

SCHEDULE

THE FIRST-TIER TRIBUNAL FOR SCOTLAND HEALTH AND EDUCATION CHAMBER RULES OF PROCEDURE 2018

PART 2

Procedure in Respect of references to First- tier Tribunal under section 18(1) of the 2004 Act

Interpretation

13. In this Part of the Rules—

“the appellant” means the person who makes a reference to the First-tier Tribunal under section 18 of the 2004 Act(1);

“an appeal committee” means a committee set up under section 28D of the Education (Scotland) Act 1980(2);

“case statement period” means the period referred to in either rule 17(2)(a) or (b) as appropriate;

“the child or young person” means the child or young person to whom a reference relates;

“decision” in relation to the First-tier Tribunal includes—

- (a) an order, including dismissal of a reference;
- (b) a requirement under section 19 of the 2004 Act(3); and
- (c) a reference by the First-tier Tribunal to an appeal committee under section 19(5) of the 2004 Act(4);

“grounds of reference” includes the matters specified in rule 14(2)(f) and (g);

“party” means either the appellant or authority in respect of any reference made to the First-tier Tribunal;

“reference” means a reference under section 18(1) of the 2004 Act;

“Register” means the Register of References to the First-tier Tribunal kept in pursuance of rule 54;

“response” means a written response submitted by an authority under rule 19; and

“in writing” has the meaning in section 29(5) of the 2004 Act.

Reference

14.—(1) A reference to the First-tier Tribunal shall be made by notice in writing and shall be signed by the appellant or, at the discretion of the First-tier Tribunal, a reference transmitted by electronic means may be accepted without the appellant’s signature.

(2) The reference shall state—

- (a) the name, address and telephone number of the appellant;

(1) Section 18 was amended by sections 1(7), 18(1) and 19(1) of the Education (Additional Support for Learning) (Scotland) Act 2009 (asp 7).

(2) 1980 c.44. Section 28D was inserted by section 1(1) of the Education (Scotland) Act 1981 (c.58).

(3) Section 19 was amended by sections 1(8) and 18(2) of the Education (Additional Support for Learning) (Scotland) Act 2009 (asp 7).

(4) Section 19(5) was inserted by section 1(8) (b) of the Education (Additional Support for Learning) (Scotland) Act 2009 (asp 7).

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- (b) the address to which correspondence should be sent to the appellant if different;
 - (c) the name and date of birth of the child or young person;
 - (d) the name and address of the authority;
 - (e) the date on which—
 - (i) the authority notified the appellant under section 11 or 28 of the 2004 Act of the right to make a reference to a Tribunal in respect of the decision as referred to in section 18(3)(a), (b), (d)(iv), (da) or (e), or of the information as referred to in section 18(3)(d)(i) of the 2004 Act⁽⁵⁾ which is the subject of the reference;
 - (ii) the authority, if they failed to notify the appellant of the right to make such a reference, notified the appellant of that decision or information;
 - (iii) the authority became deemed, in terms of regulations made under paragraph 4 of schedule 2 of the 2004 Act, to have refused the placing request which is the subject of the reference; or
 - (iv) the failure as referred to in section 18(3)(c), (d)(ii) or (iii) which is the subject of the reference first occurred;
 - (f) the details of the decision, failure or information in respect of which the reference is made;
 - (g) the appellant's reasons for making the reference;
 - (h) the main facts on which the appellant intends to rely;
 - (i) if the appellant seeks an order that a co-ordinated support plan be amended, the part or parts of that plan to which the reference relates; and
 - (j) the name, address and profession of any representative appointed by the appellant, and, where available, the representative's telephone number, fax number and electronic address.
- (3) Where the child or young person is the subject of a placing request, and whether or not that placing request is the subject of the reference, the reference shall state—
- (a) whether there is an outstanding reference to an appeal committee under paragraph 5 of schedule 2 of the 2004 Act; or
 - (b) whether there is an outstanding appeal to the sheriff under paragraph 7⁽⁶⁾ of that schedule in which case it shall specify the court in which the appeal is proceeding and, if known to the appellant, any case reference number relative to it.
- (4) The reference shall be accompanied by—
- (a) a copy of any decision in respect of which the reference is made; and
 - (b) where the reference relates to a co-ordinated support plan, a copy of that plan.
- (5) Where the reference is in respect of a decision or information as referred to in paragraph (2)(e)
- (i) the reference shall be sent so as to be received by the First-tier Tribunal no later than two months from the later of the date on which the authority—
 - (a) notified the appellant of the right to make reference to the First-tier Tribunal; or
 - (b) in a case as referred to in paragraph (2)(e)(ii), notified the appellant of the decision or information which is the subject of the reference.
- (6) Where the reference is in respect of the deemed refusal of a placing request as referred to in paragraph (2)(e)(iii) the reference shall be sent so as to be received by the First-tier Tribunal no later than two months from the date on which the authority became deemed to have refused that request.

⁽⁵⁾ Section 18(3) was amended by sections 1(7) and 19(1) of the Education (Additional Support for Learning) (Scotland) Act 2009 (asp 7).

⁽⁶⁾ Paragraph 7 of schedule 2 was amended by section 1(9) of the Education (Additional Support for Learning) (Scotland) Act 2009 (asp 7).

(7) Where the reference is in respect of a failure as referred to in paragraph (2)(e)(iv) the reference shall be sent so as to be received by the First-tier Tribunal no later than two months from the date on which that failure first occurred.

