



Additional Support Needs

GUIDANCE TO TRIBUNAL MEMBERS No 01/2021

THE CHILD YOUNG PERSON AND THE TRIBUNAL

Purpose of this Guidance

1. There are four parts to this guidance.
 - Part 1: Explains the tests of capacity and wellbeing, set out in section 3 of the 2004 Act.
 - Part 2: Explains how to take the views of a child or young person.
 - Part 3: Explains how to ask questions of a child or young person.
 - Part 4: Explains the differences between a child and young person as a party, as a witness, or when attending to give their views.

Former President's Guidance Notes

2. This Guidance collects in one the following former President Guidance Notes, which are now revoked: 01 2018 Views of the Child; 02 2018 Capacity and Wellbeing; 01 2019 Asking the Child Questions; and 02 2019 The Child and the Hearing.

General

[President's Guidance to Tribunal Members: 03/2018: Independent Advocacy](#)

3. This Guidance should be read alongside President's Guidance 03/2018, which explains the role of independent advocacy in tribunal proceedings.

Meanings

4. In this guidance, these words have the following meanings.

child	a person of any age up to 15 years ¹
young person	a person aged 16 years and over who remains in school education
the Tribunal	the Additional Support Needs jurisdiction of the Health and Education Chamber of the First-tier Tribunal for Scotland
2004 Act	<u>Education (Additional Support for Learning) (Scotland) Act 2004</u> – all section references are from this Act unless stated

¹ [s.29\(1\) 2004 Act](#) and [s.135\(1\) Education \(Scotland\) Act 1980](#)

	otherwise
2010 Act	Equality Act 2010
the 2018 Rules	The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)
rules	all rule references are to the 2018 Rules
a tribunal	the three members who will consider a claim or reference and make a decision – the legal member, who is an experienced lawyer and two specialist members, who have expertise in education, social work or health (in some cases a tribunal may be made up of one legal member)
7 Golden Rules	7 Golden Rules for Participation , Children and Young People’s Commissioner, Scotland (CYPCCS)
Code of Practice	Supporting Children’s Learning, Statutory Guidance on the Education (Additional Support for Learning) (Scotland) Act (as amended) Code of Practice (Third Edition) 2017
Guidance on Capacity and Wellbeing	Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) Extending Children’s Rights – Guidance on the assessment of capacity and consideration of wellbeing (2017)
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
non-CSP reference	an appeal by the child or their parent against the decision of the education authority on their assessment of the child’s capacity ² or wellbeing ³
CSP child reference	a reference brought by a child in relation to a CSP

UNCRC

5. The UNCRC is the most complete statement of children’s rights ⁴ ever produced and is the most widely ratified international human rights treaty. Wherever possible, this Guidance is to read in a way, which is compatible with the terms of

² [s. 18 \(3\)\(ea\).](#)

³ [s. 18 \(3\)\(eb\).](#)

⁴ For the purposes of the [UNCRC](#), a child means up to the age of 18 years, Article 1.

the UNCRC. At the time of writing, the UNCRC has not been incorporated into Scots law.

6. Article 12 is of particular importance. Article 12 requires that every child who is capable of forming their own views has the right to express those views freely in all matters affecting them, their views being given due weight in accordance with their age and maturity. Article 12.2 requires that children are heard either directly, or through a representative or an appropriate body in any judicial proceedings affecting them. This includes proceedings in the Tribunal.

UNCRPD

7. The UNCRPD places a greater emphasis on supported decision-making and in maximising autonomy for disabled persons. Wherever possible, this Guidance is to be read in a way, which is compatible with the terms of the UNCRPD. At the time of writing, the UNCRPD has not been incorporated into Scots law.
8. [Article 7](#) is of particular importance. Article 7 requires provision of age-appropriate assistance to children with disabilities. Article 7.3 requires that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children. In order to realise that right, children with disabilities should be provided with disability and age-appropriate assistance.
9. [Articles 12.3](#) and 12.4 require appropriate measures to be taken to provide access by persons with disabilities ⁵ to the support they may require in exercising their legal capacity and to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.

Part 1: Capacity and Wellbeing

Statutory rights for children aged 12 to 15 years

5. The 2004 Act extends rights to children aged 12 to 15 years where they have the capacity to exercise the particular right and where exercising the right would not adversely affect their wellbeing. A child may access a range of rights in relation to their education authority. They also have the right to make two different types of reference to the Tribunal:

⁵ This includes children and young people for the purposes of our proceedings.

