



# The Additional Support Needs Update

Children's Rights | Equality | Inclusion



Issue 6 Winter 2020

## Welcome

Happy New Year, and welcome to my first newsletter of 2020. I hope that you had a wonderful Christmas break.

This edition offers up a review of the last year in education law and policy. A year in which the Scottish Government published revised guidance on the presumption of mainstreaming and committed to fully incorporating the UN Convention on the Rights of the Child into Scots law. Moreover, the Additional Support for Learning review got underway, with a report due to be published in March 2020. And it already looks like 2020 might be just as busy!

The importance of good foundations is highlighted in our "how-to" guide this month, which focuses on additional support needs within the early years' sector. With free early learning and childcare hours increasing to 1140 per annum from August 2020, now is the time to contact your local authority to apply, and raise any support needs your child has. Getting it right for every child, at every age – and particularly in the early years, is critical to successful long-term outcomes.

So, here's to a productive and positive new term and new year!



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## Legislation

The **Head Teachers Education and Training Standards (Scotland) Regulations 2019** require new Head Teachers in grant-aided and education authority schools to have gained the GTCS Standard for Headship. This does not apply to short term appointments (under 30 months). The requirement under Section 90A of the Education (Scotland) Act 1980 will take effect for new appointments as of 1 August 2020. There are equivalent provisions for independent schools, found in Section 98DA of the Education (Scotland) Act 1980 – but there are no current plans to introduce this requirement for the independent sector.

The **Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019** ensure that the eligibility criteria relating to student funding and tuition fees remain the same, post-Brexit.

The **Seat Belts on School Transport (Scotland) Act 2017** come into force for new vehicles as of 1 August 2018, and for an existing vehicle on 1 August 2021. This requires dedicated vehicles being used for school transport (whether home-school transport or school trip transport) to have seat belts on all passenger seats. This duty applies to all schools, including grant-aided and independent schools. There is a requirement to produce an annual seat belts statement. The first one was due after 1 August 2019. Scottish Government Guidance includes a useful template for this.

## Policy

### Presumption of Mainstreaming

In March 2019, the Scottish Government published revised guidance on the presumption of mainstreaming: “Guidance on the presumption to provide education in a mainstream setting”. The guidance spells out the benefits of inclusion: that it “affords all children and young people the opportunity to be a part of a community, boosting their emotional wellbeing and aiding the development of social skills.” It is also clear on the limitations of the presumption: “Being present in a mainstream school should not be the primary marker of successful inclusion.” There is a very welcome (and child-centred) acknowledgement of the importance of how the individual pupil experiences inclusion.

The guidance also helpfully identifies the four key features of inclusion: Present; Participating; Achieving and Supported.

### ASL Independent Review

An independent review, led by Angela Morgan, is currently underway. The review is founded on a continued commitment to a presumption to mainstreaming and on the need to ensure that children and young people’s additional support needs are met. This, it is said, will enable them to reach their full potential, with learning provision that best suits their needs.

The review has a wide remit and will be gathering views and experiences from a variety of stakeholders until the end of the year. A report with recommendations for next steps will be published in March 2020.

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## Complex Additional Support Needs Strategy

The Scottish Government recently published “The Right Help at the Right Time in the Right Place” – Scotland’s Ten Year Strategy for the Learning Provision for Children and Young People with Complex Additional Support Needs. The “Ten Years” in question are 2017-2026.

The strategy defines inclusive practice by reference to the same four key features of inclusion: Present; Participating; Achieving and Supported.

The strategy has a focus on commissioning services for children and young people with complex additional support needs, and seeks, in particular, to ensure that “the impact of any service commissioned results in capacity building across local authorities as well as at national level.” This suggests a move away from funding schools, and towards funding research, professional development and outreach services.

To sit alongside this document, an Operational Commissioning Strategy is being prepared. This will complement the Ten Year strategy, and is to be published “in late 2019”.

The strategy proposes a “phased release of funding from the current commitments”, with grant-aided special schools potentially having to adapt to a new funding landscape in which they access funding on a different basis – or not at all.

An evaluation framework for the strategy is to be developed, with annual reporting against that framework from 2021.

## Use of Restraint and Seclusion

The CYPCS published its first report using the Commissioner’s investigatory powers on the issue of restraint and seclusion in Scotland’s schools (“No Safe Place”). The investigation focused on two main issues: the existence and adequacy of policies and guidance; and the extent to which incidents are recorded and reported at local authority level.

The Commissioner found that while children’s rights are referenced in many policies, they are not given meaningful expression in terms of how they should impact on practice. There was also criticism of the Scottish Government for failing to produce a national policy to ensure consistent and lawful practice.

Several recommendations were made, including that local authorities should, as a matter of urgency, ensure that no restraint or seclusion takes place in the absence of clear, consistent policies and procedures at local authority level to govern its use; and that the Scottish Government should publish a rights-based national policy and guidance on restraint and seclusion in schools. Children and young people should be involved at all stages of this process to inform its development. The policy and guidance should be accompanied by promotion and awareness-raising.