Action upon receiving a reference

15. On receiving a reference the First-tier Tribunal shall—

- (a) enter the details of such matters specified in rule 14(2) in the Register and such other information as the Chamber President may from time to time direct under section 74(2) of the 2014 Act;
- (b) send a copy of the reference and of any accompanying documents to the authority, together with a notice in writing giving the case number of the reference from the Register, and including information, as appropriate to the matter referred, about the means and time for submission of a response, the consequences of failure to do so, and the right to receive a copy of the decision;
- (c) acknowledge receipt and provide the appellant with a notice in writing giving the case number of the reference, and including information as appropriate to the matter referred, about the time for the authority to submit a response, the right to withdraw the reference, and the right to receive a copy of the decision;
- (d) where the reference discloses the existence of an appeal to an appeal committee under paragraph 5 of schedule 2 of the 2004 Act in relation to the refusal of a placing request, notify the authority and the appeal committee to that effect; and
- (e) where the reference discloses the existence of an appeal to the sheriff under paragraph 7 of that schedule in relation to a placing request, send a copy to the sheriff clerk of the court in which that appeal is proceeding.

Sufficiency of reasons for reference

16.—(1) If the reference does not state grounds of reference which a legal member considers sufficient to enable the authority to respond to it, the legal member shall direct the appellant to send further and better particulars of the grounds of reference to the First-tier Tribunal within 10 working days of the receipt of notice of such direction by the appellant in accordance with rule 58.

(2) Rules 25 and 27 shall apply to a direction under paragraph (1).

(3) Further and better particulars of the grounds of reference sent in response to a direction made under paragraph (1) shall, if a legal member is satisfied that, together with the reference, such particulars are sufficient to enable the authority to respond to it, be treated as part of the reference.

(4) Where a legal member has made a direction under paragraph (1), a copy of that direction shall be sent to the authority with confirmation that the case statement period will not commence until the direction has been complied with.

Case statement period and statement of appellant's case

17.—(1) Where rule 16 does not apply or a legal member is satisfied under rule 16(3), the First-tier Tribunal shall send notice in writing to both parties advising them of the dates of the case statement period.

(2) The case statement period shall be—

- (a) in the case of an alleged failure of the type referred to in section 18(3)(c) of the 2004 Act, the period of 15 working days; or
- (b) in any other case, the period of 30 working days,

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beginning on the date on which notice under paragraph (1) is taken to have been received in accordance with rule 58.

(3) The appellant must submit all written evidence to be relied on and which has not already been submitted and may submit to the First-tier Tribunal a written statement of the appellant's case, which may include the views of the child or young person—

- (a) where rule 17(2)(a) applies, before the end of the case statement period;
- (b) where rule 17(2)(b) applies, before the end of the first 20 working days of the case statement period.

(4) The appellant may amend the reference, submit a supplementary written statement of the appellant's case or amend a supplementary written statement, if permission is given by a legal member or a First-tier Tribunal at a hearing after having first sought and taken account of the views of the respondent.

(5) The appellant shall submit to the First-tier Tribunal a copy of every amendment and supplementary statement for which permission is given.

(6) Subject to paragraphs (7) and (8), on the application of either party or on the legal member's own initiative, a legal member may make an order shortening or extending the case statement period in any reference.

(7) Before making an order under paragraph (6), the legal member shall seek oral or written representations from the parties on the issue of shortening or extending the case statement period.

(8) A legal member may only make an order under paragraph (6) if satisfied that—

- (a) both parties will have sufficient time to prepare their cases; and
- (b) it is fair and just to do so.

(9) In the case of any reference where permission is given by a legal member under paragraph (4) the legal member giving permission may extend the case statement period if satisfied that it is fair and just to do so.

(10) If, at the time permission is granted under paragraph (4), the authority is not entitled to take any part in the proceedings in accordance with rule 19(4), the giving of permission shall restore such entitlement and, if necessary, the hearing shall be rearranged or adjourned, as a legal member or the First-tier Tribunal at the hearing may consider appropriate, so that the authority can be represented.

Distribution of documents by the First-tier Tribunal

18.—(1) Subject to paragraph (2), the First-tier Tribunal shall—

- (a) forthwith send to the authority a copy of any amendment to the reference received during the case statement period;
- (b) at the end of the case statement period, and in so far as copies have not already been sent, send to each party—
 - (i) a copy of any amendment to the reference or response;
 - (ii) any statement of case submitted by the other party; and
 - (iii) the written evidence of the other party;
- (c) forthwith send to the other party copies of any amendments or supplementary statements, written representations, written evidence (other than written evidence of which a copy is received in accordance with rule 17(3) or 19(3)) or other documents received from a party after the end of the case statement period.

(2) If, after the closure of the case statement period, any amendment, supplementary statement, written representation, written evidence or other document or application is delivered to the First-tier Tribunal, the First-tier Tribunal shall—

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- (a) where the parties agree to the late submission, send a copy of it to the other party; or
 - (b) where the parties do not agree to the late submission, send a copy of it to the other party to enable the parties to make representations on its admission within such time limits as may be determined by a legal member or by the First-tier Tribunal at a hearing.
- (3) Where an education authority has been called under rule 35(2), the First-tier Tribunal shall send to that authority a copy of all of the documentation submitted by the appellant under rule 17(3) and (5).

Response

19.—(1) The authority shall submit a response to the First-tier Tribunal within the last ten working days of the case statement period.

(2) The response shall be signed and dated on behalf of the authority and shall state—

- (a) the name and address of the authority;
- (b) the address to which correspondence should be sent, if different;
- (c) the response to the grounds stated in the reference;
- (d) the basis on which the reference is resisted;
- (e) which facts as set out in the reference or in any statement of case under rule 17 are admitted and which are disputed;
- (f) any further facts on which the authority propose to rely;
- (g) the views of the child or young person concerning the issues raised by the reference, or the reason why the authority has not ascertained those views; and
- (h) the name, address and profession of any representative appointed by the authority, and, where available, the representative’s telephone number, fax number and electronic address.

(3) The authority must submit along with the response all written evidence to be relied on.

