



## INFORMATION NOTE No 04/2018

### MAKING A REFERENCE

#### *Purpose of this Information Note*

1. This information note is to assist you to decide whether a reference can be made to the Additional Support Needs part of the Health and Education Chamber of the First-tier Tribunal for Scotland (referred to as “the Tribunal”) in this note.
2. The Tribunal can deal with disputes about the opening, closure, review, timescales or content of co-ordinated support plans, transition from school and, in certain circumstances, can deal with the refusal of a placing request. The legislation which sets out what the Tribunal can consider can be found in the [Education \(Additional Support for Learning\) \(Scotland\) Act 2004, section 18](#).
3. This Information Note is set out in three parts. **Part 1** explains who can make a reference and the types of references that can be made. **Part 2** explains the process of making a reference. **Part 3** explains what happens after you have made a reference.
4. The following terms are used in this Note:
  - “The Tribunal” means the Additional Support Needs part of the Health and Education Chamber of the First-tier Tribunal for Scotland.
  - “a tribunal” means the three people who will consider a claim or reference and make a decision – one will be a legal member who is an experienced lawyer and the other two are specialist members, with expertise in education, social work or health. Occasionally a tribunal will be made up of one legal member, sitting alone.
  - “The 2004 Act” means the *Education (Additional Support for Learning) (Scotland) Act 2004* as amended.
  - “The appellant” means the person making the reference to “the Tribunal”.
  - “The respondent” means the Education Authority responding to the reference.
  - “Parties” means the appellant and respondent.

- “Parent” includes guardians and any person who is liable to maintain or has the actual custody of a child or young person<sup>1</sup>.
- “The 2017 Rules” means The First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017.

## Part 1: who can make a reference and the types of references

### *Who can make a reference?*

5. A parent of a child with additional support needs. A “young person” (aged 16 years or over), who remains in school education, can make his or her own reference to the Tribunal. Where the young person “lacks capacity”, the parent can make the reference on their behalf.
6. From January 2018 children aged between 12 and 15 years who have capacity (and where their wellbeing will not be adversely affected) may make a reference in relation to a co-ordinated support plan or the education authority’s assessment of the child’s capacity or wellbeing. There is separate guidance available on the approach the Tribunal will take when considering capacity and wellbeing.<sup>2</sup>
7. **The person making the reference is called “the appellant”.**

### *Who is the reference against?*

8. **The reference is against the “respondent”**, who is the Education Authority responsible for the child or young person’s education.

### *Types of References*

9. Below is an outline of the types of reference the Tribunal can consider.

#### *Assessment for a co-ordinated support plan*

10. The Tribunal can consider references related to the assessment for a co-ordinated support plan:

<sup>1</sup> [Education \(Scotland\) Act 1980, section 135.](#)

<sup>2</sup> Guidance to Tribunal Members No 02/2018 Capacity and Wellbeing

- Where a parent, young person or child (“the appellant”) has asked the Education Authority to assess if the child has additional support needs which would require a co-ordinated support plan and that request has been refused<sup>3</sup> or there has not been a reply within the required timeframe,<sup>4</sup> which is normally 8 weeks but which can be extended in certain circumstances<sup>5</sup>. This is known as a deemed refusal; or
- Where the Education Authority has said that the child needs a co-ordinated support plan but it has not been received within the time allowed<sup>6</sup>, normally 16 weeks<sup>7</sup>.

#### *Need for a co-ordinated support plan*

12. The Tribunal can consider references relating to the need for a co-ordinated support plan where:

- The Education Authority has decided that the child or young person needs or still needs a co-ordinated support plan and the appellant does not agree<sup>8</sup>; or
- The Education Authority has decided that the child or young person does not need a co-ordinated support plan and the appellant does not agree<sup>9</sup>.

#### *Contents of the co-ordinated support plan*

13. The Tribunal can consider references where the appellant disagrees with what the Education Authority has written or has omitted in the following parts of the child or young person’s co-ordinated support plan:

- the factors from which the child or young person’s additional support needs arise;
- the educational objectives that have been set taking account of these factors;
- the type of support proposed to help the child or young person meet these objectives; and
- the person or agency who will provide that support<sup>10</sup>.