This has been followed by a recently launched campaign from ENABLE: “In Safe Hands?”. The Mental Welfare Commission has also recently published strict guidance on the use of seclusion (although it does not explicitly apply to education contexts).

## UN Convention of the Rights of the Child

The UNCRC was 30 years old this year, and the Scottish Government have committed to its full incorporation into Scots law.

## Case Law

### Ashdown House case

"Bobby" was ten years old and a pupil at Ashdown House School. He has ADHD, sensory processing difficulties and emotional and social difficulties arising from trauma in his early childhood and the womb. He is a disabled person in terms of Section 6 of the Equality Act 2010. He was permanently excluded on 9 February 2019 for aggressive behaviour, including "37 incidents of unprovoked aggression".

A Tribunal found that the exclusion was not proportionate, and was, therefore, unlawful discrimination. While the school had made some reasonable adjustments, there were others which could have been made (including anger management sessions, consulting with the local authority, and allowing parents to seek a review of Bobby's Education, Health and Care Plan (EHCP), or seeking advice from CAMHS regarding his medication) but were not. The Tribunal ordered Bobby's immediate readmission and an apology.

The school appealed to the Upper Tribunal arguing that, for independent schools, the Tribunal is restricted to making a declaration of discrimination, and recommendations. The Upper Tribunal rejected this – the Tribunal has the power to order reinstatement to an independent school.

The Upper Tribunal also confirmed that the Tribunal does have the power to make an order for an apology, and issued extensive guidance on the factors to consider in doing so: "Before ordering an apology, a tribunal should always satisfy itself that it will be of some true value."

### Midlothian UT case

The first reported decision of the Upper Tribunal for Scotland from the Health and Education Chamber, albeit only on the narrow question of permission to appeal.

In this case, one of the grounds relied upon was the presumption of mainstreaming. The Tribunal require to consider whether any of the exceptions to the presumption apply or not. In the context of a placing request appeal, that means considering the particular mainstream school proposed by the education authority - without engaging in a comparison with the special school requested by the parent(s).

The Upper Tribunal also notes (albeit in passing) that the "availability or otherwise of outdoor education" is legitimately regarded as a factor which the Tribunal may consider when thinking about the extent to which a school is suited to the "age, aptitude and ability" of the child or young person in question.

### D (A Child) - UKSC

D was born in 1999. He has ADHD, ASD, Tourette's and a mild learning disability. D, with his parents' agreement, and with Birmingham City Council ('the Council') accommodating him under s 20 Children Act 1989, was moved to a residential placement, where he was under constant supervision and not allowed to leave the premises except for a planned activity. On his 16th birthday proceedings were issued in the Court of Protection for a declaration that the consent of D's parents meant that he was not deprived of his liberty at the placement.

The Supreme Court considered the case. Article 5 of the ECHR protects children who lack the capacity to make decisions for themselves from being arbitrarily deprived of their liberty. The degree of supervision to which D was subject was not normal for a child of 16 or 17. The fact that they were made in his best interests did not mean he was not deprived of his liberty. Parental consent could not substitute for the requirements of Article 5 for a lawful order.

Human rights are about the relationship between private persons and the state, and D's deprivation of liberty in the placement was attributable to the state. There is no scope for the operation of parental responsibility to authorise what would otherwise be a violation of a fundamental human right of a child.

The Court declined to rule on the situation concerning children under the age of 16.

### Poole Borough Council - UKSC

It is no longer the case that public policy excludes a local authority's common law liability towards children in the context of the authority's performance of its statutory duties, nor does it exclude a public body's liability for its negligence in the exercise of its statutory duties or powers.

There is a crucial distinction between a local authority who did a positive harm by way of negligence, and one which failed to exercise a power to prevent harm by a third party. A local authority could be liable in both scenarios but in the second only in circumstances where, for example, there had been an assumption of responsibility.

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



## How To: Secure Support For Your Child in a Nursery Setting

The Scottish Government are in the midst of a publicity drive to make parents aware of the increased funding available for early learning and childcare from August 2020. Currently, three and four-year-olds (and some two-year-olds) are entitled to 600 hours of free childcare per year. This is set to almost double from August 2020 to 1140 hours per year. At the same time, there will be a shift to a 'funding follows the child approach' which will be provider neutral and is to be underpinned by a National Standard that all childcare providers will have to meet.



To resource the inevitable leap in childcare demand, there will be an increased reliance on private and third sector nurseries and childminders. They will work in partnership with local authorities and will require to meet the new standard (along with local authority nurseries).

The National Standard contains ten criteria – including inclusion. The Standard states, in terms, that all childcare providers must comply with their duties under the Equality Act 2010; outlines how that will work in practice and confirms that the provider must be willing to provide appropriate support. This includes making any reasonable adjustments to the learning and care environment.

