils with additional support needs. While further research is needed, it reveals the extent

to which exclusions and part-time timetabling are used to 'manage' children with autism, and the devastating impact that can have. The seminar also heard from the Head Teacher of a mainstream primary school about her positive approach to preventing exclusion. The event provided a space for discussion about exclusions in schools, and looked at innovative ways to reduce the use of, and reliance on, exclusion.

For those who may be dealing with exclusion, I provide information about the current state of the law on exclusion and disability, and some pointers on how to approach appealing an exclusion.

Finally, instead of sending Christmas cards, I have decided to send board games to some schools I have worked closely with over the course of the year. These schools will be getting a copy of Dixit each – a delightful game with beautiful artwork which encourages communication, imagination and storytelling. There are some great ideas on how to use Dixit in the classroom on this blog: <https://teachinggamesefl.com/2017/08/24/how-to-use-dixit-in-the-classroom/>

My next newsletter will be in 2019! I hope that you have a very merry Christmas, and a blessed and happy New Year.

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Earlier in the year, the national press reported on a case of mine in which a mother successfully claimed against Glasgow City Council for discriminating against her son, who has an Autistic Spectrum Disorder. The nub of that case was that he had been excluded, to the detriment of his mental health, for behaviour related to his disability. The behaviour in question included occasions when he was distressed, and when feeling cornered, he could lash out.

The Tribunal, in that case (and in other subsequent cases in which I have been involved) was satisfied that the child met the definition of a disabled person for the purposes of [Section 6 of the Equality Act 2010](#). This means that the protection against discrimination afforded by the Equality Act comes into play, and the education authority has an obligation to make reasonable adjustments for such disabled pupils at school.

This may seem obvious, but the law is not as straightforward as it could be.

The Regulation 4 exception

Reg 4 of the [Equality Act 2010 \(Disability\) Regulations 2010](#) sets out conditions that are not to be treated as impairments or disabilities – including things like voyeurism and a tendency to set fires. One such exception at Reg 4(1)(c) is “a tendency to physical .. abuse of other people”. Guidance issued in May 2011 suggested that this exclusion applies not only where such behaviour constitutes an impairment in itself, but where it “arises as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act”. In such cases, behaviour that fell within the exception was excluded from protection, but other effects of the disability were still covered.

This left disabled pupils who, like the child in the Glasgow City Council case, are excluded where the school environment has led to a violent response, struggling to challenge the exclusion.

Human Rights for all

A recent decision of the Upper Tribunal in England has changed this approach fundamentally: [C & C v The Governing Body of a School \(SEN\) \[2018\] UKUT 269](#).

The child, in that case, had autism, anxiety and Pathological Demand Avoidance (PDA). The appeal concerned a fixed term exclusion from the school for 1.5 days. The reason given for the exclusion was ‘aggressive behaviour’. The First Tier Tribunal dismissed the claim as although it considered that the child generally met the definition of a disabled person, he had been given the exclusion as a result of his ‘tendency to physical abuse’.

The family appealed on the basis that Reg 4(1)(c) should be disapplied to avoid a breach of Article 14 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#). Article 14 provides that the enjoyment of the rights conferred by the Convention should be secured without discrimination. One of the rights covered by the Convention is the right to education (in [Article 2 of the First Protocol](#)).



The Upper Tribunal agreed that Reg 4(1)(c) applied to both freestanding conditions as well as conditions arising in consequence of protected impairments. While there may be good social policy reasons to exclude free standing conditions ‘that are not generally recognised as disabilities’, the Secretary of State failed to justify, in the context of education, maintaining a provision:

“which excludes from the ambit of the protection of the Equality Act children whose behaviour in school is a manifestation of the very condition which calls for special educational provision to be made for them.”

The decision making process was fortified by the belief of officials, set out in a discussion paper in October 2017 and produced to the Tribunal, ‘that there would be fewer exclusions of disabled children from school if regulation 4(1)(c) applied only to free-standing conditions’

For those reasons, the Tribunal found that, in the context of education, regulation 4(1)(c) of the 2010 Regulations violates the Convention, and should not be applied in the circumstances of this particular case.

It is hoped that this judgement will lead to schools thinking twice before resorting to exclusion, and to more appropriate supports being put in place by budget holders at authority and government levels. Whilst the decision does not mean that disabled children cannot be excluded for violent behaviour, a school must be able to justify in law any such exclusions.



The case of **C & C v The Governing Body of a School (SEN) [2018] UKUT 269** represents a massive and welcome boost in protection from discrimination for disabled pupils. While the focus of that case was on the discrimination experienced by those children with a recognised condition that can result in a ‘tendency to physical abuse’, this year has also seen significant milestones in the wider fight against unlawful exclusions.

