



INTRODUCTION AND OVERVIEW

QUARTERLY DIGEST OF PUBLISHED DECISIONS ABOUT THE NDIS FROM THE ADMINISTRATIVE APPEALS TRIBUNAL.

This digest has been prepared by the Living with Disability Research Centre at La Trobe University. It aims to summarise a selection of AAT decisions about the NDIS published in the preceding three months and highlight overarching themes.

By drawing out the implications of AAT decisions for interpreting the provisions of the scheme the digest will help to inform scheme participants, supporters and advocates and those involved in its administration. The primary intended audience are people who have some familiarity with the scheme, including Partners in the Community organisations, advocacy organisations, peak bodies and disability service providers.

The digest has several parts.

- An explanatory section, introducing the AAT and the core concepts in the NDIS legislation, with links to more detailed information.
- A thematic summary of AAT decisions summarised in this edition of the digest.
- Decision summaries, each organized under the headings: decision category, questions addressed, facts, Tribunal reasoning, outcome and significance.

This work is funded by the Brotherhood of St Laurence, to help support the development of a sustainable NDIS that is true to its original purpose. It is intended to be freely available. The authors are Dr Darren O'Donovan, Professor Christine Bigby and Professor Jacinta Douglas from the La Trobe University Living with Disability Research Centre.

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THE ADMINISTRATIVE APPEALS TRIBUNAL AND THE NDIS

What are applicants' appeal rights under the NDIS?

Any person that is directly affected by a reviewable decision of the NDIA can submit an application for an Internal Review of a decision. Section 100 of the NDIS Act provides for review of a range of agency decisions. The two most common are *access decisions* and *decisions to approve the supports in your plan*.

A request for internal review of a decision must be made **within three months** of receiving notice of the decision from the NDIA. It can be made orally or in writing. The internal review is undertaken by the NDIA. The NDIA member who works on the internal review will not have been involved in the original decision. This person will decide whether to confirm, vary or set aside and substitute the original decision.

Asking for a review of a decision to approve your initial statement of supports is **different** from asking for an **unscheduled review** of an existing NDIS plan. Unscheduled reviews of NDIS plans are most commonly requested when there is an important change in your circumstances, for instance if your day to day support needs have significantly changed.

If they are unhappy with an internal review outcome, how do applicants access the AAT?

The AAT **cannot** review a decision until you have had an internal review performed by the Agency.

An application can be made to the AAT within **28 days** of being notified of the Internal Review decision. Individuals should be informed of their right to appeal a decision in the letter they receive advising them of the outcome of their internal review.

The AAT has a case management policy which ensures that parties attempt to conciliate an outcome prior to a hearing. The latest statistics indicate that 95% of NDIS AAT matters are settled before hearing. This quarterly digest contains those matters in which settlement was not possible and the Tribunal had to take a formal decision.

How does the AAT go about its work?

The Tribunal's role is to make the *preferable* decision on the material in front of it. It "stands in the shoes" of the original decision-maker, and has all the powers of that person. Applicants to the Tribunal will usually leave the Tribunal with a full decision, not just a limited finding that the original decision was wrong.

For those working the disability sector, published Tribunal decisions therefore represent best model examples of NDIS decision-making. The long term goal for everyone is to align "first instance" frontline decision-making with the emerging approaches we are seeing in the Tribunal.

What are the outcomes the AAT can order?

The AAT can **affirm** the decision – which means it is left unchanged. It can **set aside** the original decision, **and substitute** what it views as the preferable outcome. It can also **vary** parts of the decision. It also has the ability to **remit** a matter – where it sends the appeal back to Agency (this usually accompanied by general directions as to how the case should then be determined)

Does a decision to vary the original decision, or substitute a new one, mean the original one was incorrect?

No. A decision to change an outcome may be based on new information or reports which emerged after the original decision or internal review. An AAT matter is a fresh consideration and the Tribunal will consider the available information and testimony at the time of hearing. Equally a decision to leave a decision unchanged, might be driven by information tendered by the Agency which was not available originally.

Is the AAT bound by the Agency's policy (operational guidelines)?

As the Tribunal is standing in the shoes of the Agency decision-maker, they are required to take the Agency's operational guidelines into account. Policy is essential to administration as it promotes consistency.

Policy itself however, must be employed in a way that is consistent with the NDIS Act and the rules, in particular the purposes and principles outlined in the legislation.

The Tribunal can depart from the general approaches outlined in Agency operational guidelines, where there are “cogent reasons to the contrary”. This includes where the rigid application would work an “injustice in a particular case”, by not furthering the purposes and principles in the legislation. The *weight* or degree of importance that is given to policy depends on the circumstance.

It is also important to underline that policy cannot force a decision-maker to arrive at a particular conclusion in individual cases. Policy exists to guide or channel a decision-makers’ judgment discretion not to “lock in” specific outcomes. This is reflected in the Agency’s own drafting; the guidelines themselves are written to leave room for exceptions and compelling circumstances.

Are Tribunal decisions binding precedents?

When you first read these summaries, you should be struck by how fact and circumstance driven the Tribunal’s decision-making is. This is particularly the case under the NDIS Act where every decision centres on valuing each individual’s support needs, family circumstances and personal goals. This is always why statements within this quarterly digest do not, and cannot, constitute legal advice, being for informational or study purposes only.

Tribunal decisions are not formally binding precedents in the way that higher court decisions are, but they have a very significant persuasive force, especially given the importance attached by administrators to consistency. The last section of each case note identifies the general principles that might be taken from a case. It is essential however, for the reader to always consider if a future case is sufficiently similar or different on the facts.

It is important to note that the Agency or the applicant may choose to challenge a past Tribunal decision in the courts. This has so far occurred in the Federal Court cases of *McGarrigle* and *Mulligan*. In a judicial review, the Court will ask if the Tribunal has taken a lawful decision. The Court will audit the Tribunal’s reasoning for certain legal flaws, like failure to take into account a relevant consideration or a misunderstanding of the Act. If the Court finds these criteria of lawfulness are not met, the Tribunal would hear the matter again and retake the decision without the flaws.

Where can I find support to make an AAT appeal?

It is important to note that contacting the Agency and requesting an internal review of the decision is the first step in every case. As part of the new participant pathway, the Agency is investing heavily in improving its internal appeal processes.

