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SENDIST Discrimination Case

The work of NICCY recently received media attention through the publicity surrounding the case of Alistair Close. In this article I want to explore the case in more detail by looking at the broad themes that were involved and also reflect on the judgement in light of the United Nations Convention on the Rights of the Child (UNCRC) and the law and practice surrounding special educational needs provision generally.

NICCY became involved in this case in early 2012 when we were contacted by Alistair's mother who was seeking advice regarding ongoing issues that Alistair was experiencing in school. Despite efforts to rectify Alistair's situation, due to ongoing issues within the school, Alistair was unable to return to school and has since been educated through a combination of home tuition, provided by the Education and Library Board and a work based training programme. NICCY provided ongoing casework support to the family since that date and have been involved in meetings with the Education and Library Board and the school to try to resolve issues arising in relation to Alistair's educational provision. Alistair has a diagnosis of high level frequency hearing loss and concentration difficulties and associated learning difficulties particularly within literacy, which has been defined as a mild specific literacy/dyslexic type difficulty. Further Alistair has high levels of anxiety. Alistair has a Statement of Special Educational Needs which is maintained by his local Education and Library Board (ELB) as per the Education (NI) Order 1996 Part II, article 15. The statement sets out his various diagnoses and the provision that was to be made to meet his educational needs. Specifically, Alistair was to have access to a sympathetic member of Pastoral/Counselling Staff on a regular basis to monitor his adjustment to school and to ensure that all staff working with him were aware of and took into account his difficulties.

Alistair, through his mother, brought an application to the Special Educational Needs and Disability Tribunal (“the Tribunal”) under the Special Educational Needs and Disability (NI) Order 2005. The family claimed that Alistair had been discriminated against by the school in how they handled his disability and the provision of education to him. NICCY undertook to provide legal advice and assistance to Alistair and funded Counsel to represent him at the hearing. NICCY was particularly concerned that Alistair’s voice be heard at the Tribunal and that he was able to participate in all aspects of the case.

Under our founding legislation NICCY is required to have regard to any relevant articles contained in the UNCRC when conducting our work. The UNCRC was the first human rights treaty that contained a specific reference to disability (within article 2 on non-discrimination) and a separate article 23 which was exclusively dedicated to the rights and needs of children with disabilities. The UNCRPD also contains provisions which specifically reference children with disabilities, at article 7 and the rights of persons with disabilities within education under article 24. NICCY had regard to all of these provisions during the preparation of this case.

The UN Committee on the Rights of the Child issue General Comments which set out a further explanation of the rights and gives guidance regarding the interpretation of same. The UN Committee’s General Comment No. 9 sets out clearly the Committee’s concerns regarding the longer term impact about discrimination in the educational setting. At paragraph 8 they state:

“The lack of appropriate education and vocational training discriminates against them (children and young people with disabilities) by denying them job opportunities in the future”.

The main issues of concern for Alistair and his mother were the lack of use of assistive technology within the school environment, the bullying that he endured and difficulties with his classroom assistant.

During the hearing, Alistair himself gave evidence in a mature and insightful way. He told the panel of his experiences in school and talked in particular about the fact that due to issues within the school he had not been able to complete his GCSE’s and feels that his future opportunities in terms of employment for further education are limited as a result, echoing the concerns of the UN Committee as set out above.

In relation to the issue of assistive technologies, Alistair claimed that the school were not supportive of his use of an Alphasmart computer, which is a word processing device which saves banks of words that are typed into it and are often used to assist young people with literacy difficulties in the classroom. During his last 2 years at primary school Alistair had been trained and supported to use the device to assist with his written work. However, when he transferred to Post Primary School the majority of the class work was completed on pre-printed work sheets which made the use of the device cumbersome and Alistair asserted that the teachers dissuaded or prevented him from using the device. Alistair's claim was that, as a reasonable adjustment for his disability, the school should have adapted their teaching modalities to allow for the use of either the Alphasmart or other assistive technologies but they failed to do this, resulting in him experiencing discrimination. The school gave evidence that they were not aware of Alistair ever having been prevented from using the device but did concede that there were occasions when working on any type of device would not have been possible for example when pre-printed worksheets were being used or when only short sentences were necessary. The Tribunal found that "no imagination or effort was put into enabling use of equipment such as the Alphasmart computer" by the school.

The Department of Education has issued best practice guidance to schools regarding the use of assistive technologies in its Resource File for Schools to Support Children with Special Educational Needs. This guidance states:

"Knowing how to provide suitable software and assistive technology puts teachers in a better position to meet the learning needs of all children."

and goes on to state:

"It is the responsibility of each school to address accessibility needs for pupils."

Alistair advised the Tribunal that he was bullied by his peers, teachers and classroom assistants. In his pupil contributions to the Annual Reviews of his Statement in 2010 and 2011 Alistair had noted that bullying was an area he found difficult in school. He highlighted to the Tribunal that the behaviour of his class peers and the bullying of him in corridors increased his anxiety in the school setting. Alistair recounted that the school had promised that they would take this on board but nothing happened. Alistair gave examples of the bullying that he endured. He recalled that other pupils would make noises and use high pitched squeakers which meant that due to his hearing aid he would end up

lying on the floor in agony. According to Alistair the teachers either didn't believe him when he said that he was being bullied or said it would be sorted out, but it wasn't.

The school confirmed that they were aware of the incident regarding the use of high pitched squeakers and confirmed that they had investigated the matter and had disciplined the pupils involved.