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<sup>3</sup> 2004 Act section 18(5)

<sup>4</sup> 2004 Act section 18(5A)

<sup>5</sup> Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005/518 regulation 4A

<sup>6</sup> 2004 Act section 18(3)(c)

<sup>7</sup> Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005/518 regulation 4

<sup>8</sup> 2004 Act section 18(3)(a)(i)

<sup>9</sup> 2004 Act section 18(3)(b)(i)

<sup>10</sup> 2004 Act section 18(3)(d)(i)

*Providing the support indicated in the co-ordinated support plan*

14. The appellant may make a reference where the Education Authority has failed to provide or make arrangements for the provision of the additional support specified in the co-ordinated support plan whether relating to education or not<sup>11</sup>.

*Reviewing the co-ordinated support plan*

15. The Tribunal can consider references relating to the review of a co-ordinated support plan where:

- the Education Authority has reviewed the child or young person's co-ordinated support plan and decided the plan is still required and the appellant does not agree<sup>12</sup>;
- the Education Authority has reviewed the child or young person's co-ordinated support plan and decided a plan is no longer required and the appellant does not agree<sup>13</sup>;
- it has been more than 12 months since the child's co-ordinated support plan was opened/reviewed and the Education Authority has not started to review it<sup>14</sup>;
- the Education Authority has started to review the child or young person's co-ordinated support plan but has not completed that review within the timescales allowed<sup>15</sup>, normally 12 weeks<sup>16</sup>; or
- the Education Authority refuses a request for a review where there has been less than 12 months since the child or young person's co-ordinated support plan was reviewed but the parent, child or young person has written informing the authority that there has been a significant change in the child's additional support needs<sup>17</sup>.

*Placing Requests- Special Schools*

16. The Tribunal may consider an appeal against a refusal of a placing request where the Education Authority has written to the parent or young person refusing a placing request for a special school anywhere in Scotland, England, Wales or

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<sup>11</sup> 2004 Act section 18(3)(d)(ia)

<sup>12</sup> 2004 Act section 18(3)(a)(ii)

<sup>13</sup> 2004 Act section 18(3)(b)(ii)

<sup>14</sup> 2004 Act section 18(3)(d)(ii)

<sup>15</sup> 2004 Act section 18(3)(d)(iii)

<sup>16</sup> Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005/518 regulation 5

<sup>17</sup> 2004 Act section 18 (3)(d)(iv)

Northern Ireland<sup>18</sup> or the parent having made the placing request has not received a decision within a specified timeframe<sup>19</sup> (a deemed refusal).

### *Placing Requests- Mainstream Schools*

17. A reference in relation to a placing request can also be made in the following circumstances:

- The Education Authority has written to the parent refusing a placing request for a mainstream school.

**OR**

- The parent made a placing request and has not had a decision within a specified timeframe<sup>21</sup> (a deemed refusal).

**AND**

on that date (or the deemed refusal date) one of the following applied:

- The Education Authority has already issued a co-ordinated support plan<sup>20</sup>.
- A co-ordinated support plan has not been prepared but the Education Authority has confirmed that the child requires a plan or is in the process of preparing one<sup>21</sup>.
- The Education Authority has informed the parent of their proposal to establish whether a co-ordinated support plan is required<sup>22</sup>.
- The Education Authority has decided that the child does not require a co-ordinated support plan and the decision has been referred to a Tribunal<sup>23</sup>.

### *Transitions from School to post School*

18. The Tribunal can hear references relating to transitions in circumstances where the Education Authority has failed to meet its duties regarding post school transitions<sup>24</sup> which include:

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<sup>18</sup> 2004 Act section 18(3)(da)

<sup>19</sup> *If a placing request is made on or before 15 March for the child to start at a specified school on the first day of term in the next school year AND a decision is not received by 30 April, that placing request is 'deemed' to have been refused. For a placing request at any other point in the school year, if a decision is not received within 2 months of a placing request, it is deemed to have been refused. The Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005*

<sup>20</sup> 2004 Act section 18(4)(a)

<sup>21</sup> 2004 Act section 18(4)(b)

<sup>22</sup> 2004 Act section 18(4)(ba)

<sup>23</sup> 2004 Act section 18(4)(c)

<sup>24</sup> 2004 Act section 18(3)(g)

- Providing appropriate agencies with information concerning the child's additional support needs and school leaving date;
- Considering what provision the Authority, in the exercise of any of its functions other than those relating to education is likely to make for the child on ceasing school education;
- Taking account of information provided by the child and the child's parent;
- Failing to contact appropriate agencies for information regarding the additional support needs of children and young people in their intended destination.

### *Capacity and wellbeing reference*

19. Each time a child seeks to exercise a right under the 2004 Act (other than a right to make a reference to the Tribunal) the Education Authority must complete an assessment of the child's capacity and wellbeing. Where the child or their parent disagrees with the decision of the Education Authority following that assessment, the child or their parent may refer the matter to the Tribunal. Separate guidance is available<sup>25</sup> detailing the process the Tribunal will adopt in such references.