- a) an appeal against the decision of the education authority on their assessment of the child's capacity ⁶ or wellbeing ⁷ - **a non-CSP reference**
- b) a reference in relation to a CSP - **a CSP child reference**.

Rights and Capacity - [sections 3 and 3\(A\)](#) of the 2004 Act

6. Section 3 of the 2004 Act provides that a child has capacity to:

- a) carry out an act ⁸ if the child has sufficient maturity and understanding to carry out the act
- b) be provided with information, advice or a CSP ⁹ by an education authority if the child has sufficient maturity and understanding to understand the information, advice or the CSP
- c) express a view ¹⁰ if the child has sufficient maturity and understanding to express the view.
- d) make a decision ¹¹ if the child has sufficient maturity and understanding to make the decision, to communicate the decision, to understand the decision and the implications for them, and to retain the memory of the decision.¹²

7. It may not always be straightforward to identify which of the section 3 rights the child is exercising. Where there is a dispute, the tribunal will have to determine which right is engaged and which capacity tests apply.

Wellbeing: [section 3B](#)

8. A child's wellbeing is assessed by reference to the extent to which the child is or would be: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included (the 'SHANARRI principles').
9. The Guidance on Capacity and Wellbeing suggests that consideration is made of the impact on the child's health and wellbeing as part of the Curriculum for Excellence and also signposts a variety of assessment tools which can be helpful including the Getting it Right for every Child Interactive Guide.¹³

⁶ [s. 18 \(3\)\(ea\)](#).

⁷ [s. 18 \(3\)\(eb\)](#).

⁸ [s. 3\(1\)\(a\)](#).

⁹ [s. 3\(1\)\(c\)](#).

¹⁰ [s. 3\(1\)\(d\)](#).

¹¹ [s. 3\(1\)\(b\)](#).

¹² Note there are four parts to this test, compared to two parts for the other section 3 rights.

¹³ [Guidance on Capacity and Wellbeing, Chapter 4, paragraph 38.](#)

Non-CSP reference

Assessment of capacity and wellbeing by an education authority

10. Each time a child seeks to exercise a right under the 2004 Act (which is not a right to make a reference to the Tribunal) the education authority must carry out an assessment of the child's capacity and wellbeing. The *Guidance on Capacity and Wellbeing* emphasises the need for the education authority to reach evidence-based decisions.¹⁴ Where the child or their parent disagrees with the decision of the education authority, the child or their parent may make a non-CSP reference to the Tribunal.¹⁵

Tribunal procedure: legal member sitting alone

11. A legal member may sit alone when hearing an appeal against the assessment decision of the education authority,¹⁶ which allows for an efficient hearing in keeping with our overriding objective.¹⁷

Documentary evidence

12. In a non-CSP reference, the respondent should provide the tribunal with a report, which provides a 'pen picture' of the child and the steps taken by the respondent to complete their assessment. This should include:
 - a) how the child was involved in the assessment
 - b) the position/qualifications of those involved in the assessment and their level of contact with and knowledge of the child
 - c) any expert report instructed regarding the assessment
 - d) any other material relevant to the particular section 3 right.

Represented child

13. Where the child is a party and they are represented, the child's representative should provide the tribunal with the following:
 - a) a statement setting out the reasons why the child does not agree with the education authority's assessment
 - b) any expert report instructed by the child
 - c) any other material relevant to the particular section 3 right.

¹⁴ [See chapter 3 \(capacity\) and chapter 4 \(wellbeing\).](#)

¹⁵ [s.18\(3\)\(ea\)](#) (capacity); [s.18\(3\)\(eb\)](#) (wellbeing).

¹⁶ [rule 23.](#)

¹⁷ [rule 2.](#)

Unrepresented child

14. Where the child is a party and they are unrepresented, the legal member will remind the child of their right to representation during the case management call. Where necessary and appropriate, the legal member may instruct a report from an independent advocate or an expert.¹⁸

CSP child reference

Tribunal procedure

15. A tribunal of three members will hear a CSP child reference. The legal member will address the questions of capacity and wellbeing during the case management call. Where there is no dispute between the parties, there is no need for a preliminary hearing. The legal member must be independently satisfied on both tests and must record their findings. A sample decision is at Appendix A.
16. Where the parties are in dispute, this may be heard at the beginning of the hearing or, in exceptional circumstances, at a separate preliminary hearing. Where a preliminary hearing is fixed, the President shall be informed.

Assessment of capacity

17. A tribunal shall assess the child's level of maturity and current understanding in relation to the specific right the child seeks to exercise. 'Sufficient maturity and understanding' as a concept is not age specific.