- The Australian Government funds services to assist people applying for review of NDIS decisions. You can contact **a support person in your area** who can help you understand the AAT process, assist with preparing documents for the review, attend conferences and hearings with you, and help you to put your case to the AAT. The support person is independent of the AAT and the National Disability Insurance Agency. Their services are provided free of charge.
- You can find NDIS Appeals providers, state and territory advocacy providers as well as National Disability Advocacy Program providers through the new online Disability Advocacy Finder, made available by the Department of Social Services: **[Access the Disability Advocacy Finder](#)**
- You might also be eligible for legal services provided by the Legal Aid Commission in your state or territory if the Department of Social Services determines that your case raises complex or novel issues. You can ask a support person about this.
- You can ask another support person, family member or friend to help you with your case or support you on the day
- You can engage your own lawyer to represent you.

Where can I read the full versions of the decisions?

The decisions are available on publicly accessible database, Austlii: <http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/AATA/>

NDIS: CORE CONCEPTS

For ease of reference, this section summarises the main criteria for access and funding under the NDIS. It also explains the various sources of law and policy that can shape an NDIS decision.

What are the criteria for accessing the NDIS?

There are two main pathways for entering the Scheme. An applicant can, firstly, meet the **disability requirements**. These are outlined in section 24 of the National Disability Insurance Scheme Act, which provides that the Agency must be satisfied that:

- a The person has a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or one or more impairments attributable to a psychiatric condition;
- b the impairments are likely to be permanent;
- c the impairments result in substantially reduced functional capacity or psychosocial functioning in undertaking, at least one of the following activities; communication; social interaction; learning; mobility; self-care or self-management;
- d The impairments affect their capacity for social or economic participation; and
- e The person is likely to require support under the NDIS for their lifetime.

There is also an alternative, **early intervention pathway**, which has the following requirements:

- a The person's impairment is likely to be permanent;
- b Early intervention supports are likely to benefit the person by reducing their future needs for disability related supports;
- c The National Disability Insurance Agency is satisfied that the provision of early intervention supports will improve, mitigate, avoid the deterioration of, the person's functional capacity; and
- d the Agency is satisfied that early intervention support for the person is most appropriately funded or provided through the NDIS

What is the test for funded support under the NDIS?

In order to be funded under the NDIS, a support must be found to be "**reasonable and necessary**". The criteria for this are defined, in general terms, by section 34 of the Act:

- a The support will assist a participant to reach the goals and aspirations outlined in their participant statement.
- b The support will facilitate the participant's social and economic participation.
- c The support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
- d the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;
- e the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide
- f the support is most appropriately funded or provided through the NDIS, and is not more appropriately funded or provided through other general systems of service delivery

What are the NDIS rules?

The NDIS rules are binding secondary legislation passed to add further detail and explanation to broad terms of the Act. The most prominent rules which will feature regularly in this quarterly digest are:

- 1 *NDIS (Becoming a Participant) Rules 2016*:
<https://www.legislation.gov.au/Series/F2016L00544>
- 2 *NDIS (Supports for Participants) Rules 2013*:
<https://www.legislation.gov.au/Series/F2013L01063>

These rules "unpack" some of the broad terms in the legislation, for example by providing certain examples or relevant principles or criteria which must be applied.

What are operational guidelines?

Operational guidelines are statements of approach prepared by the National Disability Insurance Agency. They outline the Agency's internal policy in relation to making various types of decisions. They are not permitted to contradict the Act or the NDIS rules, and have been drafted to be consistent with them. They aim to guide, (not control), decision-makers in achieving consistent results, while still responding to the individual participant or applicant.

As the Tribunal “stands in the shoes” of the decision maker, it will apply policy unless doing so would fail to promote the principles and purposes of the legislation. The role of policy is explained further in the Tribunal explainer section, and in the cases themselves.

The operational guidelines which feature most prominently in this quarterly digest are:

- *The Operational Guideline on Access*
<https://ndis.gov.au/operational-guideline/access.html>
- *The Operational Guideline on Planning*
<https://ndis.gov.au/operational-guideline/planning.html>
- *The Operational Guideline on Including Specific Supports in Plans*
<https://ndis.gov.au/Operational-Guideline/including.html>
(this lays out important principles in relation to specific supports such as transport, carers and others)

THEMES RAISED IN NDIS AAT DECISIONS

This short section highlights some of the key themes arising from the AAT decisions summarised in this edition of the digest.

By looking across AAT decisions we aim to capture the way the AAT is dealing with some of the common issues raised in appeals against NDIS decisions. As with the summaries, the circumstances of each individual must be considered in conjunction with broader themes. In this edition, we highlight five issues that have featured in these decisions:

- The purpose and significance of support coordination
- Maintaining capacity of family and unpaid carers
- Perspectives on choice
- Importance of evidence
- Interfaces between NDIS and other systems

Purpose and significance of support coordination

Support coordination has been a vexed issue, with constantly evolving signals from planners and the NDIA about availability, purpose, and continuation across plans. Core expectations, skills and or qualifications of support coordinators, like those of planners have not been clearly articulated. The purpose and importance of support coordination has been considered in several decisions ([2018] AATA 983, 431, 692). These decisions suggest the importance of support coordination for particular participants or circumstances. These circumstances include where participants:

- have complex or high intensity needs;
- have needs which are not stable;
- have cognitive disabilities and are likely to have difficulties in finding and coordinating their own services
- do not have family or other supporters with the knowledge or resources to take on this role or taking on this type of role may unnecessarily increase the strain on family or supporters;
- live in rural locations where there are limited services which are difficult to engage or organise.

The purposes of support coordination are also considered in some of these decisions. Purpose related factors may include: ensuring funds are not underspent; funds are used flexibly for the intended purpose; maintaining records of interactions with professionals; and commissioning and overseeing highly specialized services. For example, one case [Way] talks about the importance of a support coordinator exploring ways of building the capacity of a participant to be present or participate in community activities by finding or adapting suitable activities and ensuring appropriately skilled support. The implications here are that a support coordinator should have skills relevant to the specific needs of the participant. Coordinators need to understand the type of enabling support, activities and places that might assist a person with complex needs and challenging behaviour to build their capacity for participation, and the capacity to commission such support.