From my own casework, we have been successful in having the exclusion policies and practices of five different education authorities recognised as amounting to unlawful exclusion. Where exclusion rates are higher for pupils with disabilities than those without (as is often the case), all education authorities should take note. Such disproportionality could make them vulnerable to indirect discrimination claims.

In general, exclusion rates in Scotland have fallen year on year since 2006/07. In the past two years that movement has slowed. In 2010/11 there were 40 exclusions per 1,000 pupils falling to 27.2 in the year 2014/15 and remaining at a fairly static 26.8 in the year 2016/17. Of these recorded exclusions children with additional support needs are, on average, more than four times as likely to be kept out of school than those without a disability. For looked after children that number increases six-fold compared to the average, with 169 exclusions per 1,000 pupils.

Pupils who are excluded on an informal basis – being sent home from school part-way through a day, for example – or subjected to a part-time timetable to ‘manage’ their additional support needs are not recorded in these official statistics. Nor do they record those who are home-schooled and thus not included on the school roll. According to a recent [TES article](#), the numbers of children being home-schooled in Scotland has risen by 52% in five years, with one of the most common drivers for this being a failure of the school to meet the additional support needs of a child. The continued widespread use of informal exclusions is concerning and indicates a failure in the education system to adequately understand and support pupils with additional support needs.

The Right to be Educated

All children of school age have a right to school education. Formal exclusions, informal exclusions and part-time timetabling all run contrary to that duty, particularly when efforts to support the child on their return, or provide alternative means of education are lacking.

While home-schooling is an option open to all parents, and enthusiastically embraced by some, feeling forced to vote with your feet, and remove your child from school when their additional support needs are not met, raises serious system-wide questions.

Scottish Government Policy

The Scottish Government are striving for excellence and equity for all in Scottish Education, with a reduction of formal exclusions being part of that ambition. In July 2017 they published ‘Included, Engaged and Involved Part 2: a positive approach to preventing and managing school exclusions’, to support the focus on transforming lives, closing the educational attainment gap and opening the doors for opportunity for all. The guidance (which is very good, in my opinion) outlines approaches that can be used to prevent the need for exclusion in the first place. The guidance is clear in stating that informal exclusions should not happen at all, and that part-time timetabling is only legitimate for specific purposes over a limited and short time period.

Not Included, Not Engaged, Not Involved – A case study on exclusion

A recent report, jointly published by Children in Scotland, the National Autistic Society Scotland and Scottish Autism

considers the volume and type of exclusions reported among parents of pupils on the autistic spectrum. It also offers insight into the true impact that missing school has on children with additional support needs. While focusing on the experience of autistic children it offers a valuable understanding of the experiences of children with additional support needs being excluded from school.

The report, 'Not Included, Not Engaged, Not Involved' does not claim to be comprehensive but is a useful snapshot of the current position, and a call to action for true inclusion for all pupils. The research undertaken focused on parents of autistic children who had missed school within the last two years. A total of 1,417 responses were received covering all local authority areas in Scotland.

In the last two years:

- » 13% of children had been formally excluded.
- » 34% of children had been informally excluded.
- » 28% of children had been placed on a part-time timetable.
- » 71% of children had missed school for reasons other than a common childhood illness.

The latter statistic is particularly concerning as of those who had missed school, nearly 20% were out of school for over six months. Reasons for absences varied but almost two-thirds of parents reported that their child had missed school due to anxiety, with almost half saying their child refused to attend. Over a third of parents were making an active choice to keep their child out of school due to concerns surrounding support and the suitability of the school environment. This can lead to a voluntary removal of the child from school to educate at home, fuelling the increase in the numbers of children being home-educated in the last five years.

Missing school impacts children emotionally, increasing anxiety and stress levels. Families also suffer, with high levels of stress and anxiety being reported amongst siblings and parents of excluded pupils. Informal exclusions and part-time timetabling also causes parents difficulty in sustaining full-time employment. Many have had to give up work entirely to be able to pick up their child when the call from school (inevitably) comes.

Reversing the trend: From exclusion to inclusion

The report concludes with nine 'Call for Actions', to support those with additional support needs to remain in school.

1. Stop the use of unlawful exclusions and inappropriate use of part-time timetables.
2. Reduce the number of formal exclusions with additional support needs.
3. Improve the availability of specialist teachers.
4. Review the availability of appropriate placements for autistic children.
5. Enhance programmes of initial teacher training and CPD to improve understanding of autism.

6. Reinstate a minimum number of hours of education for children out of school.
7. Improve access to online learning.
8. Use of whole school approaches to raise awareness and understanding of pupils with additional support needs, including autism.
9. Awareness raising of children's rights to additional support for learning with children, young people and families.

