

EXECUTIVE NOTE TO
THE ADDITIONAL SUPPORT NEEDS TRIBUNALS FOR SCOTLAND (PRACTICE
AND PROCEDURE) AMENDMENT RULES 2010

SSI 2010/152

The above instrument was made in exercise of the powers conferred by section 17(4) and paragraph 11 of schedule 1 of the Education (Additional Support for Learning) (Scotland) Act 2004 and all other powers enabling them to do so and after consultation with the Administrative Justice and Tribunals Council and its Scottish Committee. It amends the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2006 (S.S.I. 2006/88).

Policy Objectives

Section 17 and Schedule 1 of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) provides for the constitution of the Additional Support Needs Tribunals for Scotland (“Tribunal”).

Section 18 of the 2004 Act provides that parents or young people themselves can refer to the Tribunal any specified decision, failure or information relative to a co-ordinated support plan; a refusal of a placing request where the school specified in the request is a special school or a co-ordinated support plan has been prepared, is about to be prepared or a decision that a co-ordinated support plan is not required and that decision has been referred to the Tribunal; and failure to plan for post school transitions.

Section 19 of the 2004 Act specifies the powers of a Tribunal in relation to references made to it. When determining references made to it, the Tribunal must take account of any code of practice published by Scottish Ministers under section 27(1) of the 2004 Act. The Scottish Ministers have to date published one code of practice entitled “supporting children’s learning”.

Definition of Authority

Schedule 2, paragraph 2(5) to the 2004 Act, as amended, enables all parents of children with additional support needs and young people with additional support needs (including those with a co-ordinated support plan) to submit a placing request directly to an authority outwith the authority in which they live. The 2004 Act, as amended, provides that where an out of area placing request is refused by an authority in respect of a child or young person with a co-ordinated support plan, the parents or young person will have the ability to refer the decision to refuse the request to the Tribunal.

The rules enable references to the Tribunal in respect of out of area placing requests, where the authority making the decision is not the authority responsible for the child’s education.

Accepting Electronic References

Rule 4 amends rule 5 to provide the Secretary to the Tribunals with the discretion to accept an electronic reference without a signature. Rule 21 makes a consequential amendment to rule 49.

Case statement period and statement of appellant's case

Rule 5 amends rule 8 to provide that the case statement period will be 15 working days for references submitted to the Tribunal where it has been established that a child or young person does require a co-ordinated support plan and an authority have failed to prepare a plan within the specified timescale laid down in legislation (16 weeks or 24 weeks if a time limit exception applies). The appellant (parent or young person) and respondent (the authority) will have to prepare their case within the 15 working days.

For all other references submitted to the Tribunal, while the case statement period will remain at 30 working days, the appellant will be required to submit all written evidence to be relied on within the first twenty working days of the case statement period. Rule 7 amends rule 10 to provide that the respondent will then have the 10 remaining working days within which to draft their response to the documents submitted by the appellant.

The appellant can amend his or her reference subject to the convener or Tribunal seeking and taking account of the views of the respondents before this is allowed.

The convener has the power to extend or shorten the case statement period in all references. However, before doing so, the convener must seek written representation for the parties on the issue.

Distribution of documents by Secretary

Rule 6 amends rule 9 to provide the Secretary with the power to circulate all late submissions in advance of the hearing with the agreement of the parties. If the parties do not agree to the late submission, the Secretary may still circulate the submissions, but a convener or a Tribunal may set time limits within which the parties may consider and make representations on why the submissions either should, or should not, be admitted without the need for a break in proceedings and without the need for a formal order from the convener extending the case statement period.

Where a reference involves an authority that is not responsible for the education of the child or young person refusing a placing request, the Secretary shall send that authority a copy of all of the documents submitted by an appellant.

Withdrawal of reference

Rule 8 amends rule 11 to permit a representative of the appellant to sign a withdrawal notice for any reference made to the Tribunal at any time before the hearing of the reference, or at the hearing of the reference, by sending a notice to the Secretary.

Recovery of documents

Rule 9 amends rule 21 to enable a convener on his or her own initiative or on the application of any party, to direct the Secretary to send a citation to any person requiring that person to produce any documents under the control of, or in the custody of that person.

Witnesses and citation of witnesses

Rule 10 amends rule 22 to enable a convener on his or her own initiative or on the application of any party made no later than 8 working days before the hearing, to direct the Secretary to send a citation to any person whose details are included in either party's list of witnesses requiring that person to attend any hearing. This rule and rule 16 reposition the existing rule 28(2) to what is now rule 22(7).

Evidence by telephone, video link or other means

Rule 11 and 17 delete rule 23 which allows witnesses to be able to give evidence by telephone, video link or by any other means of communication in certain circumstances and repositions the same provisions in rule 29.

Expert evidence

Rule 12 amends rule 24 to provide a convener with the discretion to appoint a person having appropriate qualifications to enquire into and report on any matter, where in the opinion of the convener, it would be desirable for the Tribunal to have the assistance of an expert.

Specified persons

Rule 13 inserts a new rule 24A which provides that, on application of either party or on its own initiative the Tribunal can require any person to attend the hearing and give evidence when that person has information which could assist the Tribunal in reaching its decision.