Example:

A care experienced child aged 12 years, who has a history of caring for their younger siblings due to parental neglect, may have a greater degree of maturity and understanding than a 15 year old child, who has not had similar challenging life experiences and responsibilities.

18. A child may have a particular intellectual age, but this does not mean this age applies to everything.
19. Capacity is not a static concept. A child may lack capacity to exercise certain rights, but hold capacity to exercise others. Capacity is measured in relation to the particular child and the particular right at the particular time. There is no single way in which to assess a child's capacity in the 2004 Act.

¹⁸ [rule 34](#) (references).

20. The *Mental Welfare Commission for Scotland* recommends a functional approach when determining capacity to make a decision.¹⁹ This focuses on whether an individual is able to make the particular decision at the particular time when the decision has to be made. The tribunal should have regard to this definition when considering the meaning of capacity, although they are not bound to follow it.

Example:

A child may not have the capacity to make a decision in relation to the making or review of their CSP, but they may have the capacity to express a view with regard to some or all of the educational objectives within the CSP. An example of this could include a request that the input of a speech and language therapist is increased.

21. When considering the child's capacity the tribunal shall consider²⁰ the child's:
- a) age and stage of learning²¹
 - b) practical understanding of the particular right they are seeking to exercise
 - c) ability to understand the consequences of exercising the particular right at the particular time
 - d) progress within the context of the *Curriculum for Excellence* and its key features of healthy living and relationships, approaches to personal planning, assessing risk and decision making
 - e) level of achievement and ability to understand core learning in relation to literacy and numeracy.

And the views of:

- a) the child in relation to the particular right
- b) the child's parent in relation to the particular right
- c) the child's class/support/pastoral teacher(s) who know the child well
- d) the educational psychologist, where one is involved
- e) any expert, where one is involved.

Overcoming barriers

22. A child is not to be treated as lacking capacity by reason only of a lack or deficiency in a faculty of communication, if that lack or deficiency can be made good by

¹⁹ [Consent to Treatment, A guide for mental health practitioners - Mental Welfare Commission for Scotland](#)

²⁰ See also [Code of Practice](#) and the section entitled 'Rights of Children who have capacity', from paragraph 18 onwards.

²¹ A child who is 12 years of age and in primary education is still able to exercise rights under the 2004 Act.

human, electronic or mechanical aid (whether of an interpretative nature or otherwise).²²

Part 2: The Views of the Child or Young Person

23. In all types of reference or claim, a tribunal will have regard to its duty²³ to *seek* the views of the child. This statutory duty does not apply to young people. However, a tribunal will have regard to this Guidance when considering the views of a young person.
24. There may be limited circumstances where it is not possible to obtain the views of the child or young person, or where they do not wish to express a view. The threshold for obtaining views is low, and tribunals will make every effort to overcome communication barriers, taking all necessary steps to obtain the child or young person's views in a way appropriate to their age, maturity understanding, wellbeing, choice and needs.
25. The Code of Practice provides examples of good practice for communicating with a child or young person,²⁴ which include giving them enough time to prepare and go over the material to be discussed, a supportive communication facilitator to tease out full meanings and specialised or new vocabulary (perhaps in sign or symbol form).
26. The [CYPCS, 7 Golden Rules for Participation](#) provides child-centred guidance, which will be of assistance to the tribunal.

Section 12 of the 2004 Act - duty of the education authority

27. The 2004 Act²⁵ places a duty on the education authority to seek and take account of the views of the child or young person, unless they are satisfied that the child or young person lacks capacity to express a view. Where the education authority expresses this opinion, the legal member shall address this at the case management call.

Methods of communication

28. A child or young person can express their views, using a range of communication aids. These include the use of alternative or augmentative communication systems, for example signing, interpreters, video, audio recording and the use of pictures and symbols (for example, [Makaton](#) and [Talking Mats](#)).

²² [s.3\(3\)](#).

²³ [rule 44](#).

²⁴ [Chapter 7, paragraph 27](#).

²⁵ [s.12\(2\)\(b\)\(i\)](#). This duty is subject to [s.12\(3\)](#). When the authority is identifying whether any child or young person has additional support needs and when determining adequate and efficient provision for such additional support, the duty only applies where the authority considers it to be appropriate.

29. Appendix B provides practical examples from the Young Ambassadors for Inclusion, which will be of assistance to the tribunal.

