

## **Advice on Support and Representation at Tribunal by Information, Advice and Support Services**

### **Introduction – Summary Advice**

1. I am asked to advise the Information, Advice and Support Services Network ('IASSN') on issues relating to support and representation for young people and parents at Tribunal by Information, Advice and Support Services ('IASS').
2. I would stress at the outset that I am only able to provide general advice to IASSN and this advice cannot be relied on individual cases. The issues which are the subject of this advice are heavily fact-sensitive and individual IASS will need to obtain advice on the facts of any particular case. I would of course be happy to advise any individual IASS or the IASSN further on these issues if the need arises.
3. In summary, I advise that it is a matter for each IASS whether it chooses to provide representation at Tribunal for young people and parents, subject to the terms of any relevant contracts and an assessment of the risks involved. Provision of such support falls clearly within the remit of IASS as set out in the SEND Code of Practice. Furthermore local authorities should not seek to prevent IASS from providing Tribunal representation, as to do so would undermine the 'arms length' nature of the service. Further it is essential that IASS are able to signpost young people and parents to effective sources of Tribunal representation, particularly if they are not willing or able to take on that role themselves.

## Background

4. The IASSN is based at the Council for Disabled Children (part of the National Children's Bureau), and supports and promotes the work of IASS across England. Under the Children and Families Act 2014, IASS have replaced former Parent Partnership Services as statutory providers of free, impartial and confidential information, advice and support on a range of matters concerning disabled children and young people and children and young people with special educational needs. Under section 32 of the 2014 Act each local authority is required to have at least one IASS in its area.

5. Section 32 provides:

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- (1) A local authority in England must arrange for children and young people for whom it is responsible, and the parents of children for whom it is responsible, to be provided with advice and information about matters relating to the special educational needs of the children or young people concerned.
- (2) A local authority in England must arrange for children and young people in its area with a disability, and the parents of children in its area with a disability, to be provided with advice and information about matters relating to the disabilities of the children or young people concerned.
- (3) The authority must take such steps as it thinks appropriate for making the services provided under subsections (1) and (2) known to –
  - (a) the parents of children in its area;
  - (b) children in its area;
  - (c) young people in its area;
  - (d) the head teachers, proprietors and principals of schools and post-16 institutions in its area.

(4) The authority may also take such steps as it thinks appropriate for making the services provided under subsections (1) and (2) known to such other persons as it thinks appropriate.”

6. In essence, English local authorities are obliged to secure the provision of advice and information to children for whom they are responsible or who are in their area, and their parents, about matters concerning the special educational needs and disabilities of the children concerned, as well as to take appropriate steps to make such services known to specified persons, including the parents and the children themselves (as well as such other persons as the local authority thinks appropriate).
7. Section 32 of the Act thus contains the key duty pursuant to which IASS are provided ('the section 32 duty'). I understand that while most IASS are provided by local authorities around 25% are provided by voluntary sector organisations. The duty is for local authorities to 'arrange' for IASS to be provided, and not to provide IASS themselves. Essentially, local authorities have an obligation to secure the provision of IASS, but it is left to the judgment of each local authority as to precisely how, and by whom, the services will actually be provided.
8. The Code of Practice ('CoP') for SEN and disability was introduced pursuant to section 77(1) of the 2014 Act. Section 77(4) provides that a range of persons and bodies including local authorities 'must' have regard to the CoP when exercising their functions under Part 3 of the Act.
9. Chapter 2 of the CoP is entitled 'Impartial information, advice and support', and concerns the information, advice and support ("IAS") which local authorities 'must' provide for 'children, young people and

parents' covering special educational needs, disability, health and social care.

10. Paragraph 2.4 of the CoP notes that IAS should be provided through a 'dedicated and easily identifiable service'. It refers to the fact that local authorities have 'established Parent Partnership Services to provide information, advice and support to parents in relation to SEN', and that many local authorities provide or commission IASS 'for young people'. Paragraph 2.4 goes on to say that local authorities should 'build on' these existing services, to provide the IAS detailed in Chapter 2 of the CoP. Such services should be impartial, confidential and accessible, and should have the capacity to handle face-to-face, telephone and electronic enquiries (CoP, para. 2.5, emphasis added).