Maintaining capacity of family and unpaid carers

Increasing the economic participation of family or unpaid carers was a key rationale for the NDIS, but provision of respite care has been a thorny issue. Three decisions ([2018] AATA 431, 692, 980) address this issue directly, or consider what can reasonably be expected from family or unpaid carers before they are stretched too far. These decisions reiterate the significance of funding support hours or respite care that will reduce unsustainable demands on unpaid carers, and as a result enable them to continue in a caring role and or take up or increase paid employment. These decisions suggest that in making a case for funding support, families need to articulate the benefits to them, as well as to the participant, either in terms of employment or sustaining their caring capacity.

Perspectives on choice

Choice and the dignity of risk underpins the NDIS. Various perspectives on choice are considered in several of these decisions. They touch on constraints and expectations about well informed choices ([2018], AATA 387, 983, 355). If a person wants to become an NDIS participant, they must exhaust all treatment options likely to remedy the condition. Otherwise they may be found ineligible as their condition is not likely to be permanent. This requirement may mean that a person could have little practical choice about accepting treatment or complying with a rehabilitation program. The decisions also suggest that participants' choice about use of funds for a particular activity or purchase of equipment may be mediated by a judgement about the degree of risk to the person or others involved, a person's understanding of the costs and benefits involved, or the extent to which the choice is likely to further a person's goals as articulated in their plan. These decisions suggest that the NDIA will have to make judgements about possible risks to endorsing a purchase, or a disability service provider delivering a service. The criteria for making such judgements however, are still emerging.

The importance of evidence

The NDIS relies on potential participants making claims for eligibility and funding for supports. Many of these decisions highlight the heavy onus placed on participants to provide evidence to substantiate claims about things such as medical conditions, history of treatment, the rationale for particular types of support and prior contact with the Agency. They also show the importance of the way in which evidence is framed, the terminology that is used and the coherence of the argument to the conclusions that are drawn. These decisions strongly support the point repeatedly made in the literature about individualised funding schemes, that participants able to present a logical, clear and evidence based rationale for their claims will do best in the NDIS. The decisions also review clear lessons for medical, allied health and other professionals about writing reports with purpose, based on an understanding of the language, rules and principles that underpin the NDIS. This type of report is very different from those required by Centrelink for things such as a disability support pension. The other lesson is much broader and about equity; ensuring robust skilled support to make claims and manage funding is available to people with disabilities without strong resourceful families or support networks.

Interfaces between the NDIS and other service systems

Whether support should most appropriately be funded by the NDIS or another service is a key issue in many NDIA decisions. This issue was considered in four of the decisions summarised ([2018] AATA, 431, 3052, 386, 692). These decisions reinforce the fuzzy rather than clear boundaries that differentiate the NDIS from other sources of funding or services. They reiterate the importance of presenting a clear unequivocal evidence based case to the NDIS about the benefits, efficacy and purpose of support requested, and the very individualised nature of decision making that must occur. Being able to articulate the primary purpose of support is one of the most effective ways of determining whether the NDIS provides that support. Is it, as in the case for ZCPY for the purpose of educational attainment and thus the responsibility of the education system? Or directed at increasing functional capacity to socially participate, in which case responsibility lies with the NDIS? Or in the case of LNMT is the purpose of a multi-disciplinary assessment to inform the provision of support rather than simply confirming the existence of disability? Interesting, too is the difference between whether another agency actually does provide funding for something or simply should be responsible for it. In the LNMT case the AAT found there was no other body in position to fund the assessment in question. While there will be gaps in services which the NDIS will not fill, the work of the Tribunal will be vital to ensuring such unmet needs are identified clearly and responsibility is clearly allocated to relevant agencies and governments.

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DECISION CATEGORY: ELIGIBILITY

POMEROY AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 387 (6 March 2018)

Questions addressed

Permanence, early intervention, health system interface

The focus of this decision was whether the applicant's conditions of morbid obesity and chronic osteoarthritis were permanent. In order to access the NDIS, there must be "no known, available and appropriate" treatment likely to remedy the person's impairment.

Facts

The applicant in this case suffered from morbid obesity and chronic osteoarthritis. Medical evidence at the time of the access request was that she required full time assistance with the daily activities of bathing and showering, toileting, dressing and grooming, and transportation. She had specific difficulties transferring in and out of bed, and was at risk of pressure injuries. The applicant was also moving to a new private rental property that featured steps and a bathroom that would be inaccessible to her. She had been rendered housebound by her existing property, which had stairs.

Before the AAT hearing into the matter, the applicant had been hospitalised with a bowel obstruction. The hospital rehabilitation team had found her to be an unsuitable candidate for rehabilitation as she had been bedbound for the past eight months. This reflected a pattern of functional decline and a failure to carry through multidisciplinary teams' recommendations after previous hospital discharges. At the time of the hearing an occupational therapist report tendered by the applicant indicated that she was currently unable to access the community to attend medical and social appointments due to lack of connection with services.

Tribunal's reasoning on eligibility

An applicant can access the NDIS by satisfying the *disability requirements* under section 24 or the *early intervention requirements* under section 25. The Tribunal found that neither pathway was available to the applicant. Her conditions were not permanent.

Disability requirements

In relation to the first pathway under section 24, the Tribunal did find that the applicant's conditions of morbid obesity and chronic osteoarthritis were disabilities under the Act. Morbid obesity could constitute an impairment due to the loss of functioning that often accompanies it. The Tribunal also found that the applicant had substantially reduced capacity for mobility and self-care. The impairments also affected her social and economic participation.

The evidence, however, failed to establish that the applicant's morbid obesity was permanent in the sense required by the Act. The NDIS rules require that no "known, available and appropriate" treatment "likely to remedy" the condition exist. The relevant medical evidence showed that the applicant had not followed up on a recommendation to consult a rheumatologist about further treatment in her previous hospital discharge. The Tribunal noted that the possibility of the applicant undertaking gastric surgery was unexplored in the medical evidence before it. It did accept that the applicant's weight and hernias made the possible surgery complex and risky. The applicant had undergone a strict supervised weight reduction diet of Optifast® shakes for three months in 2017, but had failed to continue this. Ultimately the Tribunal concluded that the evidence failed to establish that the applicant's osteoarthritis and morbid obesity were likely permanent.

The section 24(1)(e) criterion - that an applicant must be likely to require support under NDIS for their lifetime - was also not met. The Tribunal found that until the applicant was treated, the impairments were best understood as conditions that are most appropriately treated and provided for through the health system.