Views obtained before the hearing

30. Where a child or young person has been supported to communicate their views before the hearing, the tribunal shall identify what was expressed, how this has been interpreted and by whom.
31. Context is important. Tribunals must be alert to this. If the person asking questions is an authority figure in school, this may influence the child or young person's response. They may be reluctant to share freely or they may give the answers they think are expected. There is an obvious power balance here which may lead to the child or young person feeling compelled to tell that authority figure everything. The same may apply in the context of home. Schools may approach the national children's agency, [My Rights My Say](#), for assistance in obtaining the child or young person's views.

Trust and independence

32. A tribunal may decide that the best way to identify the child or young person's views is through independent advocacy. Trust and independence are important factors for the child or young person. They need to trust the person taking their views 'as they are' and that these will not be altered or adjusted. Children and young people often open up more to people they trust.

Example:

When asked questions about how they are getting along and whether the supports in school are working, a 13 year old child party in a CSP child reference tells their pastoral care teacher that everything is fine, that they are happy at school and home. At home, the child tells their mum that everything is ok. The tribunal instructs an independent advocate to obtain the child party's views before the hearing, with the following questions:

- 1. How is school?*
- 2. Does the child understand the range of supports available at school?*
- 3. What supports work for the child?*
- 4. Does the child need any more support?*
- 5. Does the child want to tell us anything more?*

The child party replies to the questions asked by the independent advocate:

- 1. I hate school.*
- 2. I don't know where I am supposed to go for supports and I don't know how it all works. I don't want to stand out from the other pupils. I feel stupid.*
- 3. Nothing works.*

4. I need the teachers to know that I am not stupid and that I need more time.
5. I hate home. I can't cope.

33. Tribunal published child or young person party cases can assist the tribunal in developing expertise and understanding. See for example: [ASN D 10 12 2020](#).

Part 3: Asking the Child or Young Person Questions

34. Being prepared for questions and having someone to explain questions works well for children and young people (see Appendix B).
35. A tribunal should use questions at a level the child or young person can understand. There are a number of strategies to support children to understand questions and to be able to participate meaningfully. The *Blank Model of Questions* explains how to ask questions effectively.²⁶ The strategies at paragraph 36 provide further assistance.

Blank model of questions

36. There are four levels of questions, starting with the most basic and becoming increasingly complex to understand and answer. If members are unsure of the level of understanding of the child or young person, start with Level 1 questions.

Level One

The child or young person matches their immediate perceptions to language. These are questions about what they can see and hear or what they saw or did in the immediate past.

Example:

“Who is here with you today?”

“Is this a photograph of your school?” (Showing photograph)

Level Two

The child or young person needs to focus on a situation in more detail. Questions at this level can include concrete and abstract concepts.

Example:

“Who is in your class at school?”

“What do you need help with in school?”

“What do you like about school?”

²⁶ [Blank, Rose and Berlin \(1978\)](#) and [Elks and McLachlan \(2008\)](#).

Level Three

The child or young person is required to reorder perception beyond the 'here and now' and to make links. A child or young person who is able to understand questions at Level 3 is able to describe a sequence of events and to make deductions about a situation.

Example:

"How do you feel when...?" "Tell me what happens when..."
"Tell me something that might make school better for you."

Level Four

A child or young person who understands questions at this level is able to analyse, explain and reason. This most complex level includes 'why?' questions.

Example:

"What will happen if...?"
"How are the two schools different?"
"What could teachers do to make things better for you?"
"Why do you think you should have a CSP?"

Considerations and strategies for questions

37. A tribunal will have information on the child or young person's strengths and needs to support their level of language. The following strategies also assist:
- a) Check you have the child or young person's attention before asking a question. Keep questions as short and simple as possible. Give plenty of time to respond to a question.
 - b) Repeat questions if needed - do not re-word your original question immediately - it is more helpful to repeat it, as this reduces the processing load on the child or young person.
 - c) Do not ask multiple questions - always wait for the child or young person to process and answer one question before moving on to another.
 - d) Be mindful of the reason for your question – it is likely you will start with a question to which the tribunal already knows the answer, such as those at level 1.

- e) Regularly ask the child or young person if they understand the question and check this with whoever is with them - monitor how they respond to checking understanding to identify if repeated checking is irritating them.
- f) Look for signs that the child or young person has not understood a question. Obvious signs are when an answer is not related to the question, or when they say they do not understand. More subtle signs include withdrawal of eye contact, an increase in fidgeting and a change in physical posture.
- g) Be aware that the child or young person is likely to be in a heightened state of anxiety at the tribunal - this can make listening, maintaining focus, processing language and answering difficult. A slow pace and plenty of time to think are important.