Money for new initiatives is in short supply, but many of these actions rely more on a change of approach, understanding or policy. Support for children, support for their teachers and awareness raising within the school community in general is required. Where support is focussed and co-ordinated it can work and truly inclusive schooling can become the norm for children with additional support needs.

Innovate for success

There is good cause for optimism, too. There are schools bucking the exclusion trend and providing good templates for success. On realising that their exclusion rates were the highest in the education authority, Perth Academy have used Innovation Fund money to reduce exclusions and improve pupil wellbeing through an [eight-week inclusion programme](#). Focusing on planning, support and inclusion the rates of exclusions are now the lowest of all secondary schools in Perth & Kinross.

This year alone, the Tribunal have ordered three different local authorities to begin monitoring the rates of exclusions for disabled pupils, and to set strategic targets to reduce the "exclusion gap" between disabled pupils and non-disabled pupils. Two further authorities have agreed to do so as part of agreed settlements to similar cases.

At the recent DIFFERabled Exclusion Conference in October, the headteacher of Broomhill Primary shared key strategies she has successfully implemented to achieve lowered exclusion rates in her school, and to keep all children included, engaged and involved. Maintaining this focus on inclusion, the School Improvement Plan always includes a specific section on Inclusion.

The Future

The issue of exclusions for pupils with autism and other disabilities was brought to public attention with the publication of "Not Included, Not Engaged, Not Involved". There may now be the need for more research to follow up on this small study; to further raise awareness and support for those children with additional support needs facing exclusion; and to get a true sense of the scale of the problem of informal exclusions.

The more attention the issue receives and the more positive examples that can be shared – the quicker the march from exclusion to inclusion will be. The process has already begun, and we must do what we can to keep the momentum going and to press for lasting change.

To find out more please visit my [facebook page](#), [website](#) or send me a [tweet](#).

When a formal exclusion is imposed either by a school (for a fixed period, usually up to a maximum of 20 school days) or by the education authority directorate (on a permanent basis, removing the pupil from the school roll) – there is always a right of appeal.

Parents, young persons (aged 16 or 17) and even children with capacity can appeal against an exclusion from school. Aged 12+, the presumption is that the child would have the necessary capacity to appeal.

Here's my list of important points to remember about appealing against an exclusion.

1. There isn't a formal time limit to appeal against an exclusion to the education appeal committee. That being said, an appeal should be lodged by writing to the clerk of the education appeal committee without undue delay (the address should be on the exclusion letter or accompanying paperwork).
2. An education appeal committee will hear the appeal. An education appeal committee is made up of (usually) 3, (sometimes) 5 or (almost never) 7 people – a mixture of parent members, elected councillors and local people with a knowledge of education in that area. The councillors may not outnumber the non-councillors by more than one. The committee is often chaired by one of the parent members, and cannot be chaired by a councillor if they sit on the education committee of the Council.
3. An exclusion from school can take place even where the child is not at fault (e.g. the case of William Wallace v. Dundee City Council, 1999 <https://www.scotcourts.gov.uk/search-judgments/judgment?id=99ff86a6-8980-69d2-b500-ff0000d74aa7>). In fact, exclusions should not be primarily viewed as a punishment at all. According to the Court of Session, they should be seen as a "management tool" to be used in specific circumstances set out in law. (Glasgow City Council, Petitioners 2004 <http://www.scotcourts.gov.uk/search-judgments/judgment?id=645887a6-8980-69d2-b500-ff0000d74aa7>)
4. Broadly, the education appeal committee will be looking at whether or not the decision to exclude was reasonable in all the circumstances. The relevant circumstances would include things like what led to the incident for which the pupil was excluded, and whether the pupil has additional support needs and/or is disabled.
5. If the exclusion appeal is successful, then the exclusion will be "annulled" (cancelled) and it should be removed from the child's records. If it was a permanent or ongoing exclusion, the child will be allowed to return to school. The committee also has the power to uphold the exclusion and amend any conditions for readmission. This power is rarely used, and it is seldom worthwhile refusing to sign the return to school paperwork as this only leads to a longer absence from school. Any objections to the wording

can be added to the form on signature, or communicated separately in writing or e-mail.