Early intervention pathway

The applicant was also unable to become an early intervention participant in the Scheme. The permanence requirement also that applies to that pathway – and the Tribunal applied its earlier reasoning that the applicant needed to follow up on existing treatment options.

The Tribunal emphasised that the lack of adequate treatment and support being experienced by Ms Pomeroy was an issue to be addressed by the health system. The required supports would be directed at securing her access to clinical treatment and rehabilitation. As a result, the Tribunal found that early intervention support was not most appropriately funded or provided through the NDIS (section 25(3)).

Outcome & significance of the decision

The Tribunal affirmed the original decision that the applicant was not eligible for the NDIS.

This decision underlines the principle that an applicant must have availed of relevant treatment options prior to accessing the NDIS. This applies to both long term and early intervention pathways for accessing the scheme. The decision highlights the importance of state rehabilitation and community health services, which enable those currently undergoing treatment to effectively access and pursue it. It also underlines the centrality of diagnostic services to defining and exploring remaining treatment options prior to an individual accessing the NDIS.

DECISION CATEGORY: ELIGIBILITY

BBMC AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 386 (6 March 2018)

Questions addressed**Early intervention, permanence, health system interface**

This was the first published Tribunal decision addressing how to apply the eligibility criteria to a psychosocial disability, specifically severe anxiety and depression.

The decision provides an example of where a psychosocial condition will be found to be 'likely permanent' for the purposes of the Scheme. The applicant, however, failed to gain access under the disability pathway, as the requirement of substantially reduced functional capacity was not met. She also failed to gain entry to the early intervention cohort, as the Tribunal found that the supports she required were more appropriately provided within the health system.

Facts

The applicant in this matter has had mental health impairments since childhood, experiencing extremely severe range anxiety, stress and depressive symptoms. Since 2007, she had visited approximately four psychologists and five psychiatrists and pursued many medications for her conditions which had not successfully addressed her condition. She was currently having weekly psychotherapy sessions using cognitive behaviour therapy to "develop strategies to identify and achieve goals" with the aim of improving self-worth and developing friendships.

In relation to her functioning, the applicant was living on her own in a rented apartment, was able to drive a car for short distances, play hockey in a supportive team environment and babysit for two or three hours for three afternoons each week during school term. The applicant has had a mental health care plan since 2012, entitling her to ten Medicare-subsidised psychological therapy sessions each calendar year. She had access to a rebate of approximately 28 per cent of the session fee for a further five psychological therapy sessions per year under her chronic diseases management plan. At the time of the Tribunal hearing, she was in receipt of the disability support pension and had been forced to abandon her private health insurance due to its very high cost.

Tribunal's reasoning on eligibility

An applicant can access the NDIS by satisfying the disability requirements under section 24 or the early

intervention requirements under section 25. Counsel for the applicant conceded she did not meet the disability requirements in section 24 of the Act.

The Tribunal focused upon early intervention requirements in section 25. The Agency conceded that, based on the extensive treatment history, her condition was permanent. It also conceded that providing her with psychotherapy supports would reduce her future need for supports and alleviate the impact of her condition. The core of the dispute was, therefore, whether the psychotherapy support was more appropriately funded through the NDIS or the health system.

The Tribunal found that the psychotherapy was more appropriately funded by the health system. Under paragraph 7.7 of *National Disability Insurance Scheme (Supports for Participants) Rules 2013* the health system remained responsible for "supports related to mental health that are clinical in nature, including acute, ambulatory and continuing care". Under paragraph 7.6, the NDIS was to be responsible for supports relating to the "person's functional ability, including supports that enable a person with a mental illness or psychiatric condition to undertake activities of daily living and participate in the community and social and economic life."

The Tribunal found that while they did "assist her functional ability", the psychotherapy sessions more clearly fell within the category of "clinical care in the community".

Outcome & significance of the decision

The Tribunal affirmed the original decision that the applicant was not eligible for the NDIS.

The decision provides an example of a circumstance where a mental illness was found to be "likely to be permanent". The case also explores the dividing line between the health system and the NDIS. The Tribunal did not provide generally applicable definition of "clinical treatment" or "functional support", nor was there an extensive explanation on why psychotherapy fell within the health system.

The decision also reflects a broader tension in the eligibility criteria for early intervention – that in order to enter the NDIS, the person must identify the future supports they would put in their plan as a participant. It is interesting to consider whether the outcome of this case would have been different if the applicant had requested a *different early intervention support* – such as a supported employment or community based programme to increase her functioning or life stage outcomes. The case underlines that prospective early intervention participants should consider what type of supports they need and whether they are functional rather than clinical.

DECISION CATEGORY: ELIGIBILITY

FURMINGER AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 1872 (26 June 2018)

Questions addressed

Permanence, substantially reduced capacity, disability requirements, early intervention requirements

Facts

The applicant in this matter had a degenerative back condition, PTSD and depression. Until he was made redundant in 2016 the applicant has had a variety of employment including as a truck driver and a peer support worker.

Tribunal's reasoning on eligibility

The Tribunal was unable to find the applicant's depression and PTSD were "likely to be permanent". While the applicant gave evidence that he had been an inpatient in 1999 and on antidepressant medication, there was no records of this treatment. The applicant's GP and clinical psychologist did not refer to a PTSD diagnosis in their reports, and the applicant had no records prior to 2017 which would document the treatment of the condition. While the GP's report stated that the applicant's report stated the condition was likely to be lifelong, it did not include reasons for that conclusion. The applicant's psychologist described some symptoms reported by him, but one of these (the avoidance of community and social events) was contradicted by the applicant's participation in a model railway club. The Tribunal ruled that "on the present state of the evidence" there was insufficient evidence to find that the mental health conditions were likely to be permanent.

The Tribunal was also not satisfied that the applicant had a substantially reduced capacity in one of the required fields. In relation to *social interaction*, it noted the applicant's past employment history and willingness to look for part time job in June 2016. In relation to *learning*, it stressed that the applicant had managed to achieve a Certificate III in Community Services while taking his current antidepressants. As regards *mobility*, the Tribunal noted that despite the chronic back condition, the applicant had cycled and swum in the past two years and was able to travel by car and public transport. Finally, in relation to *self-management*, the Tribunal stressed that the applicant had undertaken an interstate trip to Victoria by himself and arranged motel accommodation and his meals.

The Tribunal also found that the impairment did not affect the applicant's capacity for social and economic participation.