Part 4: The Child, Young Person, and the Hearing

Child or young person as a party

- 38. A child or young person who is a party has the same rights as an adult who is a party and the same rights as the respondent/responsible body. This includes the right to attend the whole or part of the hearing, lodge written evidence, make representations, make submissions and ask questions of the witnesses.
- 39. A child aged 12 to 15 years can be a party in certain types of reference (see part 1 of this Guidance). A young person can be a party in any type of reference (including a placing request reference). A child or young person with capacity can be a party in a claim under the 2010 Act.²⁷
- 40. In the majority of cases, where the child or young person is a party they will be represented. Where they are not, a tribunal may assist in the presentation of their case without advocating a course to be taken, consistent with the Tribunal's overriding objective.²⁸
- 41. Child or young person parties should not experience any disadvantage prior to and during the hearing. While a respondent has a duty to seek the views of the child or young person under the 2004 Act (see Part 2 of this Guidance), this duty should ordinarily have been discharged some time before a hearing. A responsible body does not have this same statutory duty under the 2010 Act.
- 42. The respondent or responsible body should not press the child or young person party for their views regarding tribunal proceedings.

²⁷ There are no statutory capacity or wellbeing tests for child parties under the [2010 Act](#).

²⁸ [rule 2\(2\)\(c\)](#).

43. A child or young person party may not be aware that any views they express in discussions with a respondent/responsible body may form part of the evidence for the respondent/responsible body. This could place the child or young person at a disadvantage.
44. Respondent/responsible bodies should be alert to this and approach pre-hearing discussions with the same care they would apply to adult parties.

Example:

In the weeks leading up to a hearing, a headteacher asks a child party for their views on the approach taken by the school to their behaviour in class. The headteacher asks, "What do you think of how we deal with this?" The child provides an answer and hears this repeated in the headteacher's evidence. The child did not know that this would happen and feels let down and betrayed. The child thought their conversation was confidential.

Here, the tribunal should consult the parties on whether or not to take account of the evidence of the child's answer.

Access to Guidance

45. This Guidance is published on the HEC website. In addition to this, My Rights, My Say, has a copy to assist child or young person parties in preparing for our tribunal proceedings. A copy has also been given to the CYPCS. Child or young person parties will, in addition, be given a link to the Guidance (or a paper copy) when their reference or claim is lodged with the Tribunal.

Child or young person as a witness

46. A child or young person witness gives evidence to the tribunal. The same rules of procedure apply to child, young person and adult witnesses.
47. There is a clear distinction between a child or young person's *evidence* and their *views*. A witness gives evidence and in doing so provides a specific, factual account of events and questions may be asked about that account. A tribunal will assess the evidence of each witness before deciding how much weight (if any) is to be attached.
48. A child or young person may present their evidence in person by attending the tribunal, or by using other means, for example by telephone or video link, by giving a written statement²⁹ or using a document in any format, for example, a talking mat or a drawing.

²⁹ [rule 40\(2\)](#) (references); [rule 86\(2\)](#) (claims).

49. The same principles set out in Part 2 of this Guidance (Views of the Child or Young Person) apply equally to hearing the evidence of a child or young person.

Agreed list of questions

50. The tribunal will prepare an agreed list of questions for the child or young person with parties or their representatives. This can be prepared in advance of the hearing or at the hearing, before the child or young person gives evidence. The tribunal should consult the parties on whether or not the list of agreed questions should be provided to the child or young person in advance of the hearing or at the hearing, in advance of their evidence.

51. The usual processes of hearing evidence, using techniques of examination-in-chief and cross-examination shall not apply to a child or young person witness.

52. The following principles shall apply:

- a) One person, identified by the tribunal, shall ask the child or young person questions from the agreed list of questions. Each question will be strictly formulated to ask one thing at a time.
- b) The independent advocate or someone appointed by the tribunal will ask the questions. This may include one of the tribunal members. This will not include any representative.
- c) Parties, the questioner and the tribunal shall have regard to this Guidance when preparing/asking questions.
- d) A child or young person should be able to give their evidence without interruption. When interruption is necessary, the reasons for this should be explained. The child or young person should then be gently reoriented back to the list of agreed questions.

Child witness under 12 years

53. A child under 12 years may only give evidence where the tribunal considers that this is necessary and that so doing will not prejudice the welfare, wellbeing and interests of the child.³⁰

54. A person with appropriate skills or experience may facilitate the giving of evidence by a child³¹ in a complex case, for example an independent advocate with specific communication skills, or a registered intermediary.