## **Part 2: Making a reference to the Tribunal**

### *Time Limits*

20. The time limit for a reference being received by the Tribunal is two months from the date of the failure referred to or the refusal (including deemed refusal) of the placing request or notification of the decision or information that is subject of the reference or being notified of the right to make a reference to the Tribunal<sup>26</sup>. The specific rule depends on the nature of the claim so you should check the [rules](#) or seek advice if there is any possibility that the time limit may be close to expiring.

### *How do I make a reference?*

21. A reference can be made using the reference form which is on the Additional Support Needs section on our website [www.healthandeducationchamber.scot](http://www.healthandeducationchamber.scot). A paper copy can be sent to the Tribunal, but if you have internet access you can complete and submit a reference form using the following email address [ASNTribunal@scotcourtribunals.gov.uk](mailto:ASNTribunal@scotcourtribunals.gov.uk). A reference may be made in writing and signed by the appellant, but a reference submitted electronically will normally be accepted without the appellant's signature. If you have told us that a representative is acting for you, all correspondence will be addressed to the representative.

<sup>25</sup> Guidance to Tribunal Members No 02/2018 Capacity and Wellbeing

<sup>26</sup> 2017 Rules, rule 14(5)(6) and (7)

### *What information do I need to provide?*

22. The completed reference form must be accompanied by a copy of any decision in respect of which the reference is made as well as a copy of the co-ordinated support plan where the reference relates to the plan.<sup>27</sup> You should also include all other relevant documentation, such as documents detailing the child's additional support needs and letters from the Education Authority which relate to the reference. If further information is required, you will be asked to provide this.

23. Original documents should not be sent.

24. If the reference is one which the Tribunal can deal with, a copy of the reference and any accompanying documents will be sent to the respondent.

### *What remedies are available?*

25. The powers of the tribunal depend on the nature of the reference but include overturning decisions of the Education Authority, requiring the Education Authority to take such action as the tribunal considers appropriate by such time as the tribunal may require, requiring failures to be rectified by such time as the tribunal may determine, correction or amendment of the co-ordinated support plan and require the placing of the child in the school specified in the placing request.<sup>28</sup> In exercising its powers the tribunal must take account of, so far as is relevant, the provisions of the Supporting Children's Learning Statutory Guidance on the Education (Additional Support for Learning) Scotland Act 2004 (as amended) [Code of Practice \(Third Edition\) 2017](#) produced by the Scottish Government<sup>29</sup>.

## **Part 3: What happens next?**

### *Case statement period*

26. Once the tribunal is satisfied that the reference is competent, both parties will be given a period of time in which to submit to the tribunal any further evidence which they feel may assist the tribunal in making its decision. This is called **the case statement period**, and both the appellant and respondent will be given a set period of time within which to submit further evidence.

27. In most circumstances, a **30 working day**<sup>30</sup> case statement period will apply. The exception to this is in respect of references where it has been established that the child or young person requires a co-ordinated support plan and the

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<sup>27</sup> 2017 Rules, rule 14(4)

<sup>28</sup> 2004 Act section 19

<sup>29</sup> 2004 Act section 19(7)

<sup>30</sup> The 2017 Rules, rule 17(2)

Education Authority has not prepared the plan within the required period, in which case the case statement period is 15 working days<sup>31</sup>. Parties will be notified of the appropriate case statement period.

28. You will be able to add to the information you provided with your reference. You should collect any further written evidence which you intend to rely upon and lodge this with the Tribunal normally before the **end of the first 20 working days of the case statement period**. This removes the risk that evidence may be missed if submitted on an ad hoc basis. The date of the 20th working day will be given to you once your reference has been registered.
29. Any documents submitted will be copied to the respondent, who will have the remaining **10 working days** of the case statement period to respond. The response must contain certain information specified in the 2017 Rules including the basis on which the reference is resisted, the facts admitted and disputed, the views of the child concerning the issues raised by the reference or the reasons why the respondent has not ascertained those views as well as all written evidence to be relied on by the respondent<sup>32</sup>.
30. The response will be collated together with the reference form and any written information submitted with it and your case statement. These documents will be numbered and sent to you or your representative and to the respondent. This collection of documents is known as **“the bundle.”**

#### *Withdrawal of reference*

31. You may withdraw your reference at any point prior to the hearing or during the hearing<sup>33</sup>. Once a reference has been withdrawn, it will be dismissed. It may, for example, be the case that you reach agreement with the respondent. If the respondent does not oppose your reference, this does not mean that you need to withdraw your reference. In this circumstance a legal member may decide the reference without a hearing<sup>34</sup>.