11. Chapter 2 of the CoP then goes on to give advice on the scope of the role of IASS. At paragraph 2.19, the services which the CoP states that local authorities 'should' provide include (emphasis added):

'Individual casework and representation for those who need it, which should include:

- support in attending meetings, contributing to assessments and reviews and participating in decisions about outcomes for the child or young person
- directing children, young people, parents and those who support and work with them to additional support services where needed, including services provided by the voluntary sector. These services should include support relating to preparing for adulthood, including housing support, careers advice and employment support.'

Help when things go wrong, which should include:

- supporting children, young people and parents in arranging or attending early disagreement resolution meetings
- supporting children, young people and parents in managing mediation, appeals to the First-tier Tribunal (Special Educational Needs and

Disability), exclusions and complaints on matters related to SEN and disability

- making children, young people and parents aware of the local authority's services for resolving disagreements and for mediation, and on the routes of appeal and complaint on matters related to SEN and disability (see Chapter 11, Resolving disagreements)'

## Advice

12. As set out above, the CoP therefore specifies that the role of IASS includes 'individual casework and representation for those who need it' and 'supporting children, young people and parents in managing...appeals to the First-tier Tribunal'. It therefore seems to me to be clear that the role of IASS under the CoP extends to providing representation to families involved in Tribunal appeals where this is necessary.<sup>1</sup> This may be in cases where the young person or parent is unable effectively to represent themselves but cannot access legal representation or appropriate representation from any other source. I address situations where the young person or parent lacks capacity to decide to appeal at the conclusion of this advice.

13. A local authority should not therefore place any unjustified restrictions on the support offered by IASS to young people and parents in relation to Tribunal appeals. To do so would not be consistent with the fundamental principle that an IASS is an 'arms length' service. See para 2.8 of the CoP: 'information, advice and support should be impartial and provided at arm's length from the local authority and CCGs.'

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<sup>1</sup> I note that the statutory duty under section 32 is focussed on information and advice, but the CoP clearly extends the role of IASS to the provision of 'support'. It seems to me that this is a permissible extension.

14. It will be a matter for each IASS to determine whether to provide Tribunal representation itself or whether effective representation can be secured by signposting young people and parents to the voluntary sector. In particular each IASS will need to determine whether it is willing to have its staff appointed as 'representatives' for the purposes of rule 11 of the Tribunal Rules<sup>2</sup>. It is important to note that it is only if a person is appointed as a 'representative' that they will be able to speak on behalf of the young person or parent at the Tribunal.
15. Under rule 11(1), a party may appoint a 'representative' who will be able to do anything the party could do on their behalf, other than sign a witness statement or an application notice (if not a legal representative).
16. However under rule 11(5):
- '(5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who...with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.'
17. IASS will therefore need to decide:
- a. Whether they are willing to have their staff formally appointed as 'representatives' under rule 11(1); and / or
  - b. Whether their staff can provide representation and assist in presenting parents' and young people's cases at hearings in accordance with rule 11(5), subject to the permission of the Tribunal being granted in each case.

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<sup>2</sup> The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, as amended. Available at <https://www.gov.uk/government/publications/health-education-and-social-care-chamber-tribunal-rules>

18. It will be important for each IASS to bear in mind that a 'representative' appointed under rule 11(1) will be expected to liaise with the local authority throughout the appeal.<sup>3</sup> If an IASS is unwilling to take on this obligation then it may be that instead permission is sought for the IASS staff member to represent the young person or parent at the hearing and assist them in the presentation of their case in accordance with rule 11(5). The IASS can then support the young person or parent to prepare the appeal themselves without having the formal responsibilities of a 'representative' appointed in accordance with rule 11(1).
19. IASS will need to ensure that the decision as to whether to provide any form of 'representation' at the Tribunal is consistent with (1) any contractual relationship with the local authority in the case of services provided by voluntary organisations and (2) individual employment contracts for IASS workers. I would observe that such contracts should not be drafted in a way which frustrates the purpose of the provision of IAS. If contracts do not facilitate the provision of representation which the IASS deems necessary then they may need to be amended, with specific advice sought.
20. IASS (particularly those who are 'in-house' services) will also need to be sure that any potential conflicts of interest are recognised and managed. This is particularly the case in my view where the IASS worker who will be representing the young person or parent (whether under rule 11(1) or 11(5)) is directly employed by the local authority. Young people and parents will need to be absolutely sure that their representative is acting solely on their behalf. Young people and parents should in my view be informed that the IASS worker is a local