³⁰ [rule 43](#) (references); [rule 89](#) (claims).

³¹ [rule 43](#)(2) (references); [rule 89](#)(4) (claims).

Views versus evidence

55. Where a child or young person gives their views, this is the equivalent of submissions by a party urging a general course of action; it is not evidence. The tribunal considers the child or young person's views in a way that is equivalent to the parent/carer's general views. Where a child or young person gives their views during the hearing, the tribunal should take those views by asking the child broad questions around the issues of the case.
56. Only the tribunal should take the views of the child at a hearing. No questions from the parties will be permitted and questions should not be agreed in advance (as is the case with evidence).

Before the hearing *The case management call*

57. Practical arrangements for the child or young person's participation in the hearing should be discussed at the case management call (**CMC**). In some cases, these arrangements will require to be very specific to meet the needs of the child or young person. The CMC note shall record the arrangements to ensure that parties, caseworker and clerk are clear about these.

Visiting the hearing room

58. Where the hearing is taking place in person, the child or young person may wish to visit the hearing room. This can take place on the day of the hearing, or at an earlier date. The legal member shall inform the caseworker of the necessary arrangements, using the CMC note for this purpose.
59. Guidance for coming to a tribunal, including the specialist hearing suites at the [Glasgow Tribunals Centre](#), is available on the Chamber's website. This Guidance can be adapted by parties to create a personalised 'social story' for the child.

Tribunal's use of a social story

60. The tribunal may wish to issue a [social story](#) to explain what happens at the hearing. A style is available for this purpose (this has been prepared for a remote hearing, but can be adapted for use in an in-person hearing).

My voice!

61. The child or young person will be provided with a ['my voice!' form](#) once the reference or claim is registered. This can be completed in-person or with the support of another person, or by using other means, which may include drawings,

pictures, a video or CD recording. The 'my voice!' form can be translated into another language or format when necessary. The 'my voice!' form includes details of the children's section on our website - [needs to learn](#) - which provides children with accessible information.

The Hearing

62. A hearing may be conducted in-person or remotely. Wherever practically possible, when a child or young person is to attend an in-person hearing, this will be held in tailored facilities, in either the Glasgow Tribunal Centre or the Inverness Justice Centre.

Supporters

63. A child or young person aged 12 years and above has a right to have a supporter present at the hearing.³² This could be one of the child's parents. The legal member shall explain the role of the supporter³³ at the start of the hearing.

64. An independent advocate may attend the hearing to assist the child or young person – which is not the same as a supporter.

65. A parent may attend where the child or young person is the party.³⁴ When a parent attends in this capacity, care shall be taken by the tribunal to avoid the impression of deference to the parent.

66. If a child or young person party would like both parents to attend the hearing, this is a matter for the legal member to decide at the CMC, taking into account the facts and circumstances of the case. Where there would be no prejudice to either party to have both parents attend, this ought to be permissible. The practical arrangements for the hearing may need to be clearly specified in this case.

67. If the hearing is in-person, the child or young person will be given a notebook and pen at the hearing to make notes or to use as a doodle pad. In a remote hearing, the child or young person can be asked to have a notebook and pen to hand during the hearing.

Stop and Go Cards

68. The clerk will have a supply of stop and go cards, which the legal member will provide to the child or young person at the in-person hearing. The child or young person can use the stop card when they need a break and the go card when they are ready to continue. In a remote hearing, the child can prepare their own stop and go card.

³² [rule 5](#).

³³ See [Information Note 01/2018 \[revised 2021\] Parties, Witnesses, Representatives and Supporters](#).

³⁴ [rule 38\(7\)](#) (references); [rule 84\(7\)](#) (claims).

Introductions

69. If the hearing is in-person, the legal member should introduce them self to the child or young person in the waiting area before the hearing starts. The child or young person may meet the specialist members before the hearing starts if they wish. The legal member or the caseworker will bring the child into the hearing room to meet the other members.
70. Alternatively, the child may prefer to be in the hearing room before the tribunal members attend. If so, the clerk will inform the tribunal members once the child is settled in the hearing room. Once the tribunal members are seated, the legal member should begin the round of introductions.
71. In a remote hearing, the legal member should begin the round of introductions, working from the tribunal members first to the remaining attendees on the screen, when the child or young person attends.