Rule 24A(2) provides that, in references relating to out of area placing requests, the Tribunal has the power to call the education authority for the area to which the child or young person belongs to attend the hearing and give evidence.

Power to decide reference without hearing

Rule 14 amends rule 26 to provide that, in certain circumstances, a convener has the power to decide a reference alone without the need for a hearing and adds to the existing circumstances provided for in rule 26(2), a new circumstance which is set out at 5 below. The full circumstances are:

1. where no response is submitted to the Secretary within the time appointed by rule 10 or any extension of time allowed under rule 19;
2. where the authority states in writing that they do not resist the reference;
3. where the authority withdraws their opposition to the reference;
4. where both parties agree in writing to dispense with a hearing; or

5. where it has been established that the child or young person requires a co-ordinated support plan and the authority fails to prepare such a plan within the specified time limits.

Rule 26(e) provides that, in the above cases, the Secretary will send to the parties information and guidance and an indication of when the Secretary expects to be able to notify the parties of the decision of the convener.

Attendance at hearings

Rule 15 amends rule 27 to change and update the reference in the list of persons who are entitled to attend a private hearing of a Tribunal to a member of the Administrative Justice and Tribunals Council or its Scottish Committee instead of to a member of the Council on Tribunals or its Scottish Committee.

Orders of the Court

Rule 18 amends rule 38 to provide that where a decision is remitted back to the Tribunal from the Court of Session, the convener will specify the timescale within which parties may submit a supplementary statement of case and further written evidence.

Register

Rule 19 amends rule 44. Rule 44 provides that the Secretary is required to keep a register of all references to the Tribunal. The amendment provides that the Secretary must note in the register any hearings at which the convener sat alone.

Review

Rule 20 inserts a new rule 45A which provides that the Tribunal can review and vary or revoke any decision, order or award where its decision was based on an error of fact or in law; where a party, who was entitled to be heard at the hearing but failed to be present or represented, had a good reason for failing to be present and the interest of justice required; or otherwise that the interest of justice require.

The appellant or respondent will have one month from the date of issue of the Tribunal's original decision to ask for such a review. The application must be in writing and state in full the reasons for the request. The application must be sent to the other party for comments within 10 working days of receipt.

The matter may be determined by the Tribunal without a hearing where both parties agree to this approach in writing.

The review must be heard by the Tribunal that decided the case or, where it is not practicable for it to be heard by that Tribunal, a newly convened Tribunal appointed by the President. If having reviewed the decision, the decision is to be varied or revoked, the Tribunal must substitute the decision it thinks fit or order a rehearing before either the same or a differently convened Tribunal.

On the setting aside or variation of the Tribunal's decision, the Registrar must immediately make such correction as may be necessary in the register and must send a copy of the entry so corrected to each of the parties.

Consultation

A formal consultation process began on 5 October 2009 with the publication and distribution of 'The Education (Additional Support for Learning) (Scotland) Acts 2004 & 2009: Consultation on Changes to the Secondary Legislation and Supporting Children's Learning Code of Practice'.

Letters inviting on-line or written responses were issued to a wide range of stakeholders (4451 in all) including all local authority education and social work departments, health boards, all Scottish schools, colleges and universities, community councils and relevant voluntary organisations.

The consultation document set out the reasons for reviewing the current Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2006, outlined the proposed legislative changes and sought stakeholder's views on the proposed changes. Additionally, Children in Scotland, supported by the Scottish Government, hosted a series of five consultation and information events throughout Scotland during November and December 2009.

The consultation exercise ended on 8 January 2010 and 46 responses were received in relation to changes to the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Amendment Rules 2010.

Furthermore, the proposals and consultation findings were discussed by the Additional Support for Learning Implementation Group which provides a reference group of expert professionals and stakeholders.

The Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) were also consulted. They raised concerns both about the proposed amount of time available to a parent or young person to prepare their case for the Tribunal (20 days) and the fact that the onus to provide their evidence is placed upon them in the first instance. The SCAJTC suggested that all relevant information in the hands of the authority should be made available within a short timescale after the reference is submitted to the Tribunal and before the parent or young person submits their case statement. They also suggested that the authority should be required to lodge a statement with all relevant productions justifying the initial decision with an appropriate time for the parent or young person to respond.

The suggestions made by the SCAJTC were considered during the consultation process. In response to the question "Do you think that the case statement period of the respondent (the authority) should be shortened instead?" most of those who responded (85%), including almost all local authorities (90%), did not agree with this proposal. In fact most of those

who responded (79%), including almost all local authorities (90%), were in favour of the proposal to reduce the appellant's case statement period to 20 days.

Additionally, the consultation findings were discussed at length during a meeting of the Additional Support for Learning Implementation Group and the Group agreed that the appellant's case statement period should be shortened.

We are therefore of the opinion that the changes suggested by SCAJTC would be contrary to the views of our stakeholders, Additional Support for Learning Implementation Group and consultation findings and it could prove onerous to local authorities.

Financial Effects

Any relevant financial effects were set out in the Financial Memorandum accompanying the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16A).