(4) An authority who does not submit a response shall not be entitled to take any part in the proceedings, except—

- (a) to make an application under rule 25 for a direction requiring the appellant to provide further information on the grounds on which the appellant relies and any facts and submissions relevant thereto, to enable the authority to respond;
- (b) to apply under rule 29 for an extension of the time appointed under this rule for the response; or
- (c) in exceptional circumstances at the discretion of a legal member or the First-tier Tribunal at a hearing.

(5) In exceptional circumstances the authority may amend the response if permission is given by a legal member or the First-tier Tribunal at a hearing.

(6) The authority shall submit to the First-tier Tribunal a copy of every amendment for which permission is given.

Withdrawal of reference

20.—(1) An appellant may withdraw any reference made to the First-tier Tribunal—

- (a) at any time before the hearing of the reference by sending to the First-tier Tribunal a notice to that effect signed by the appellant, or by the representative of the appellant; or
- (b) at the hearing of the reference.

(2) Upon receipt of any such notice, the First-tier Tribunal shall send a copy to the authority.

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(3) Upon withdrawal of the reference a legal member or the First-tier Tribunal at a hearing shall make an order dismissing the reference.

Withdrawal of opposition

21.—(1) The authority may withdraw their opposition to the reference—

- (a) at any time before the hearing of the reference by sending to the First-tier Tribunal a notice to that effect signed on their behalf; or
- (b) at the hearing of the reference.

(2) Upon receipt of any such notice, the First-tier Tribunal shall send a copy to the appellant.

Preliminary matters

22.—(1) A legal member or, at the start of a hearing, the First-tier Tribunal may, either on the application of a party or on their own initiative, consider and determine any preliminary or incidental issue arising from a reference which must be determined prior to the substantive hearing of the reference, and which cannot be determined by the giving of directions under rule 25.

(2) Before any such issue is determined by a legal member or the First-tier Tribunal, the legal member or the First-tier Tribunal may direct that—

- (a) notice is given to the parties giving them an opportunity to submit representations in writing within a specified period; or
- (b) notice is given requiring the parties to appear before a legal member or the First-tier Tribunal for a preliminary hearing on that issue.

Power for legal member to decide references

23. A legal member of the First-tier Tribunal may consider and determine any reference made to the First-tier Tribunal of a decision referred to in section 18(3)(ea) or (eb) of the 2004 Act⁽⁷⁾.

Suspension of proceedings

24.—(1) A legal member or the First-tier Tribunal at a hearing may—

- (a) if both parties are so agreed, suspend proceedings in respect of a reference pending the outcome of mediation or dispute resolution under section 15 or 16 of the 2004 Act⁽⁸⁾; or
- (b) on the application of either party, or on their own initiative, suspend such proceedings if it would be fair and just to do so.

(2) Any such suspension may be indefinite or for such specified period as the legal member or the First-tier Tribunal may consider appropriate.

Directions

25.—(1) A legal member may, at any time before the hearing, either on the written application of a party or on his or her own initiative, give such directions to either or both parties as the legal member may consider necessary or expedient to further the overriding objective in the consideration of the reference and may in particular—

- (a) direct a party to provide any further information or particulars;

⁽⁷⁾ Sections 18(3)(ea) and (eb) were inserted by paragraph 16(c) of schedule 1 of the Education (Scotland) Act 2016 (2016 asp. 8).
⁽⁸⁾ Section 15 was amended by section 2 and 11 of the Education (Additional Support for Learning) (Scotland) Act 2009 (asp 7) (“the 2009 Act”). Section 19 was amended by sections 3, 12 and paragraph 15 of schedule 1 of the 2009 Act.

- (b) direct a party to produce any document which may reasonably be required and which it is in the power of that party to produce;
- (c) direct that a party shall supply a list of documents and a list of witnesses whom that party intends to call to give evidence at the hearing, on such date before the hearing as may be specified;
- (d) give directions as to the dates by which any documents or other evidence which any party is intending to rely on or produce shall be submitted;
- (e) where a party has notified that they do not wish to attend a hearing, give a direction as to the date by which that party shall send any written representations on the case to the First-tier Tribunal;
- (f) give a direction on—
 - (i) any issues on which evidence is required;
 - (ii) the nature of the evidence so required;
 - (iii) the way in which the evidence is to be provided to the First-tier Tribunal; and
 - (iv) the exclusion of any evidence which is irrelevant, unnecessary or improperly obtained.

(2) Where an application is made by a party for a direction under paragraph (1), it shall be made in writing to the First-tier Tribunal specifying the direction sought and the basis for the application.

(3) On receipt of such an application, the First-tier Tribunal shall, unless the application is accompanied by the written consent of the other party, send a copy of the application to the other party inviting the party to make written representations on it within 10 working days or such other period as may be specified by a legal member.

(4) Where a party objects to the application, a legal member shall consider the objection and, if considered necessary for deciding the application, may afford the parties an opportunity to be heard.

(5) The First-tier Tribunal shall give notice to the parties of any direction to any party required to comply with it and shall—

- (a) include a statement of the possible consequences of failure to comply as mentioned in rule 27; and
 - (b) unless the person to whom the direction is addressed had consented to the application, contain a statement to the effect that that party may apply to a legal member under rule 26 to have that direction varied or set aside.
- (6) When making a direction under paragraph (1)(b) of this rule a legal member may—
- (a) impose a condition on the supply of a document that the party receiving the document shall treat it as confidential and shall use it only for the purposes of the reference; and
 - (b) require, before the direction takes effect, a written undertaking to that effect from that party.

Varying or setting aside of directions

26.—(1) Where a party to whom a direction is given under rule 25 was not afforded the opportunity to be heard before the direction was given and did not consent to the relative application, that person may apply at any time before the First-tier Tribunal has determined the reference, by notice to the First-tier Tribunal, to a legal member for the direction to be varied or set aside, but a legal member shall not vary it or set it aside without first notifying the other party and considering any representations made by that party.

(2) An application under paragraph (1) may be considered by a legal member alone or with such other members of the First-tier Tribunal as the legal member considers appropriate.