6. In advance of an appeal hearing, you should be able to request access to relevant information concerning your case. This may be individual (e.g. a copy of the incident report) or more general. Statistics which show that a particular school has a higher rate of exclusions than other similar schools may be relevant. It may also be worth asking whether the rate of exclusions for disabled pupils or looked after pupils is higher than the overall rate in that authority.
7. Do check the Council's own policy on exclusions to make sure it has been followed correctly, together with any other relevant policies. The Scottish Government's guidance on exclusions "Included, Engaged, Involved" (2nd ed.) is very good and well worth a read. It includes checklists for those who are making decisions to exclude. Have all of the checklist items been complied with in this case? If not, why not?
8. You are entitled to be represented at an education appeal committee, but there is no Legal Aid available, so legal representation for parents is unlikely to be a practical option. You may be able to find an advocacy or support group who can help.
9. If your appeal is unsuccessful, there is a further right of appeal to the Sheriff Court within 28 days. The appeal is effectively a complete rehearing of the case. Legal Aid is available for appeals to the Sheriff Court, subject to financial eligibility etc.
10. Where the pupil excluded is disabled, and that disability was relevant to the exclusion, be sure to consider whether a disability claim to the Tribunal under the Equality Act 2010. You can pursue a disability claim of this sort within six months of the exclusion and can do so as well as, or instead of, an appeal to the education appeal committee. The Tribunal can only make an order where a breach of the Equality Act is proved, but their powers are much broader and can include things like an apology, amendments to policy, staff training etc.

This year, I have been concentrating on challenging exclusions which amount to unlawful disability discrimination, and it is a couple of years since I have conducted an exclusion appeal in an education appeal committee. However, the Tribunal can only deal with cases where there has been an allegation of disability discrimination, so for many cases there is no option but to attempt an appeal to the education appeal committee. I hope these pointers are helpful if you ever have to use them.

To find out more please visit my [facebook page](#), [website](#) or send me a [tweet](#).

2018 marks the 25th anniversary of Children in the Highlands Information Point Plus, known to most as CHIP+. Founded by a group of parent-carers in 1993, CHIP quickly became a lifeline to families in Highland. We provide information, advice and support to families in Highland, with children who have additional support needs, and to the professionals who support them.



A child or young person has additional support needs if they need more, or different, support to what would usually be provided to children or young people of the same age. This could be a child or young person with a disability, a chronic illness, caring responsibilities, mental health issues, difficult family circumstances or any other reason that may limit their ability to fulfil their potential. Over a third of children attending schools in Highland have additional support needs.

Caring for a child or young person who has additional support needs can be an anxious, lonely and overwhelming experience, and throws up all kinds of questions. That's where we come in! We can provide information, advice and support on a whole range of issues from condition-specific information to accessing services and funding. By far our biggest area of work concerns education – our working knowledge of the Additional Support for Learning legislation enables us to support parent-carers and professionals to collaborate effectively, to achieve the best possible outcomes for children and young people.

As one parent-carer puts it:

"You want your energies to be the best parent you can be rather than spend time trying to find out information, best education provision, if your child is entitled to any support and then trying to jump through the hoops for them to access it."

Without a doubt, our biggest asset is our team – Karen, Karen and Catherine have a wealth of knowledge, skills and experience. They truly listen and empathise with the families we support, and their warmth and passion for their work is palpable as soon as you meet them. They know the legislation, they know the systems and they're fully versed in all the complexities that come along with living in the Highlands.

chip+

Children in the Highlands Information Point

It's almost impossible to describe a typical day – the team's primary focus is always dealing with enquiries from parent-carers. They spend much of their time on the phone or in meetings with parent-carers, gathering the relevant information, exploring and explaining options, linking in to other services, whatever will best help meet the needs of each family and their unique circumstances. They're also out and about at outreach events, delivering training, producing resources and a whole host of activities, all aimed at supporting parent-carers, and ultimately, improving outcomes for children and young people.

It would be remiss of us not to mention the wider economic climate and the impact this is having on both families and services. While we advocate early intervention, we also recognise the challenging economic climate and are seeing the impact of ever dwindling resources and budget cuts across the board. We have seen a steady increase in the volume and complexity of requests for help from CHIP+.

Rather than being a first point of contact and signposting on to other services, the norm is working with families in crisis. Our support makes a real difference to these families when they need it most and we are working hard to ensure we can continue to provide this support for many more years to come.

When asked about CHIP+ one parent-carer said :

"If it wasn't for CHIP+ this ship would have sank a long time ago". Another told us the difference we made to their family was "Immeasurable, changed our lives for the better".

For us, the voices of our parent-carers are the most powerful.

Find us on Facebook: www.facebook.com/supportingparentcarers or visit our website for more info: www.chipplus.org.uk



Catch up with me here...

- » 25th Feb 2019
LSA Family Law Conference, Glasgow
- » 9 March 2019
Borders Additional Needs Group event (provisional)
- » 11th Mar 2019
CLT Family Law Conference, Glasgow
- » 13th Mar 2019
Contact Transitions Conference for parents, Glasgow



To find out more please visit my [facebook page](#), [website](#) or send me a [tweet](#).

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