#### *Consolidation of hearings*

32. There may be more than one reference about the same person or about a similar issue. A legal member can make a decision to enable the references or to be heard at a single hearing<sup>35</sup>. The Tribunal also deals with disability discrimination claims. If your reference relates to a child or young person for whom a disability has already been lodged, the legal member may consolidate the hearings for the reference and the claim, if this is appropriate<sup>36</sup>.

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<sup>31</sup> The 2017 Rules, rule 17(2)(a)

<sup>32</sup> The 2017 Rules, rule 19

<sup>33</sup> The 2017 Rules, rule 20

<sup>34</sup> The 2017 Rules, rule 37

<sup>35</sup> The 2017 Rules, rule 30

<sup>36</sup> The 2017 Rules, rules 31 & 77



## *Witnesses*<sup>37</sup>

33. Before the case statement period ends, parties should consider whom they wish to bring as a witness and provide a list of names to the Tribunal<sup>38</sup>. Each party is entitled to call up to two witnesses to give evidence<sup>39</sup>. The legal member or a tribunal at a hearing may, in exceptional circumstances, permit more witnesses. The parties themselves may also give evidence. In some cases the evidence of one or two people may be sufficient to decide the reference.
34. Parties should consider whether the witnesses they wish to call would be available to attend on the notified hearing date. A witness can give written evidence or speak to the tribunal by video link or telephone conference call if personal attendance is not possible. If a witness is reluctant to attend or may have difficulty in getting time away from work to attend, you can apply to the Tribunal to have the witness cited to attend.
35. Both parties are responsible for keeping their own witnesses up to date and should inform them if there have been any changes to the hearing date or time.

## *Representation*

36. Both parties can choose to have a representative or can change a representative at any point prior to the hearing, but it is important that the party informs the Tribunal in writing without delay. The representative does not require to be legally qualified and could be a family member, a friend, or someone from a representative organisation.
37. If you chose to have a representative, you or your representative should confirm this in writing to the Tribunal and all communication will normally be sent only to the named representative.
38. Legal aid may be available but this will depend on each individual's circumstances.

## *Pre-hearing case conference calls*

39. Shortly after the end of the case statement period, the legal member will hold a telephone conference call with the parties or their representatives, to discuss the hearing procedure, to confirm what witnesses are to be called and when, to agree a running order and to deal with any other preliminary matters. The legal member will also discuss whether further steps are necessary to ascertain the views of the child or young person and, if so, the most appropriate method of obtaining those views. No special equipment is required to take part in a conference call. The case officer will send all the necessary information to those who will be taking part in the call.

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<sup>37</sup> See [Information Note No 01/2018: For Parties, Representatives, Witnesses and Supporters](#)  
You will find a copy of this on the Tribunal's website.

<sup>38</sup> The 2017 Rules, rule 33

<sup>39</sup> The 2017 Rules, rule 33(6))

40. Where the parties are legally represented, the legal member may ask the representatives to prepare a written minute of agreement setting out the facts which are not in dispute. This will allow the tribunal to focus on the remaining matters which are not agreed.
41. The legal member will normally fix the hearing date at the case conference call, after taking into account the availability of both parties and their witnesses. If there is a problem with the date, the party must inform the Tribunal immediately, stating the reason why the date is unsuitable.
42. Once the date has been agreed, the case officer will send information to both parties regarding the date, time and place of the hearing. It is possible that further case conference calls may take place prior to the hearing if the legal member considers this to be necessary.

*The views of the child or young person*

43. The Tribunal requires to consider the views of the child in respect of many types of reference<sup>40</sup> The legal member or tribunal will always consider parties and the child or young person's opinions on the best methods of obtaining the views of the child or young person. Parties and their representatives should ensure that they are in a position to discuss this at the conference call. Paramount in the consideration is the child or young person's welfare and the best way of obtaining the child or young person's own views. The child or young person may attend the tribunal hearing in person to provide views and to give evidence (the child does not have to remain throughout the hearing); the child or young person may give his or her views by letter, recording or video tape. They can be recorded by a teacher or professional who works with the child or young person. The tribunal can engage an independent advocate, skilled in obtaining views of the child or young person, to support them to express their views, opinions and feelings. The independent advocate may prepare a written report giving the child or young person's views on the reference and on matters that the tribunal considers the child or young person's views would be helpful. Where the child or young person attends the hearing they may wish to have the independent advocate present to support him/her to express his/her views. If the child or young person does not wish to attend the hearing the child or young person may wish the independent advocate to attend for the purpose of expressing their views.
44. Where a child decides to attend, the tribunal is flexible about the best way of his or her views being communicated. Views can be taken outwith the presence of parties (with parties agreement), although the tribunal will communicate those views back to parties; or by one member of the tribunal who will then feedback the views to the others. A case officer (from the Tribunal's administration) will remain in the hearing room and the child's views will be recorded, in the same way the hearing is recorded.