Failure to comply with a direction

27.—(1) If any direction given to a party under rule 25 is not complied with by that party within any period specified in the direction, a legal member or the First-tier Tribunal at a hearing, may—

- (a) where the party in default is the appellant, dismiss the reference either in whole or in part;
- (b) where the party in default is the authority, determine the reference without a hearing; or
- (c) where appropriate, direct that a party in default take no further part in the proceedings.

(2) In this rule the expression “party in default” means the party who failed to comply with the direction.

Power to dismiss

28.—(1) Without prejudice to the powers of the First-tier Tribunal at a hearing, a legal member may, at any time before the hearing of a reference, direct that the First-tier Tribunal serves notice on the appellant stating that it appears that the reference should be dismissed on one or more of the grounds specified in paragraph (2) or for want of prosecution.

(2) The grounds referred to in paragraph (1) are that the reference—

- (a) is made otherwise than in accordance with these Rules;
- (b) is not, or is no longer, within the jurisdiction of the First-tier Tribunal; or
- (c) is frivolous or vexatious.

(3) The notice under paragraph (1) shall invite the appellant within such period as may be specified (being not less than 5 working days) to make representations in writing as to why the reference should not be dismissed and shall explain that the appellant may request a hearing.

(4) After expiry of the period specified in paragraph (3), and subject to paragraph (5), a legal member may order that the reference be struck out on one or more of the grounds specified in paragraph (2) or for want of prosecution.

(5) Before making an order under paragraph (4) a legal member shall consider any representations under paragraph (3) and may afford the appellant the opportunity of a hearing.

(6) Any decision to dismiss a reference under this rule shall be recorded in summary form in a document signed by the legal member and a copy of that document shall be sent by the First-tier Tribunal to each of the parties, and details of the decision entered in the Register.

Extension of time

29.—(1) Where these Rules or any direction made under them require or authorise a party or other person to do something within a period of time, a legal member or the First-tier Tribunal at a hearing may, in exceptional circumstances, on the application of that person or on their own initiative, and even if the period has expired, grant such further period as the legal member or the First-tier Tribunal may consider appropriate.

(2) Where such a further period has been granted, reference in these Rules to the period of time shall be construed as a reference to the period of time as so extended, and, unless the further period is granted by the First-tier Tribunal at a hearing at which both parties are either present or represented, the First-tier Tribunal shall give notice to each of the parties of any such extension.

Consolidation of references

30.—(1) Where more than one reference relates to the same child or young person, or requires a decision on substantially the same issue, a legal member may order that such references be heard at the same hearing.

(2) A legal member may make an order varying or revoking an earlier order made under paragraph (1).

(3) An order under this rule shall only be made if it appears to the legal member to be fair and just to do so and, before an order is made, the parties to each reference affected shall have the opportunity to be heard, and to have their views taken into account, either by a legal member alone or with such other members of the First-tier Tribunal as the legal member may consider appropriate.

(4) A legal member must not make an order under this rule if it would cause a breach of any of the rules in this Part, or the rules in Part 3.

Consolidation of hearings of claims and references

31.—(1) Where a claim under paragraph 8 of schedule 17 of the 2010 Act and a reference relate to the same person, and the other party to the claim and the reference is also the same, the person or, where the claim was made by the person's parent, the parent or the other party may apply to the First-tier Tribunal for an order that such a claim and reference be heard at the same hearing.

(2) A legal member may—

(a) make an order under paragraph (1);

(b) make an order varying or revoking an earlier order made under paragraph (1).

(3) An order under this rule shall only be made if it appears to the legal member to be fair and just to do so and, before an order is made, the parties have had the opportunity to be heard, and their views taken into account, either by a legal member alone or with such other members of the First-tier Tribunal as the legal member may consider appropriate.

(4) A legal member must not make an order under this rule if it would cause a breach of any of the rules in this Part, or the rules in Part 3.

Recovery of documents

32.—(1) Subject to the provisions of the 2004 Act and to paragraph (2) of this rule, the First-tier Tribunal or a legal member may, on the application of any party or on its or his or her own initiative, direct that citation be sent to any person requiring that person to produce to the First-tier Tribunal, by such date as may be specified, any document in the custody, or under the control, of that person.

(2) The citation must explain that it is an offence under the Scottish Tribunals (Offences in Relation to Proceedings) Regulations 2016⁽⁹⁾ to refuse or fail to produce any such document without reasonable excuse or to deliberately alter, conceal or destroy any document which that person is required by the citation to produce, and that a person guilty of such an offence may be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(3) Where such a citation has been duly served on a person and that person fails to comply within the time specified in the citation, a legal member or the First-tier Tribunal at a hearing may—

(a) where the person in default is the appellant, dismiss the reference without a hearing or further hearing; or

(b) where the person in default is the authority, order that the authority take no further part in the proceedings.

(4) In the exercise of the power conferred under paragraph (1) regard shall be had to the need to protect any matter that relates to intimate personal or financial circumstances of any person or consists of information communicated or obtained in confidence.

(9) [S.S.I. 2016/342](#).

Witnesses and citation of witnesses

33.—(1) Where a party wishes to call witnesses to attend a hearing to give evidence, that party shall, prior to the end of the case statement period, provide to the First-tier Tribunal a list of the names and addresses of such witnesses.

(2) A party may not call and lead evidence from any witness who is not included on their list of witnesses except with the permission of a legal member or the First-tier Tribunal at a hearing.

(3) Subject to the provisions of the 2004 Act and to paragraph (5) of this rule, the First-tier Tribunal or a legal member may, on the written application of any party made not later than 8 working days before the hearing, or on its or his or her own initiative, direct that citation be sent to any person whose details are included in either party's list of witnesses under paragraph (1) requiring that person to attend any hearing, including any adjourned hearing, of the First-tier Tribunal at such time and place as may be specified in the citation, for the purpose of giving evidence.