Outcome & significance of the decision

The case provides an example of where conditions do not have sufficient functional impact to result in "substantially reduced capacity" under the Act. The decision is also useful for its definition of the various activity domains. Social interaction was defined as including "interaction on a more-or-less regular basis with people [the applicant] feels comfortable with". Self-management referred to "a cognitive capacity to organise one's life, to plan and make decisions, and to take responsibility for oneself".

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

PEROSH AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 980 (23 April 2018)

Questions addressed**Transport, substantially reduced capacity to take public transport**

Perosh is the first published Tribunal decision since the Federal Court ruling in *McGarrigle* and the introduction of revised operational guidance on transport. The decision is an example of the type of compelling reasons which justify increasing funding for transport beyond the three levels specified in the Agency's current transport guideline (outlined in Part 12 of *Including Specific Supports in Plans Operational Guideline*)

The decision also underlines the importance of occupational therapist evidence when evaluating whether an individual experiences "substantial difficulty" in taking public transport.

Facts

The applicant in this case was a young man with spastic quadriplegic cerebral palsy. The central ground of his appeal was his need for increased transport funding in order to complete a certificate IV (NRT) TAFE course. In his previous NDIS plans, he had been approved for level 2 funding of \$2,625.00. The relevant operational guideline states that "in exceptional circumstances, participants may receive higher funding if the participant has either general or funded supports in their plan that enable their participation in employment."

Mr Perosh sought funding for taxi fares to attend his TAFE courses 31 weeks of the 2018 academic year: \$100 per trip, total \$6,200. The applicant also sought funding for taxi fares to attend a gym once a week for fifty two weeks, at a total cost of \$1,664. He also sought funding for a weekly outing (accompanied by his support funding) for a further \$1,664.

In the Tribunal hearing, the family testified that they were currently funding the cost of taxis to the TAFE and the gym. Even with the NSW Taxi Transport Subsidy Scheme, this led to them being out of pocket for \$250 a week. Under cross examination by counsel for the agency, the applicant's mother noted that they were not in a financial position to purchase a modifiable vehicle and had travelled to the hearing using a four wheel drive vehicle which can accommodate the applicant's manual wheelchair. The son's electronic wheelchair could not be put into the back of eleven year old, open utility vehicle as it would be exposed to the elements. The family also testified that they used a step ladder to get the applicant into their vehicle, which was "not a safe means of transfer".

Counsel for the Agency argued that the applicant's mother could drive her son to the Pennant Hills Railway Station on two mornings a week. The applicant could catch the train from Pennant Hills Railway Station to the St Leonard's Railway Station, both stations being wheelchair accessible. He could then catch an accessible bus to the TAFE. On returning each afternoon, he could book a wheelchair taxi to take him from the Pennant Hills Railway Station to his home. This would fit within the level 2 transport funding (\$2,625.00) provided within the original NDIS plan.

Tribunal's reasoning on transport supports

The Tribunal first found that the cost of the proposed taxi transport was attributable to Mr Perosh's disability. It was not an ordinary day to day living cost, which must not be funded under Rule 5.1(d) of the *NDIS Support for Participants Rules*.

The Tribunal found that Mr Perosh was not able to take public transport without substantial difficulty. It made direct comment on the failure of the Agency to obtain an independent occupational therapist report to support its belief that Mr Perosh should take public transport. In the absence of this, the Tribunal relied upon the evidence tendered by the Perosh family and the general medical review conducted by his treating doctors. This noted that he fatigues easily, was reliant on a wheelchair and required "full assistance for activities of daily living, including toileting and dressing as well as bathing".

In addressing the family's possible role in transporting the applicant, the Tribunal found that it was not reasonable to expect his mother or father to drive him to and from TAFE or the gym. This likely reflected the Tribunal's desire to protect their employment arrangements as both were working full time (the mother left work at 3 and completed her two remaining hours at home). As the applicant's father had an established pattern of taking his son every Saturday afternoon and taking him to the shops after work on two or three evenings each week, the Tribunal found that the requested funding for social trips was not reasonable and necessary.

Outcome & significance of the decision

The Tribunal found the taxi fares from Mr Perosh's home to the TAFE and to the gym were reasonable and necessary supports which were to be fully funded under the National Disability Insurance Scheme.

The decision is notable for the manner in which it approved funding exceeding the guideline transport amounts. This reflects the fact that while the Tribunal will have due regard to Agency policy, it must always assess what is value for money and what the reasonable for the family to provide in the particular circumstances. Here the evidence disclosed an inability to take public transport, the parents were in paid employment and had no access to a modified vehicle due to limited means. These factors, and the direct connection between the transport and a young person's education and physical well-being supported more extensive funding.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

WAY AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 983 (11 April 2018)**Questions addressed****Capacity building, unspent funds, acquired brain injury, group home, support coordination, regional Australia, risk management**

This decision was an unsuccessful appeal for increased funding, in circumstances where there were large amounts unspent in the existing plan. It features the first published Tribunal discussion of some important future issues in the scheme. The first issue is when and how to take into account unspent funds when reviewing a plan or decision. The second is the circumstances in which a service may determine that delivering the planned supports is too risky, and how this should be communicated to the family in the context of the new NDIS system.

Facts

The applicant in this case had an acquired brain injury failing a car accident. She had highly individualised needs and found it difficult to respond to a standardised model of care. By her guardians, Ms Way requested an increase of funding to enable her to go on outings be included in her plan.

Tribunal's reasoning on supports

The parties were in agreement on the fact a further six hours of funding per week to enable two staff members to take the applicant on outings would benefit her. The Agency however, argued that there was already sufficient flexibility in the plan to allow the reallocation of money to this. Upon examination of the plan, the Tribunal found an underspend of over \$20,000 across the categories of capacity building (daily activity), capacity building (relationships), support coordination, assistive technology and home modifications.

In rejecting the additional funding, the Tribunal noted that the underspent money in Ms Way's core funding could be used to fund some outings. It also however, underlined that funding for additional outings was not appropriate where an individual might pose a risk to themselves or others. There was no evidence before the Tribunal that capacity building programmes had been used to lessen the applicant's behavioural difficulties. The Tribunal underlined the importance of prior planning and sequencing of supports to ensure the outings were undertaken safely.