This is not new, of course. Children with additional support needs who attend a local authority or partnership nursery or preschool have the same rights as they would if attending school. The education authority must identify their needs and provide support.

Here are some useful pointers to remember:

- » Although education authorities are supposed to offer flexibility and choice for parents, placing requests are not permitted for pre-school placements unless the child in question has additional support needs. This does depend on the placement meeting the definition of a "school" – which is not always clear.
- » Children who meet the criteria are entitled to a Co-ordinated Support Plan on commencing their funded pre-school place. You do not have to wait until school. This applies whether the pre-school place is run by the education authority or by a partner organisation.

» Children with additional support needs are entitled to a pre-school transition process, which would involve the education authority and pre-school provider liaising with external agencies (including health and social work, where appropriate) to ensure that a) the child is ready for nursery and b) nursery is ready for the child! This should take place six months before the child is due to begin their early learning and childcare placement. Similar requirements also apply if there is to be a change in provider, and again for the transition to primary school.

» Both education authority and independent pre-school providers are subject to the Equality Act 2010, and must (among other requirements) make reasonable adjustments for disabled children. Depending on the type of provision, this may be under Part 3 (goods and services) or Part 6 (schools) of the Act, but the provisions are broadly similar.

» The Scottish Government have established an inclusion fund, operated by Children in Scotland, which allows funded providers of early learning and childcare to access funding for specialist training and equipment. Your own child's nursery may not be aware of this, so let them know!

Find out more: <https://childreninscotland.org.uk/our-work/services/the-early-learning-childcare-elc-inclusion-fund/>



The charity Mindroom was established by Sophie and Robin Dow in 2000, in response to their experience of a lack of support as parents of a child with learning difficulties. In 2015 the charity attracted a major philanthropic donation from Alastair and Elizabeth Salvesen, and the charity became known as (The) Salvesen Mindroom Centre.



The purpose of the charity is to support, inform and empower parents and carers, and young people, living with learning difficulties and those working with them. This is achieved by providing 1:1 advice and support, by offering training and a range of resources, and by investing in research.

In 2018, assisted by funding from the TUI Care Foundation, we initiated a pilot project supporting young people with learning difficulties into the world of work. Our contact with families of young people transitioning from school into adult life had raised an awareness of a lack of provision in this area, and we saw that these young people often left school with no experience of the workplace, despite the Scottish Government's 'Developing the Young Workforce' (DYW) initiative and its allied 'Work Placement Standard'. The focus of this pilot was to provide ten young people with a bespoke work placement (previously known as work experience) and to use this process also to inform and educate employers of the potential benefits of employing people with learning difficulties and to explicitly create a more neurodiverse workplace. In addition, we hoped to model a way of working that demonstrated how young people with learning difficulties could be enabled to have a relevant, challenging, enjoyable and appropriate placement, which would help them to make informed decisions about their future.

The pilot project focused on working in partnership with schools and ran extremely successfully, with positive feedback received from young people, parents/carers, schools and employers. We are now in the second phase, having extended the pilot to work with more young people in the senior phase of their school life as well as introducing group work with students in S3.

The model that we've developed follows a 5-stage progress:

1. We work with school staff to identify a young person who has learning difficulties (whether or not diagnosed) that would benefit from a supported work placement. Discussions take place with the young person as well as their parents/carers before making a formal agreement to take part.
2. Working 1-to-1 over several months with the young person, we establish their key skills and interests, and together identify a career goal. We agree on what support may be needed in a placement, and what the young person is happy to share about their needs with a prospective employer.

3. Having established the young person's career goal, we then find a suitable employer who can provide experience in the form of a placement. Collaborating with colleagues from DYW, Skills Development Scotland and schools themselves is immensely helpful in this. We always take the young person along to meet with a prospective employer to see for themselves where it could be and with whom they might work and, if the young person and employer are then both happy, a placement is arranged. Placements may be for a 'traditional' 1-week block but could equally likely be a day or part-day a week over a prolonged period. A learning goal is also agreed, which helps to give the placement a specific focus.
4. It's at this stage that the supported placement itself takes place. In our experience, when the right employer is found and the young person, who has been a part of the decision-making process, is suitably prepared then surprisingly little on-site support is needed. Regular visits to touch base and check on progress are, however, always important and we remain available to provide support at whatever level is most appropriate. During the placement, the young person keeps a diary of the activities they have undertaken and the skills that they have used and/or developed.
5. The final part of the process, once the placement is completed, is to review the experience and reflect on what the young person learned from it, before discussing how it has influenced their thinking about a future career path.

We have now begun to develop a training programme that will allow us, once completed, to share our methodology and the resources we have developed to support this work. Enquiries are welcome from those who would like to know more, including employers that may consider offering a placement.

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