(4) The citation must explain that it is an offence under the Scottish Tribunals (Offences in Relation to Proceedings) Regulations 2016 without reasonable excuse to fail to attend the First-tier Tribunal proceedings as required by the citation or to refuse or fail, whilst attending proceedings as so required, to answer any question and that a person guilty of such an offence may be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) No person shall be required so to attend unless—

- (a) they have been given at least 5 working days' notice of the hearing or, if less than 5 such days, they have informed the First-tier Tribunal that they accept such notice as they have been given; and
- (b) the necessary expenses of their attendance are paid or tendered to them by the party seeking their attendance.

(6) At the hearing of a reference, the parties shall, subject to the provisions of these Rules, be entitled to be present and be heard, to give evidence, to call witnesses, to question witnesses and to address the First-tier Tribunal both on the evidence and generally on the subject matter of the reference, provided that neither party shall be entitled unless permitted to do so by a legal member, or the First-tier Tribunal at a hearing, to call more than two witnesses in addition to the child or young person to give evidence in person.

Expert evidence

34.—(1) The First-tier Tribunal or a legal member may, if any issue arises in relation to a reference on which, in the opinion of the First-tier Tribunal or a legal member, it would be desirable for the First-tier Tribunal to have the assistance of an expert, appoint a person having appropriate qualifications to enquire into and report on any matter.

(2) The First-tier Tribunal must supply the parties with a copy of any written report received under paragraph (1) in advance of the hearing or resumed hearing.

(3) If the First-tier Tribunal or a legal member sees fit, it, he or she may direct that the expert shall attend the hearing and give evidence.

Specified persons

35.—(1) On the application of either party or on its own initiative the First-tier Tribunal or a legal member may call any person having a sufficient interest in the matter before the First-tier Tribunal to attend a hearing and give evidence.

(2) In the case of the decision of an authority refusing a placing request the First-tier Tribunal or legal member may call the authority for the area to which the child or young person belongs (where

it would be desirable for the First-tier Tribunal to have the assistance of the authority) to attend a hearing and give evidence.

Notice of hearing

36.—(1) The First-tier Tribunal shall, after consultation with the parties, fix the date, time and place of the hearing and, not less than 10 working days (or such shorter time as the parties may agree) before the date so fixed, send to each party a notice that the hearing is to be at such time and at such place or notify them in such other manner as the First-tier Tribunal thinks fit.

(2) The First-tier Tribunal shall include in or with the notice of hearing—

- (a) information and guidance as to attendance at the hearing of the parties, their witnesses and any persons whom they may wish to be present at the hearing in support, the lodging of documents, and the right of representation or assistance as provided for in rules 4 and 5;
- (b) a statement explaining the possible consequences of non-attendance by a party, unless that party has stated in writing that they wish to withdraw the reference or withdraw the response, and of the consequences of the failure to name a representative or witness whom the party may wish to attend;
- (c) an invitation to notify the First-tier Tribunal if a party or a witness may require the attendance of an interpreter or other person to give other necessary assistance at the hearing or may require any other particular arrangements to be made; and
- (d) a statement explaining the right to make representations in writing provided for under rule 38(6) by—
 - (i) an appellant who does not attend and is not represented at the hearing; or
 - (ii) an authority if they are not represented at the hearing and if they have submitted a response, unless they have stated in writing that they do not resist the reference or have withdrawn opposition to the reference.

(3) The First-tier Tribunal may alter the date, time or place of any hearing provided that the parties are given at least 5 working days' notice (or such shorter time as the parties may agree) of any altered hearing date, time or place.

(4) An altered hearing date shall not (unless the parties so agree) be earlier than the date previously fixed.

(5) Nothing in this rule shall oblige the First-tier Tribunal, in relation to the arrangements for any hearing, to consult with or send notice to any party who is not entitled to be present or represented at that hearing.

(6) In this rule, “working day” has the meaning given to it in rule 1 except that it includes any day in July which is not a Saturday, a Sunday or a day specified as a bank holiday in accordance with these Rules.

Power to decide reference without hearing

37.—(1) A legal member may, in any of the circumstances referred to in paragraph (2), decide the reference without a hearing.

(2) For the purposes of paragraph (1) the circumstances are—

- (a) where no response is submitted to the First-tier Tribunal within the time appointed by rule 19 or any extension of time allowed under rule 29;
- (b) where the authority states in writing that they do not resist the reference;
- (c) where the authority withdraws their opposition to the reference;
- (d) where both parties agree in writing to dispense with a hearing;

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- (e) 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 time limit provided; or
- (f) where a reference to the First-tier Tribunal is made by a child or child's parent under section 18(3)(ea) or (eb) of the 2004 Act.

(3) In deciding a reference under paragraph (1) the legal member shall do so on the basis of the notice of reference, any response, any statement of case and any written evidence submitted in accordance with the Rules.

(4) The legal member shall, after receipt of a reference which is to proceed without a hearing in accordance with this rule, send to the parties—

- (a) information and guidance; and
- (b) an indication of when the legal member expects to be able to notify the parties of the decision of the legal member.

Attendance at hearings

38.—(1) Subject to the provisions of this rule, any hearing before the First-tier Tribunal shall be in private.

(2) A legal member or the First-tier Tribunal at a hearing may, on the application of the appellant or on his, her or its own initiative, make an order that a hearing or part of a hearing be held in public.

(3) An order shall not be made under paragraph (2) in any of the circumstances referred to in paragraph (4).

(4) Those circumstances are that a public hearing—

- (a) would prejudice the welfare, wellbeing or interests of the child or young person;
- (b) would not, in all the circumstances, allow the fair hearing of the reference; or
- (c) would not be fair or just.

(5) The First-tier Tribunal, with the consent of the parties or their representatives actually present, may permit any other person to attend the hearing of a reference which is held in private.