The Tribunal underlined that in some situations, particularly in regional Australia, families will need to use funded support coordination. The support coordination budget should have to be used to identify suitable activities and modification and carry through the funding. Without prejudice to the family wish to advocate for Ms Way, a coordinator would have helped maintain records concerning her interactions with her doctors, physiotherapists, occupational therapists etc. This portion of the decision is significant for its emphasis upon the importance of support coordination in areas where there are 'thin markets' (a lack of services) and where the applicant lacks capacity. In some contexts, the non-delivery or underspending of a plan may point to the need for funded support coordination.

Outcome & significance of the decision

The applicant's request for additional funding was unsuccessful.

The decision shows that the under-utilisation of funding to the NDIS needs to be closely monitored by participants, planners and advocates. Decision-makers should examine what the underlying reasons for a failure to spend approved funds are. The Tribunal also underlined the importance of support coordination in regional Australia, where families may struggle to identify possible service providers. It is important to build the capacity of guardians to drive the implementation of NDIS plans.

Way is also the first published example of the Tribunal finding that a participant currently lacks the capacity to undertake a proposed support. Participants and planners should work together to consider how capacity can be built across plans. The Tribunal here underlined that Ms Way needed to build capacity by undertaking a behavioural programme prior to the additional outings. The sequencing of supports across the plans needs to be discussed with participants. A participant will have multiple future NDIS plans. Capacity can be built over time through incremental steps. This will also help avoid situations where a support fails, and progress not made due to insufficient capacity.

DECISION CATEGORY: AGENCY PROCEDURES (DELAY)

SIMPSON V NATIONAL DISABILITY INSURANCE AGENCY**[2018] AATA 1326** (22 May 2018)**Questions addressed****Access request, unreasonable delay**

This decision was the first published decision where the Tribunal found there had been an unreasonable delay in deciding an internal review of unsuccessful request to access the NDIS. Such a delay entitles an applicant to lodge an appeal directly with the Tribunal. The decision stresses that delays can be justified in complex cases, and that there is no mandatory number of days which must be complied with in all circumstances.

Facts

The applicant's request to access the NDIS was rejected in January 2017. On the 11 April, a representative of Alzheimer's Australia ACT, who were providing support to Mrs Simpson, rang the Agency. She made an oral request to appeal the access decision. Over the next few months, there was continual email and phone interaction with the Agency. A document entitled "application for review of a reviewable decision" was forwarded on Mrs Simpson's behalf on 29 November 2017. On January 4th, a representative of the Agency rang Alzheimer's Australia. They were informed that as the access decision was made in January 2017, an appeal could not be taken as it was outside the three month time limit under the Act.

Tribunal's reasoning on delays

The Tribunal found that a person does not have to make appeal request personally but can use their representative. They can also make the appeal request by phone and not writing. This is outlined in section 100(3) of the Act. The request was made on April 11th, and was within the three month limit for taking appeals.

The Tribunal found that failure of the Agency to take a decision within nine and a half months was an unreasonable delay. Mrs Simpson could therefore take her appeal to the Tribunal directly and did not have to wait for further agency action. The Tribunal found that the delay was unreasonable as there was nothing complex or unusual about the request, that would explain why such a long period of time had passed. It found that Mrs Simpson's case had fallen "between the cracks and was overlooked". The Tribunal noted that this situation was not unusual and it had encountered other people in Mrs Simpson's position.

Outcome & significance of the decision

The decision shows that those appealing NDIS decisions are entitled to have their appeals resolved in a reasonable amount of time. They are otherwise entitled to make an appeal to the Tribunal. This does not however apply to all cases where there is a delay of nine and a half months. In other cases, the delay may be justified due to complex issues, the need to analyse the file or for more time to gather information.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

MUNDAY AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 983 (11 April 2018)

Questions addressed

Assistive technology, risk management, the dignity of risk

This case was a successful appeal, where the Tribunal granted funding for the applicant's preferred wheelchair/mobility device. The decision underlines the importance of allowing people with disability to undertake activities which may involve a degree of risk.

Facts

The applicant in this case had an inherited degenerative condition which impairs walking due to spasticity and weakness of the legs. In his first NDIS plan, Mr Munday was denied funding for his preferred wheelchair, a Zoom 4WD Electric All-Terrain Vehicle. An occupational therapist from the local health authority had recommended the purchase of a Glide Centro.

Tribunal's reasoning

The Tribunal had to consider whether the Zoom vehicle was value for money compared to the Glide, and whether it was safe for Mr Munday to use.

The two chairs were similarly priced, with the Glide being slightly more expensive. The Agency argued however, that the Zoom vehicle had some limitations that would limit its benefits to Mr Munday. The Zoom could not be put into a wheelchair taxi or used on buses. The Glide also had fully adjustable seating and ability to tilt. This would be beneficial given the degenerative nature of Mr Munday's condition. Despite this, the Tribunal refused to find that the applicant's preferred Zoom vehicle would not be beneficial to him. It stressed the importance of choice under the NDIS Act. While the Zoom had limitations, Mr Munday believed that he would be more likely to use it for social participation. Section 4(4) of the Act emphasises that people with disability were to "be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports".

The Agency also argued that it should not fund the Zoom vehicle under NDIS Support Rules clause 5.1. This rule states a support should not be funded where "it is likely to cause harm to the participant or pose a risk to others". The Zoom's top speed was above that permitted on footpaths in NSW. The Agency noted that trunk strength was important for transferring into the Zoom, and the progression of the applicant's condition could make the vehicle unusable or unsafe.

The Tribunal rejected the safety argument. While there was a risk that Mr Munday's physical capacity could decrease, the lifetime of a powered wheelchair is from three to five years. The Tribunal underlined the importance of choice to the NDIS, stressing that Mr Munday was an adult and accepted that in seeking a Zoom vehicle "he runs the risk of being housebound again". The Tribunal noted that a speed inhibitor could be fitted to the vehicle and the Agency was required that the applicant submit the vehicle for regular inspections.

Outcome & significance of the decision

This decision is an example of how the principle of choice is respected and valued within the NDIS. Where an applicant prefers an option which has benefits and risks, their capacity to measure these should be respected. While there will be supports which cannot be funded on the basis of risk, any dangers can also be reduced by imposing requirements on their use in the plan. Participants should also be made aware of how their choice of vehicle might affect their future entitlement to transport funding and further equipment under the NDIS.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

PNFK AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 692 (28 March 2018)

Questions addressed
In home care, respite care**Facts**

The applicant in this case was a two and half year old girl who suffered severe hypoxic encephalopathy at birth. PNFK's care needs are profound and when she is awake, she cannot be left alone for more than a few minutes or she suffers distress. While she has a doubtful prognosis, the Tribunal noted that she is "real fighter and has pulled through every setback."