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<sup>3</sup> See regulation 11(4); the local authority 'must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party'.

authority employee and asked to agree that they remain happy to be represented by them. Furthermore issues such as confidentiality and data protection need to be addressed; see my separate advice on these points. It would not in my view be appropriate for there to be any possibility of the local authority accessing records relating to the role of an IASS worker as a representative of a young person or parent, other than in exceptional circumstances such as child protection concerns.

21. All of the above in essence requires the IASS to be genuinely 'arms length' from the local authority, as the CoP mandates. Finally, an IASS (particularly an in-house service) may want to distinguish between workers acting as a formal 'representative' under rule 11(1) and assisting young people and parents to present their case under rule 11(5). It seems to me that the less formal role under rule 11(5) carries less risk of a conflict of interest, although that risk will still need to be carefully managed.

22. IASS will also need to consider the wider risks inherent in deciding to provide any form of representation, including the need to have adequate and appropriate insurance in place. Again specific advice should be sought if IASS have any concerns in this regard.

23. I note that the Quality Standards for IASS state as follows:  
'4.2 The IASS offers impartial support tailored to the individual (up to and including SEND Tribunal), which may include:

- casework support
- representation
- an independent supporter
- key working'

24. This is consistent with the views I express above.

25. It is important to stress that representing a young person or parent at the Tribunal does not require legal qualification, nor would a member of IASS staff be acting as a legal representative unless they were appropriately qualified (and they must not give any impression to the contrary). This remains the case if they are formally appointed by the parent or young person as a 'representative' within the meaning of rule 11(1).
26. Finally, it is important to note that the statutory scheme makes provision for cases where young people and parents lack capacity to appeal to the Tribunal, within the meaning of the Mental Capacity Act 2005. Under sections 2 and 3 of the Mental Capacity Act 2005, it is likely that the relevant questions will be whether the young person or parent can (1) understand the information relevant to the decision as to whether to appeal to the Tribunal and (2) use or weigh that information as part of the process of making the decision.
27. In cases where the young person or parent lacks capacity to decide to appeal, under section 80 of the Children and Families Act 2014 and regulations 63-64 of the Special Educational Needs and Disability Regulations 2014 decision-making powers transfer to:
- a. A 'representative' of a young person (i.e. a court appointed deputy or a person with power of attorney, in both cases covering decisions in relation to education, health and care), or if there is no 'representative' the young person's parent; and
  - b. A 'representative' of a parent.
28. As such IASS will need to be careful to identify cases where young people or parents may lack mental capacity to bring their own appeal to the Tribunal and ensure that the appeal is lodged instead by the 'alternative person' identified above. If IASS are unsure how to proceed in such cases then specific legal advice should be sought.

## Conclusion

29. Looking at matters in the round, the duty in section 32 of the Children and Families Act 2014 as explained in chapter 2 of the CoP seems to me clearly to extend to the provision of advice and support in relation to Tribunal appeals. There is no statutory bar to the IASS providing representation at Tribunal, although equally there is no express statutory duty for them to do so. As such it seems to me to be open to each IASS to reach a decision about the nature and extent (if any) of the representation they are willing to provide for young people and parents faced with the daunting task of appealing to the Tribunal. This decision should take into account relevant contractual obligations and a proper assessment of any risks involved, including the risk of a conflict of interest.

30. If the IASS decides not to provide such representation itself then it must be able to provide information and advice on where effective representation can be obtained locally, taking into account that many young people and parents will not be in a position to pay a representative.

Dated 3 May 2016

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