(6) An appellant or authority who does not intend to attend or be represented at the hearing may, not less than five working days before the hearing, submit additional written representations in support of their case.

(7) The following persons, as well as the parties and their representatives, shall be entitled to attend the hearing of a reference held in private—

- (a) the child or young person unless, in the case of a child, the First-tier Tribunal considers that in respect of the whole or any part of the proceedings the welfare, wellbeing, or interests of that child would be prejudiced by being present;
- (b) a parent of the child or young person who is not a party;
- (c) a supporter under rule 5;
- (d) a person appointed under rule 43(2);
- (e) a witness, but only for the purpose of giving evidence;
- (f) the Chamber President and a member of the First-tier Tribunal (when not sitting as a member of the First-tier Tribunal);
- (g) a member of staff of the Scottish Courts and Tribunals Service;
- (h) an interpreter;
- (i) a person giving necessary assistance to a person entitled to attend the hearing.

(8) Without prejudice to any other powers it may have, the First-tier Tribunal may exclude from the hearing, or any part of it—

- (a) a person whose conduct has disrupted or is likely, in the opinion of the First-tier Tribunal, to disrupt the hearing;
- (b) a person, including the child or young person, whose presence is likely, in the opinion of the First-tier Tribunal, to make it difficult for any person to present evidence or make representations necessary for the proper conduct of the hearing;
- (c) a representative who was not notified to the First-tier Tribunal in the reference, response or in accordance with rule 4; or
- (d) a witness not included in the list of witnesses submitted by either party in accordance with rule 33(1).

Conduct of the hearing

39.—(1) At the beginning of the hearing the legal member shall explain the procedure which the First-tier Tribunal proposes to adopt.

(2) The First-tier Tribunal may permit a parent of the child or young person, who is not a party, to address it on the subject matter of the reference.

(3) The First-tier Tribunal may, if it is satisfied that it is fair and just to do so, permit—

- (a) the appellant to rely on grounds not stated in the reference or in any statement of case and to produce or lead any evidence not presented to the authority prior to the date of—
 - (i) the decision which is the subject of the reference; or
 - (ii) the provision of a copy of the co-ordinated support plan or amended plan in accordance with section 11(5)(a) of the 2004 Act containing the information which is the subject of the reference; or
- (b) the authority to rely on grounds not specified in the response.

(4) If, at or after the beginning of a hearing, a member of the First-tier Tribunal other than the legal member is absent, the hearing may, with the consent of the parties, be conducted by the legal member and the remaining member and in that event the First-tier Tribunal shall be deemed to be properly constituted, and the decision of the First-tier Tribunal shall be taken by the legal member and that member (see regulation 2(4) of S.S.I. 2018/).

(5) In the absence of the consent referred to in paragraph (4) the hearing shall be postponed.

(6) Except in so far as expressly permitted by these Rules to give evidence or to address the First-tier Tribunal none of the persons mentioned in rule 38(5) or (7) shall, save in the case of persons mentioned in rule 38(7)(h), take any part in the hearing or (where entitled or permitted to remain) in the deliberations of the First-tier Tribunal.

(7) For the purposes of arriving at its decision the First-tier Tribunal shall, and for the purposes of discussing a question of procedure, may, notwithstanding anything contained in these Rules order all persons to withdraw from the sitting of the First-tier Tribunal other than the legal member and ordinary members of the First-tier Tribunal and any of the persons mentioned in rule 38(7)(f) and (g).

Evidence at hearing

40.—(1) Evidence at a hearing may be given in person or by written statement, but, subject to the provisions of these Rules, the First-tier Tribunal may at any stage of the proceedings require the personal attendance of the maker of a written statement.

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(2) A party shall only be permitted to give evidence by written statement if such statement is submitted prior to the expiry of the case statement period or at any time with the consent of the other party and with the approval of a legal member or the First-tier Tribunal at a hearing.

(3) A legal member or the First-tier Tribunal may at the start of a hearing, on the application of either party or on his, her or its own initiative, determine that a witness be allowed to give evidence by telephone, video link or any other means of communication, if satisfied that this would not prejudice the achievement of the overriding objective.

Postponement of hearing

41.—(1) A legal member may, on his or her own initiative, or on application by either party, postpone any hearing.

(2) The First-tier Tribunal shall notify the parties of the date, time and place of any postponed hearing.

Adjournment of hearing

42.—(1) The First-tier Tribunal may from time to time adjourn a hearing.

(2) A hearing shall not be adjourned solely on account of the failure of a witness to appear unless the First-tier Tribunal, on cause shown, so directs.

(3) When the hearing is adjourned, a legal member or the First-tier Tribunal may give directions to be complied with, before or at the resumed hearing.

(4) Such directions may require a party to provide such particulars or evidence as may reasonably be required for the determination of the reference.

(5) If a party fails to comply with such a direction, the First-tier Tribunal shall take account of that fact when determining the reference or deciding whether to make an order for expenses.

(6) The First-tier Tribunal shall notify the parties of the date, time and place for the resumed hearing.

Children

43.—(1) The First-tier Tribunal may permit a child under the age of 12 to give evidence only where it considers—

(a) that the evidence of the child is necessary to enable a fair and just hearing of the reference; and

(b) that the welfare, wellbeing and interests of the child will not be prejudiced by so doing.

(2) If it allows such a child to give evidence in person, a legal member or the First-tier Tribunal may appoint for the purpose of the hearing a person with appropriate skills or experience in facilitating the giving of evidence by children.

(3) The First-tier Tribunal shall pay such reasonable fees, expenses or allowances as the Chamber President may determine to any person appointed under this rule.

Views of the Child

44. Where a parent of a child refers any decision, failure or information specified in section 18(3) of the 2004 Act relating to that child for whose school education an authority are responsible to the First-tier Tribunal, the First-tier Tribunal is required to seek the views of that child.