Her second NDIS participation plan enabled the family to use approximately 1,515 hours for PNFK's care – which was about 29 hours a week. By her parents, PNFK appealed for an increase in her hours of care as a necessary and reasonable support. PNFK's father was in a senior position, working about forty hours a week. Her mother was working 18.75 hours, in a permanent part time position and expressed a desire to supported back into the workplace.

Tribunal's reasoning on support funding

The parties agreed that the funded care hours should be increased, with the family requesting a rise to 3176 hours. The Tribunal found that the increase reflected the reality that caring for PNFK places strains on the entire family. The Tribunal noted that the high level of care required by PNFK left her parents with little time to care for her three siblings.

The Agency argued that care funding should not extend to those days where PNFK's mother was not working. The Tribunal however, noted that she had expressed a wish to undertake full time work. It found that it was "necessary to give her time to gear up" for full time employment. The issue could be reviewed when the plan concluded in six months, in meantime, the extra funding was to support her to transition to full time employment.

The second issue addressed by the Tribunal related to the funding of respite care hours. The Agency argued that families and informal networks were to provide basic respite care with only "additional care" being funded under the Scheme (Clause 7.11 of the NDIS rules). The Tribunal rejected this, noting that the Council of Australian Government Principles (COAG) principles support the principle that NDIS funding should be available for out-of-home care for children with disability, where they have additional needs due to their disability. The Tribunal

noted that there was "limited evidence" of any other available scheme or funding. While the family had used the Commonwealth Emergency Respite Service, this was mainly directed at families in crisis situations. Respite funding in this situation reflected the functional supports required by PNFK and would ensure the sustainability of the carers' role.

Outcome & significance of the decision

The issue of in home care is a prominent one for the NDIS. This case concerned a situation of complete dependence with parental carers who are in employment. Rather than simply giving the total number of hours, it is helpful to share the full design of the care component of the plan, which shows the balance struck between care, employment and other family responsibilities:

- 1 PNFK was given 100 hours of support coordination as a high intensity participant.
- 2 On standard work weeks from Monday to Friday, PNFK be given 9 hours of care from 8:30 am to 5:30 pm, and 3 hours of care to be used flexibly either before 8:30 am or after 5:30 pm;
- 3 On standard weekends, 4 hours of care for PNFK on both days, to be used flexibly;
- 4 On two weekends, PNFK be given 24 hours care, totalling 48 hours;
- 5 On two long weekends, 24 hours of paid care for PNFK totalling 72 hours;
- 6 On two weeks of the four weeks of the annual leave of PNFK's Father and Mother, 24 hours of care for PNFK per day being 168 hours per week, totalling 336 hours for the two weeks;
- 7 For the remaining two weeks of annual leave, 9 hours care of PNFK on week days, that is from Mondays to Fridays, and four hours of care on each Saturday and Sunday;
- 8 For the remaining public holidays, 9 hours of care for PNFK at the public holiday rate; and
- 9 For the two public holidays which fall on weekends, 4 hours of care for PNFK at the public holiday rate.

The case reflects other recent Tribunal decisions which uphold the role of the NDIS in providing respite care where no other service is available and the child has very high intensity needs. The Tribunal placed emphasis upon ensuring the sustainability of the carer's role by protecting their future employment and offering support for self-care and care of other siblings.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

LNMT AND NATIONAL DISABILITY INSURANCE AGENCY

[2018] AATA 431 (6 March 2018)**Questions addressed****Support coordination, respite care, funding of cognitive assessment, social participation funding**

This Tribunal decision received widespread public coverage as the decision increased the applicant's plan by tens of thousands of dollars. It provides an important analysis of how NDIS plans should be structured to ensure that a carer's role is sustainable. This is achieved by ensuring that the carer or participant are not at serious risk of harm and through the funding of respite where appropriate. The decision also saw funding approved for a multidisciplinary cognitive assessment which was found to be key to designing and delivering NDIS supports effectively.

Facts

The appeal concerned an eleven year girl in foster care based in Tennant Creek in the Northern Territory. She qualified for the NDIS due to blindness, epilepsy and cognitive impairments. The Tribunal noted that she faced "enormous challenges" due to the complexity and significance of her disabilities. Her intellectual disability interacted with her blindness in complex ways, and led at times to difficult behaviours.

Through her guardian, the applicant requested increased funding for support coordination (104 hours over six months for a total of \$12,228.32). She also sought additional funding for two support workers to take her to the pool for 5 hours per week. The appeal also included funding for a multidisciplinary cognitive assessment of her condition worth \$1,020.00. Finally, additional respite care support was sought for disability supported accommodation for seven days every 6 weeks.

Tribunal's reasoning on supports

Given the length of the decision we will deal with each requested support separately.

Support coordination

The Tribunal rejected the agency's position that eighty hours of support coordination were sufficient. It funded the requested 104 hours due to the complexity and changing nature of the applicant's need and the level and variety of support she requires. These are the key factors when considering the extent of support coordination funding. It was not reasonable to expect the applicant's guardian to perform this administration on top of her "already enormous workload". In complex cases, support coordination can be justified by the need to ensure carers and applicants focus on securing outcomes for other funded supports.

Social participation (pool trips)

The applicant enjoyed going to the local swimming pool, which was helping her confidence and muscle tone. Given her weight was now 43 kgs, the Tribunal accepted that she needed two adults supervising her to undertake this activity safely. In one previous instance, the applicant suffered an epileptic fit, with her guardian somehow successfully removing her from the pool "due to an adrenaline rush". The guardian successfully argued that this support should be fully funded as she was unable to take the applicant to the pool on week days. The carer was in full time employment and already took the applicant to a range of activities such as school, medical appointments and recreational activities.

Multidisciplinary cognitive assessment

The Tribunal decided to approve funding for a multidisciplinary assessment of the applicant's cognitive assessment. It rejected the Agency's submission that it was more appropriately funded by the health system. The Tribunal stressed that, in presenting its case, the Agency had failed to identify any other body or agency with a responsibility to meet this cost. The Agency may be able to prepare a more detailed response in future cases.