The UN Committee are alert to the issues which can be faced by all children, and in particular children with disabilities in the school environment. General Comment No. 13 which relates to the right of the child to freedom from all forms of violence references bullying as constituting "mental violence" and also recognises that bullying: "not only harms a child's physical and psychological integrity and well being in the immediate-term, but often has a severe impact on his or her development, education and social integration in the medium and long term."

The UN Committee addressed the issue of bullying specifically when they considered the report from Great Britain and Northern Ireland in 2008. Following their consideration of the State Party report they produced concluding observations which noted, at paragraph 66(c), that bullying is a serious and widespread problem which may hinder children's attendance at school and successful learning. They went on, at paragraph 67(f), to recommend that the State Party:

"intensify its efforts to tackle bullying and violence in schools including through teaching human rights, peace and tolerance."

NICCY acknowledge that efforts have been made by the Department of Education in relation to tackling bullying. The Minister for Education has recently commissioned a review of bullying and that the next phase will be the implementation of the recommendations. However, it is clear that for Alistair, the issue of bullying remained and had a very negative impact on his school experience.

The Tribunal also found that the schools pastoral side was lacking and stated:

"there was no psychological safety in the school, for instance, no evidence of any buddying system. Pastoral care was poor and no strategies were identified in Alistair's individual education plan to meet his pastoral needs."

Given that the ELB had added a clear provision to the Statement dealing with their expectations of the pastoral care that Alistair would receive NICCY is concerned that both the school and the ELB did not then make this provision for Alistair.

Alistair gave evidence regarding his experience of working with classroom assistants. Alistair's main issue was the apparent lack of consistency between the approach of the teachers and the classroom assistants. Alistair recounted that the teachers would explain things in a certain way and then the classroom assistants would propose a different way of working which caused him confusion. When Alistair would question this, the classroom assistants would take him outside of the classroom and tell him off. He alleged that this happened a lot. Alistair also claimed that the classroom assistant, despite being allocated to him on a one to one full time basis, was often not available to assist him as they were given tasks by the teacher, for example photocopying handouts for the use of the class. Finally, Alistair raised that although the school had agreed to produce his worksheets on yellow paper this was not done by the classroom assistants. There is evidence to suggest that people with dyslexic traits are assisted by having reading materials printed on coloured paper. In failing to make this reasonable adjustment, Alistair claimed the school discriminated against him.

The school contended that Alistair would have been supported by the classroom assistant at all times and that the assistant would perhaps reinterpret the teacher's instructions to make them more manageable for Alistair but would not give contradictory instructions. The Tribunal found that:

“the classroom assistants’ working relationship with Alistair did not empower him to learn but rather frustrated him; the school could have done much more to support Alistair in his learning, for example a classroom assistant could have organised printing of worksheets on yellow paper at the beginning of the day rather than during class, leaving Alistair alone. There was generally little evidence of any monitoring by the school of the effectiveness of the classroom assistant.”

The Tribunal reflected the ethos of Article 12 of the UNCRC in one of its findings in relation to the classroom assistant. They found:

“the voice of the child was not given the significance and value it merited for example when the teacher gives instruction and the classroom assistant interprets it her own way with no opportunity for the child to express his own view. This leads to frustration and disengagement, particularly when he is then frequently reprimanded by the classroom assistant.”

More broadly in relation to the general attitude of staff towards Alistair, the Tribunal found:

“little evidence of empathy for Alistair’s circumstances and difficulties being fostered amongst the staff in the school but on the other hand there was evidence of attitudinal discrimination”

It is clear that the provisions of the UNCRC touch on every aspect of this case. The rights to education are set out at articles 28 and 29 of the Convention. Article 28 sets out the substantive right to education while article 29 sets out the aims of education. It is the interplay between these rights that is of interest in this case. The right to education is also protected under Article 2 of Protocol 1 of the European Convention on Human Rights, as enshrined by the Human Rights Act 1998. While arguably the school and Education and Library Board met Alistair’s substantive right to education, it could be argued that the aims of this education were not met in full.

The first General Comment issued by the UN Committee was on the aims of education, as per Article 29 of the CRC. This General Comment focused on the issue of discrimination in the overall context of education and stated:

“Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.

...

Discrimination against children with disabilities is also pervasive in many formal educational systems and in a great many informal educational settings, including the home... All such discriminatory practices are in direct contradiction with the requirements in article 29(1)(a) that education be directed to the development of the child’s personality, talents and mental and physical abilities to their fullest potential.”

General Comment No. 9 is on the rights of children with disabilities. The Committee noted that children with disabilities were continuing to experience serious difficulties and facing barriers to the full enjoyment of the rights enshrined in the Convention. The Committee however were keen to emphasise that the barrier is not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily lives. It could be argued that Alistair experienced barriers to his enjoyment of his right to education due to attitudinal obstacles within the school environment, given the Tribunals finding that there was attitudinal discrimination from staff.

The outcome of this case was that the Tribunal determined that the school had discriminated against Alistair and directed them to issue a written apology to him. While this matter has resolved for Alistair, it is clear that the ethos of the UNCRC has not yet become embedded in practice within schools.

NICCY have received a number of referrals following this case from both parents and young people who are experiencing similar issues and are seeking our assistance to resolve same. We are working with these families to ensure that a resolution can be found which is in the best interests of the child and ensures that their rights are safeguarded, promoted and realised.

NICCY has also been contacted by a number of education stakeholders who are interested in hearing more about this case as it may influence their policy and practice development.

NICCY will continue to work with all education stakeholders to ensure that future policy and practice is in line with the UNCRC and that the rights and best interests of children, both with and without disabilities, are delivered upon within the educational system. The decision of the Tribunal is currently under review.

*Both Alastair and his mother have given us consent to use their names in this article.

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