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<sup>40</sup> 2017 Rules, rule 44

45. The tribunal will always consider the welfare of the child when determining how to seek a child's views but in respect of children under the age of 12 the 2017 Rules require that the tribunal will only permit the child to give evidence where that evidence is necessary to enable a fair and just hearing and the welfare and interests of the child will not be prejudiced by so doing.<sup>41</sup>

### *Hearings*

46. Hearings are held in a variety of venues across Scotland, which can include Scottish Government and Scottish Courts and Tribunal buildings, business centres, hotels, universities, colleges, Tribunal suites and local authority accommodation. The choice of venue is important to ensure that it is private and convenient for parties. **If you have any access needs or special requirements, please inform the case officer as soon as possible.**

47. Hearings normally start at 10.00 am and can last a full day or more. Start times may be altered by the legal member and will be notified to parties. Complex cases may require more than one day. A tribunal of three people will hear the reference. Each party will have a private waiting room. No lunch is provided and parties are asked to make their own arrangements.

48. Hearings are usually held in private<sup>42</sup>. For that reason, witnesses will normally be in the hearing room only when giving their evidence. They will not be allowed to observe either before or after this period. The case officer will come for the witness when the tribunal is ready to hear from them. As well as a representative a party can attend with a supporter, but the supporter can take no active part in the hearing. **The appellant and respondent and their representatives will be able to remain in the hearing room throughout the hearing.**

### *Decision*

49. Depending on the complexity of the issues under consideration the legal member may give a verbal decision at the end of the hearing. In all cases parties will receive a full written statement of the facts found by the tribunal and the reasons for the decision. **This should normally be issued within 10 working days.** If the decision is likely to take longer, the case officer will inform parties.

## **Appeal rights**

### *Tribunal review*

50. Following the issue of a tribunal decision, a party may make an application to the Tribunal for the decision to be reviewed where it is necessary in the interests of justice to do so<sup>43</sup>.

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<sup>41</sup> 2017 Rules, rule 43

<sup>42</sup> 2017 Rules, rule 38(1)

<sup>43</sup> 2017 Rules, rule 11

51. An application to review must be made in writing (and copied to all other parties), be made within 14 days of the date on which the decision was made or within 14 days of the date that the written reasons were sent to parties (if later). The application should state the reasons for seeking a review.
52. If the Tribunal considers that the application is wholly without merit the Tribunal shall refuse the application and inform parties of the reasons for the refusal<sup>44</sup>. Otherwise a notice shall be sent to parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may, at the discretion of the tribunal, set out the tribunal's provisional views on the application<sup>45</sup>.
53. The review will be decided, where practicable, by one or more of the members of the tribunal that made the decision.
54. An application for review does not affect the time period for an appeal to the Upper Tribunal as specified below.

#### *Appeal to the Upper Tribunal*

55. A party may seek permission to appeal by submitting an application in writing to the Tribunal for permission to appeal. The application must be received by the Tribunal within 30 days of the date on which the decision appealed against was sent to the parties.<sup>46</sup>
56. A party cannot appeal simply on the grounds that it does not agree with the tribunal outcome; **an error in law must be identified**. This is usually where a tribunal has not correctly applied the law or has not explained its decision adequately. The application for permission to appeal must identify any point or points of law on which the person making the application wishes to appeal and state the result the party making the application is seeking.
57. If the tribunal refuses permission to appeal it will supply a statement of its reasons. Application can then be made to the Upper Tribunal for permission to appeal within 30 days of the date the statement of reasons was issued.<sup>47</sup>

**May Dunsmuir**  
**President**  
**January 2018**

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<sup>44</sup> 2017 Rules, rule 11(3)

<sup>45</sup> 2017 Rules, rule 11(4)

<sup>46</sup> The Scottish Tribunals (Time Limits) Regulations 2016 regulation 2

<sup>47</sup> The Scottish Tribunals (Time Limits) Regulations 2016 regulation 3