Using specialist hearing rooms

72. Glasgow Tribunal Centre and Inverness Justice Centre provide sensory hearing rooms. These include the following sensory features:
 - a) autism sensory colour palate
 - b) three component hearing room (round table, break out and soft sofa areas)
 - c) sensory wall to personalise with an image/colour of the child's choice
 - d) the 1:2:1 room
 - e) sensory room or area for the child or young person to rest and de-stress.
73. These facilities can be used for any hearing, irrespective of the locality of the child or young person.

Use of the 1-2-1 evidence room

74. The 1-2-1 evidence room will only be used when the child or young person requests this or when they agree to its use.
75. The legal member will remind the child or young person that they will be observed throughout their time in the 1-2-1 room. The legal member will explain that proceedings will not normally be interrupted unless there is good reason to do so, for example, where the child is becoming unsettled or upset, or where the answer to a question needs to be explored further. The 1-2-1 evidence room operates as follows :
 - a) The child or young person gives their evidence to one person in a small room softly furnished with two armchairs. They cannot see anyone outside

the room.

- b) The questioner may be an independent advocate or someone familiar to the child or a tribunal member.
- c) A one-way mirror and recording facilities are in place, which allows the tribunal and parties to see and hear the child or young person.

Disagreement between the child and the parent

76. Care should be taken where it becomes apparent that there is a disagreement about the issue(s) in the case, between the child or young person and their parent. The legal member shall intervene where necessary to defuse any rising emotions and make use of adjournments to give some 'breathing space' to settle any stress or discomfort.

Taking the views of the child or young person in the absence of parties

77. The child or young person's views may be taken by the tribunal in the presence of the parties or (where the parties agree) without their presence. The three members and the caseworker shall remain present during this time.
78. Where the parties do not agree and where the tribunal reaches the view that this would be appropriate, the child or young person's views may still be taken in the parties' absence. The tribunal shall record their reasons for proceeding in this manner. The three members and the caseworker shall remain present during this time.
79. Where the parties are absent, the child or young person shall be informed at the beginning that their views will be shared with the parties when they return to the hearing room. The legal member shall provide a verbal summary of the child or young person's views to the parties when the parties return to the hearing room.

After the hearing

The decision

80. After evidence and submissions have concluded, the legal member shall explain what happens next. The tribunal can provide an oral decision at the hearing, or, as happens in most cases, it can reserve its decision. The legal member shall explain how long the tribunal will take to issue its written decision.
81. Where the child or young person is a party, the content of the decision shall be age appropriate to the level of understanding of the child so that they have the opportunity to consider it as fully as possible.

Ten page limit for child or young person party cases

82. The decision in a child or young person party case shall be no more than ten A4 pages and shall comply with the *Judicial Decision Writing Toolkit*.

Letter to the child or young person

83. If the child or young person is a party, or the child or young person has played a prominent part in the hearing, the tribunal shall consider whether it is appropriate to write a letter to them, briefly explaining the decision. The legal member shall consult with the parties before deciding whether to issue a letter. This can be done during a CMC or, more usually, at the end of the hearing.
84. The legal member shall clarify where the letter should be sent. If the child or young person has an independent advocate, it may be helpful to send it to the advocate who will support them to read the content.
85. A copy of the letter will be issued to the respondent/responsible body, unless there is good reason not to do so. The letter to the child or young person does not form part of the decision. The legal member shall inform the party representatives accordingly.
86. The letter shall be issued in the format which is most accessible for the child or young person. The letter shall be no more than one and a half sides of A4. The legal member shall consult with the other members on its content. It shall include the following:

1. An acknowledgment of the child's input:

Examples:

We found your drawings helpful. They helped us to understand what you think about your school.

Thank you for explaining what you thought about the two schools. It was very helpful.

2. A short statement setting out the decision.

Examples:

We decided that you should have a co-ordinated support plan (CSP).

We decided that Anywhere Council was wrong to refuse your mum's request that you attend A School and we have told the Council that you should attend A school, starting from 1 September.

We decided that you should stay in B school. We did not think that it was a good idea for you to change schools.

We decided that you have been treated unfairly and that your exclusion should not have taken place. We have made an order that this be removed from your school record and that you re-start school right away.

3. *A short summary explaining why the tribunal made the decision.*

Examples:

We thought that you needed support from the Speech and Language Therapist and the Genius Project to help you to do well in school. This support needs to be organised and you need to know who, when and how you will be helped. The CSP will do this.

We thought that A school would be better suited to meet your additional support needs. We did not think B school would help you as much.

4. *A short ending.*

Example:

We wish you well in your school education. You told us you want to be a teacher when you leave school and we hope you are able to do that.