Late evidence

45. At the start of a hearing, where a party proposes to submit further documents not already lodged as productions, or to call a witness not on their list of witnesses, the First-tier Tribunal, after considering any representations from the other party, may allow that proposal if it is satisfied that, in all the circumstances, it would be fair and just to do so.

Restricted reporting orders

46.—(1) If it appears appropriate to do so a restricted reporting order may be made by a legal member or the First-tier Tribunal at a hearing.

(2) A restricted reporting order is an order limiting or prohibiting the publishing of any matter specified in the order, which may include matter likely to lead members of the public to identify the appellant or any specified child or other person, where it is considered that they should not be identified.

(3) In this rule “publishing” includes, without prejudice to the generality of that expression—

- (a) publishing any matter in a programme service, as defined by section 201 of the Broadcasting Act 1990⁽¹⁰⁾; and
- (b) causing any matter to be published.

(4) An order under this rule may be made in respect of a limited period and may be varied or revoked by a legal member or the First-tier Tribunal before or at the hearing.

Failure of parties to attend

47.—(1) If a party fails to attend or be represented at a hearing of which they have been duly notified, the First-tier Tribunal may—

- (a) unless it is satisfied that there is sufficient reason for such absence, hear and determine the reference in the party’s absence; or
- (b) adjourn the hearing.

(2) Before disposing of the reference in the absence of a party, the First-tier Tribunal shall consider the reference, any response, any statement of case and any written evidence submitted in accordance with the Rules.

Decisions on references

48.—(1) A decision of the First-tier Tribunal on a reference may be reached by a majority, but where the Tribunal is constituted by a legal member and one ordinary member in terms of the First-tier Tribunal for Scotland Health and Education Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018⁽¹¹⁾ the legal member shall have a second or casting vote.

(2) The decision of the First-tier Tribunal may be given orally at the end of the hearing or may be reserved and, in any event, whether there has been a hearing or not, the Tribunal shall inform each party of the decision which shall as soon as may be practicable be recorded in a document signed by the legal member which contains a full statement of the facts found by the Tribunal and the reasons for the decision.

(3) The First-tier Tribunal shall—

⁽¹⁰⁾ 1990 c.42. Section 201 was amended by section 360 and paragraph 1 of schedule 19 of the Communications Act 2003 (c.21).

⁽¹¹⁾ S.S.I. 2018/ , regulation 2(4).

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- (a) as soon as practicable after it is prepared send a copy of the document referred to in paragraph (2) to each party and send notice about the circumstances in which there is a right to appeal under section 21 of the 2004 Act against a decision of the First-tier Tribunal;
- (b) enter such details in the Register as the Chamber President may from time to time direct under section 74(2) of the 2014 Act; and
- (c) where the circumstances mentioned in section 19(5)(c) of the 2004 Act apply, notify the appeal committee of the reference to the committee of the First-tier Tribunal's decision.

Further procedure on appeal

49.—(1) If any appeal against a decision of the First-tier Tribunal is allowed by either the First-tier Tribunal or the Upper Tribunal, the entry relating to the decision in the Register shall be altered to reflect that and the parties shall be notified accordingly.

(2) If by order of the Upper Tribunal a reference is remitted back to the First-tier Tribunal, and subject to any directions or orders of the Upper Tribunal made under section 21(3) of the 2004 Act, the First-tier Tribunal shall notify the parties that, during such period as a legal member may specify each party may submit a supplementary statement of case and further written evidence.

(3) If an appeal against an order to dismiss a reference is allowed, the First-tier Tribunal shall notify the parties—

- (a) in the case where the case statement period had not expired before the order to dismiss took effect—
 - (i) that a new case statement period shall be commenced in accordance with rule 17; and
 - (ii) that, within the new period, the parties may submit the documentation referred to in sub paragraph (b) in respect of a statement of case or evidence submitted before the dismissal took effect; or
- (b) in any other case, that each party may within such period as the legal member may specify submit a supplementary statement of case along with any further written evidence.

(4) The First-tier Tribunal shall forthwith send a copy of all statements and written evidence received from a party in accordance with this rule to the other party.

Miscellaneous

50.—(1) Subject to the provisions of the 2014 Act and these Rules, the First-tier Tribunal may regulate its own procedure.

(2) The First-tier Tribunal may, if it thinks fit, make a decision in terms agreed in writing by the parties.

Change of authority

51.—(1) This rule applies if, after the date of receipt by the First-tier Tribunal of a reference, an authority (“the new authority”) other than the authority named in the notice of reference (“the original authority”) becomes responsible for the school education of the child or young person.

(2) On receiving information that this rule applies a legal member or the First-tier Tribunal at a hearing may order that, for all the purposes of the reference, the new authority be substituted for the original authority.

(3) The appellant, the original authority and the new authority shall have an opportunity to be heard before an order is made under paragraph (2).

(4) When an order is made under paragraph (2)—

- (a) the First-tier Tribunal shall notify the appellant, the original authority and the new authority;
- (b) the original authority shall no longer be a party;
- (c) the new authority shall become a party;
- (d) these Rules shall apply as if the new authority had made the decision or was responsible for the failure or information to which the reference relates;
- (e) the First-tier Tribunal shall send to the new authority copies of all the documents and written evidence relating to the reference duly received by the First-tier Tribunal from the appellant or from the original authority; and
- (f) the legal member or the First-tier Tribunal shall give directions as to further procedure and in particular may set new dates for the new case statement period or for any hearing.

Power to exercise functions of a legal member

52.—(1) Any function of a legal member may be exercised by the Chamber President or by any other legal member selected by the Chamber President.

(2) Where the Chamber President or a legal member determines any preliminary or incidental matter alone, then unless the interests of fairness and justice require that particular reference to be determined by the First-tier Tribunal with the same legal member, the reference may be considered by the First-tier Tribunal with a different legal member, if the Chamber President considers it necessary or expedient.