The boundary between health and the NDIS will often turn on what the fundamental purpose of the support is. While its comments were brief, the Tribunal appeared to view the assessment here as key to the delivery of the NDIS plan. It was not simply defining or identifying the disability in a medical sense but laying the table for how her NDIS supports were to be identified, designed and delivered.

Deputy President Bean found that this particular assessment provided “extremely valuable opinions and advice as to the nature and extent of the applicant’s disabilities and the supports she requires”. The decision was rooted the complex and evolving nature of the applicant’s disability. Standard diagnostic processes will generally remain the responsibility of the health system.

Respite care

The decision is one of the most significant examinations of the position of carers within the scheme. The Tribunal approved the requested funding. It noted that the cost/benefit analysis, must include the possible future cost if their physical and mental capacity to undertake care reduces. The Tribunal noted the compelling evidence of the foster mother’s mental distress and exhaustion that had been provided and warned of the possible adverse implications if she had to relinquish guardianship of the child.

It found that funding the respite care would be beneficial to the applicant in ensuring the maintenance of her current care arrangement. It was simply not possible for her to be placed into the usual respite arrangements that apply to the children of foster carers. The Tribunal applied the Council of Australian Government principles on the division between the care system and the NDIS. It held that additional respite care required as a result of a child’s disabilities so as to enable sustainable caring arrangements for them will be a reasonable and necessary support under the NDIS.

Outcome and significance

This is the most high profile Tribunal decision delivered so far. The decision stresses the importance of family carers to the long-term future of the NDIS. The Tribunal strongly emphasised the need to consider the possible future costs if the level of care provided by family members cannot be sustained. This appeal was successful due to the quality of the evidence provided by the guardian, who was under extreme personal pressure because of her commitment to the applicant’s care. The complexity of the applicant’s disability also led to the highest levels of funding being applied, particularly in support coordination.

DECISION CATEGORY: REASONABLE AND NECESSARY SUPPORTS

ZCPY AND NATIONAL DISABILITY INSURANCE AGENCY**[2017] AATA 3052** (4 December 2017)**Questions addressed****Education system, literacy programme, social and economic participation, not focused on educational attainment**

This decision concerned the boundary between the NDIS and the educational system. The applicant successfully requested additional funding for a literacy programme. The Tribunal found that due to his particular circumstances, such as his age and past educational history, the programme was not primarily aimed at educational achievement. It was rather focused on improving his functioning and help his future inclusion in society and the workforce. It could be funded under the NDIS.

Facts

The Applicant was 17 years of age and had attended a mainstream public secondary school since Year 7 on a full-time basis. He was about to complete Year 10. He had consistently attended mainstream school apart from two short periods where he was home schooled due to reported bullying. In 2010, the applicant as having a “multidisciplinary diagnosis of Autism Spectrum Disorder”. The applicant experienced extreme difficulties in learning to read and write, attributable to his impairment. His reading age was assessed in September 2016 to be between 6 to 7 years old. This had affected the applicant’s capacity to engage in some daily activities, but also presented significant obstacles in accessing the standard academic curriculum. While he previously completed reading recovery programmes, these had not led to improved outcomes.

The family appealed to the Tribunal seeking funding for a specific literacy program called *Seeing Stars: Symbol Imagery for Phonological and Orthographic Processing in Reading and Spelling*. This would be delivered as part of an intensive program four hours per day, five days per week for eight consecutive weeks. The Agency opposed this on the basis that it did not represent value for money and that there was insufficient proof that it would benefit the applicant. Finally, it argued that this type of reading support related to the educational curriculum and should be funded by the educational system.

Tribunal’s reasoning

The Tribunal found that the specific reading programme was value for money. It was being delivered by a specialised team which would allow for the progress of the Applicant to be continuously monitored and for customisation to take place. It was not possible for it to be delivered by school staff, who lacked the training to engage in its delivery and adaption. The Tribunal noted that the goal of the programme was to increase the applicant’s equivalent reading age by two or three years. In that context, the Tribunal was satisfied that \$20,800 represented good value for money.

The Tribunal relied on the existing research base of multiple academic articles which supported the programme as broadly effective for certain types of reading. A 2017 article in the *Journal of Learning Disability* concluded that there were significant benefits observed in participants in the programme versus a control group. The Tribunal accepted, however, “the inherent difficulties” of delivering a programme where benefits may not occur consistently or predictably across a group. Motivation was an important factor determining whether the SI program was likely to be successful, and the applicant provided positive reviews of his character and learning engagement from his School Principal.

The Tribunal ultimately accepted the value of funding of the programme for one eight week period. It emphasised, however, that if “no reasonable progress” was made, future funding for the programme was unlikely.

Under *NDIS (Support for Participants) Rules*, the scheme is not responsible for personalising either learning or supports for students that primarily relate to their educational outcomes. The Tribunal noted that improving his reading would likely improve the applicant’s outcomes at school. Nevertheless, it also found that increased ability to read would improve the applicant’s ability to independently undertake simple daily task and be ready for employment. In such borderline cases, a decision maker must consider which purpose is the dominant: education or function?

The Tribunal held the applicant's proposal to build his capacity to read and write by undertaking the specific literacy program was "on a separate track to his current educational pursuits" at the secondary level. The applicant was unlikely to read and write independently, was focused on understanding the curriculum to obtain a leaving certificate. The primary purpose of achieving a basic level of reading functionality was to allow him to live independently as a young person. If the programme succeeded he would be able to read and understand road signs, order food at a restaurant and read labels on products when shopping.

The Tribunal commented that it would **not** have funded this support for a primary school child, as interventions to improve readings levels at that age were the responsibility of the education system.

Outcome & significance of the decision

This case is a rare discussion of boundary between education and the NDIS. The outcome should be viewed as tied to the applicant's specific circumstances. His age, future life options and the limited time remaining in the school system were key in the Tribunal reaching the exceptional decision to fund the reading support under the NDIS. It was also significant that other programmes offered by the education system had not improved his reading age, and teachers were not able to supply the programme.

When funding for an NDIS support is approved, decision-makers and participants should be made aware of the vital importance of demonstrating positive outcomes in future plan reviews. The Tribunal's funding here was conditioned upon progress, an approach that can be applied across NDIS supports. A finding that a support is value for money, reflects not just cost, but also predicted future benefits. Where these benefits are not emerging and the applicant's capacity is not improving, later plan reviews may reduce or eliminate the funding.



Further information

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