**May Dunsmuir
President**

December 2021

Appendix A

Capacity and wellbeing decision

Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) Section 18(2A) – capacity and wellbeing assessment

1. This reference has been made by the child. Given this, the provisions of section 18(2A) of the 2004 Act apply, which state the Tribunal must be satisfied that:
 - (2A) The child is a child who has attained the age of 12 years and—
 - (a) who the First-tier Tribunal is satisfied has capacity to make the reference, and
 - (b) whose wellbeing would, in the opinion of the First-tier Tribunal, not be adversely affected were the child to make the reference.
2. It is necessary to consider these provisions to determine if the reference is competent. A case management call took place for this purpose. After this, I decided there was no need for a preliminary oral hearing. The case conference call was held on **, with the party representatives. ** attended for the appellant. **, attended for the respondent.
3. Having considered the papers lodged with the reference so far and *President's Guidance to Tribunal Members No 01/2021: The Child, Young Person and the Tribunal*; and after hearing submissions, I was able to note the following.

The child

4. The child has instructed his solicitor to act for him in this reference. His solicitor explained that the child first contacted the independent children's service, *My Rights, My Say*. The child has an independent advocate, who has worked with the child for over 6 months. The independent advocate is satisfied that the child has the capacity to make this reference. The solicitor met with the child on ** using video conference, initially with his mother present, and later with the child alone. The solicitor was satisfied that the child had an understanding of what a co-ordinated support plan (**CSP**) is, why it is relevant to him and what he wants to achieve from making a reference. The solicitor was also satisfied that whilst their views overlapped, the child's views were distinct from his mothers. The child was not simply repeating his mother's views.
5. Both solicitors advised that the child, his independent advocate and his mother had recently attended a meeting with the school on **. No one at that meeting expressed concerns regarding the child's capacity to make a reference.
6. The child's solicitor is satisfied that the child has the capacity to instruct him.

7. The solicitor has no concerns that the child's wellbeing would be adversely affected by making this reference. In fact, the solicitor thought it would be beneficial to the child to be directly involved in this process.

The respondent

8. The respondent has no concerns regarding the child's capacity to make the reference nor that the child's wellbeing would be adversely affected. Before reaching this view the respondent had read the minutes of the last GIRFEC meeting dated **. The child's views are recorded in the minute of that meeting, where it says that the child understands what a CSP is and why he feels he needs one. The respondent is satisfied that child is capable of making the reference and that he understands the implications of this. The respondent does not think the child's wellbeing will be adversely affected by making the reference.

Findings and reasons

9. As there was no dispute and as I was satisfied on the preliminary evidence and the submissions, I made the following findings.
10. The child is ** years of age. He has a right under the 2004 Act to make a CSP reference.
11. The reference is competent for the following reasons.
12. The child has sufficient maturity and understanding to make, communicate, understand and retain the memory of making a decision to make a reference to the Tribunal. It follows that the child has the capacity to make the reference.
13. Making the reference will not adversely affect the child's wellbeing.
14. The child is therefore the appellant.
15. Having decided these matters, I turned to consideration of any further preliminary points.

Appendix B

Young Ambassadors for Inclusion

In 2015, Education Scotland established Young Ambassadors for Inclusion in local authorities across Scotland. These children and young people represent their authority in a range of events and discussions on inclusion. The President met with the Young Ambassadors in October 2017, to ask them about the best way to hear their views in our tribunal proceedings. Here are their responses.

What works/doesn't for children and young people with additional support needs?

What works?/Good	What doesn't/Bad
Friendly speaking, less formal and comfortable sitting, colourful	Don't like to talk to people unknown
Ask for views/receive information before meetings	People patronising
Options: giving of views before the meeting	Formal speaking, boring colour
Prefer talking to people they know	Timing
Photos, videos or visiting the room beforehand	Too much talk
Good advice-easy to follow	Fair settings
Do not have to attend the whole time - can I attend as much as I want to?	Not really being included - adults can take over the meeting
Choice	Do not always understand why we are meeting
It is important we are able to attend	Only attend the last 10 minutes
If our views are written down or captured, if we don't want to be there at the meeting	Feel pressurised to attend
Time out space	Mixed experience of views gathered before the meeting
Feel like we are treated like an age appropriate person	The rooms we meet in are not always good - not child centred or friendly
When kids get to get their own point across	When there is a lot of talking
1 to 1 interview	Adults don't always listen
When confidence is built up	Misunderstanding
Understanding views	
Knowing who is going to be there	
Someone who can help explain the questions	
If someone could come with you to meetings	
Tranquility	
Staff try and support us	