(3) Subject to rule 56(3), if the circumstances referred to in paragraph (4) occur after the decision of a legal member or of the First-tier Tribunal, the functions of the legal member for the completion of the proceedings may be exercised by the Chamber President or any other legal member.

(4) The circumstances referred to in paragraph (3) are—

- (a) the death or incapacity of the legal member; or
- (b) the legal member ceasing to be a member of the First-tier Tribunal.

Power to exercise functions of an ordinary member

53.—(1) If either of the circumstances referred to in paragraph (2) occur after the decision of the First-tier Tribunal, the functions of the First-tier Tribunal may be undertaken by the legal member and the remaining ordinary member.

(2) The circumstances referred to in paragraph (1) are—

- (a) the death or incapacity of an ordinary member; or
- (b) such a member ceasing to be a member of the First-tier Tribunal.

(3) This rule shall not apply to the First-tier Tribunal—

- (a) when constituted with a legal member and one ordinary member in accordance with rule 39(4); or
- (b) in relation to which the Chamber President or another legal member is acting in place of the legal member in accordance with rule 52(3).

Register

54.—(1) The First-tier Tribunal shall keep a Register of References to the First-tier Tribunal.

(2) There shall be entered in the Register a note of all references, and the entry for each case shall contain the following particulars where appropriate—

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- (a) the names and addresses of the parties;
 - (b) brief details of the nature of the reference;
 - (c) the date of any hearing including any hearing on preliminary or incidental matters, and, where appropriate, the nature of the hearing and any hearing at which the legal member sat alone;
 - (d) details of any directions or orders issued; and
 - (e) the document in terms of which the decision of the First-tier Tribunal has been recorded under rule 48(2).
- (3) The Register or any part of it may be kept in electronic form.

Publication

55.—(1) The Chamber President shall make such arrangements as the Chamber President considers appropriate for the publication of decisions of the First-tier Tribunal.

(2) Decisions may be published electronically.

(3) A decision may be published in an edited form, or subject to any deletions, where the Chamber President or a legal member considers that to be appropriate bearing in mind—

- (a) the need to safeguard the welfare, wellbeing and interests of the child or young person or any other person;
- (b) the need to protect the private life of any person;
- (c) any representations on the matter which any person has provided in writing to the First-tier Tribunal at any time prior to publication under the arrangements made under paragraph (1).

(4) A decision of the First-tier Tribunal shall be published in such a manner as to protect the anonymity of the child or young person.

Irregularities

56.—(1) Any irregularity resulting from failure, at any time before the First-tier Tribunal has determined the reference, to comply with any provision of, or direction made under, these Rules shall not by itself render the proceedings void.

(2) Where any such irregularity comes to the attention of the First-tier Tribunal, the First-tier Tribunal may, and shall, if it considers that any person has been prejudiced by the irregularity, give such directions as it thinks just before reaching its decision to cure or waive the irregularity.

(3) Where these Rules require the legal member of the First-tier Tribunal to sign a document, and where by reason of death or incapacity the legal member is unable to do so, the other members of the First-tier Tribunal hearing the reference, whom failing the Chamber President, shall sign it and certify that the legal member is unable to sign.

Proof of documents and certification of decisions

57.—(1) A document purporting to be a document issued by or on behalf of the Chamber President, a legal member, or the First-tier Tribunal shall, unless the contrary is proved, be deemed to be a document so issued.

(2) A document purporting to be certified by the First-tier Tribunal as a true copy of a document containing a decision of the First-tier Tribunal shall, unless the contrary is proved, be sufficient evidence of its contents.

Manner and time of service of notices etc.

58.—(1) A notice given under these Rules shall be in writing and a person required under these Rules to notify a matter to the First-tier Tribunal shall do so in writing.

(2) Notices and documents required by these Rules to be sent or delivered to the First-tier Tribunal may be sent by post, by fax or by electronic communication to or be delivered at the address of the First-tier Tribunal or such other address as the First-tier Tribunal may notify.

(3) Any citation under rule 32 or 33 shall—

- (a) be posted by first class recorded or special delivery post properly addressed and pre-paid to the addressee at their ordinary or last notified address; and
- (b) be deemed, unless the contrary is proved, to have been received on the second working day after posting.

(4) Any notice or document, other than a citation under rule 32 or 33, required or authorised to be given or sent under these Rules shall, subject to the provisions of paragraph (6) be deemed to have been given or sent if it was—

- (a) sent by first class post properly addressed and pre-paid to the addressee at their ordinary or last notified address; or
- (b) transmitted by fax or communicated electronically to a fax number or electronic address specified by the addressee.

(5) Any such notice or document as is referred to in paragraph (4), shall, unless the contrary is proved, be deemed to have been received—

- (a) where sent by first class post, on the second working day after posting; or
- (b) if transmitted by fax or communicated electronically, on the first working day after the day on which it is received in legible form.

(6) Any such notice or document as is referred to in paragraph (4) shall not be transmitted by fax or electronic communication to a person unless that person has confirmed in writing that notices or documents will be considered to have been duly sent if transmitted or communicated to a specified fax number or electronic address.

(7) A person may at any time by notice to the First-tier Tribunal change their address for service under these Rules.

(8) Where for any sufficient reason service of any document or the giving of any notice cannot be effected in the manner prescribed under this rule, a legal member or the First-tier Tribunal may dispense with service or make an order for substituted service in such manner as may be deemed fit and such service shall have the same effect as service in the manner prescribed under this rule.

(9) In this rule, “working day” has the meaning given to it in rule 1 except that it includes any day in July which is not a Saturday, a Sunday or a day specified as a bank holiday in accordance with these Rules.

Signature of documents

59. Where any of these Rules requires a document to be signed, that requirement shall be satisfied—

- (a) if the signature is written; or
- (b) subject to rule 14(1) in the case of a document which is communicated electronically in accordance with these Rules by the electronic signature of the person who is required to sign it.

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