SOS!SEN | The independent helpline for Special Educational Needs

INFORMATION SHEET

CHALLENGING A TRIBUNAL DECISION

The grounds on which you may appeal against a SEND Tribunal decision, and the procedures for doing so, are outlined in Part 5 of an official government document called *The Tribunal Procedure: First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008*. It can be viewed online at:
http://www.legislation.gov.uk/uksi/2008/2699/contents/made

Clerical mistakes/accidental omissions

The First-tier Tribunal can correct clerical mistakes and accidental slips or omissions at any time. This can be requested in a letter or Request for Changes form.

Setting aside a decision

Rule 45 states that the Tribunal has power to set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if:

- the Tribunal considers that it is in the interests of justice to do so; and
- one or more of the conditions below are satisfied.

The conditions are:

- a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
- a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
- a party, or a party's representative, was not present at a hearing related to the proceedings; or
- there has been some other procedural irregularity in the proceedings.

An application to set aside must be made in writing within 28 days of the day the decision in question was sent.

Applying for permission to appeal

Either side may apply for permission to appeal. The basic procedure is in Rule 46. The application must be made in writing within 28 days of the date on which the decision was sent. If there has been a correction of the decision or amended reason has been given following a review (see below), or an unsuccessful application to set the decision aside, then the application must be made within 28 days of the date on which the relevant decisions were sent.
If an application is entered outside the 28-day time limit, it will be necessary also to

request the Tribunal to extend the time limit and give reasons for the failure to send the application in time. The application will only be admitted if a Tribunal Judge agrees to extend the time limit.

Note that an appeal can only be made in relation to an error of law; the Upper Tier has no power to interfere with the findings of fact made by the Tribunal. However, if it can be demonstrated that the Tribunal has made a blatant error of fact which is material to the decision, or the evidence that was given and accepted was seriously misleading, that in itself would mean that the decision cannot stand in law. This is obviously quite rare.

The application for permission must:

- identify the decision to which it relates;
- identify the alleged error or errors of law in the decision; and
- state the result the party making the application is seeking.

Normally, the result being sought will be the setting aside of the decision and remitting the appeal to be reheard by a freshly constituted Tribunal: the Upper Tier will not normally substitute its own decision.

Review

When the Tribunal receives the application for permission to appeal, it will first of all be reviewed by the original Tribunal Judge (or the Senior Judge if for any reason the original Judge is not available). If the Tribunal Judge decides at that stage that there was an error of law in relation to all or part of the decision, s/he may grant an immediate review. Usually this will be dealt with by making arrangements for both sides to give representations on the issue in question, either in writing or at a further hearing. The parties must be notified in writing of the outcome of any review and any right of appeal which arises as a result.

Application for review where circumstances have changed

There is an additional power to review available only in SEN cases, where circumstances relevant to the decision have changed since the original decision was made: e.g., the Tribunal has decided in favour of a particular school because it is told that there will be a hydrotherapy pool built by the time the child arrives, but plans for the pool are subsequently shelved.

The application must be made in writing within 28 days after the decision notice was sent. However, it will often be the case that the change in circumstances will only come to light after the 28-day period; in that event the applicants will have to apply for a time extension but, if they can show that they did not delay and entered the application quickly after finding out the relevant facts, they will normally be granted the extension.

Decision on application for permission to appeal

The Tribunal must send its decision to the parties as soon as is practicable. However, there is no time limit laid down.

If it refuses permission, it must send a statement of its reasons, and notify the party

concerned of the right to make a further application to the Upper Tribunal for permission with details of the time limits and how to do this.

It may give permission to appeal on limited grounds only, and if so must again give its reasons and details of the right to make a further application to the Upper Tribunal.

Upper Tribunal procedure

For full details, see *The Tribunal Procedure: First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008*.

Application for permission

The time limit is one month from the date when the decision refusing or limiting permission to appeal was sent by the First-tier Tribunal (note – not the date when it is received by the parties).

The application must give standard information about the parties, and in particular must state the grounds of appeal and whether the applicant wants the application to be dealt with at a hearing. It must be accompanied by the original decision and statement of reasons, and the notice of refusal of the original application for permission to the First-tier Tribunal.

The Upper Tribunal may, like the First-tier Tribunal, grant permission only in relation to part of the appeal. If permission is refused, it may be possible to challenge this by way of an application in the High Court for Judicial Review, but it would have to be demonstrated that the refusal of permission was manifestly unreasonable or beyond the power of the Upper Tribunal.

If permission is granted, the Upper Tribunal must send written notice of that fact and any conditions or limitations on the grant of permission to appeal. It may direct that the application for permission will stand as the formal Notice of Appeal, or direct that the appellant file a further Notice, in which case it will impose a time limit for that purpose.

Notice of appeal, response and reply

If permission is granted by the Lower Tribunal, or if it is granted by the Upper Tribunal and they order that a Notice be filed, this must be done within one month. It must again be accompanied by a copy of the decision being appealed. A copy will be sent to the other side who may enter a response, the deadline being one month. If they enter a response it must state whether they oppose the appeal and, if so, give the reasons. A copy will be sent to the appellant.

The appellant may provide a reply to the response, again within one month.

The Upper Tribunal will number the pages of the documents received and send copies out with an index. As these may come out at different stages it is important to keep a file of the numbered documents maintained as this will be used at the final hearing.

Hearing

The Tribunal must give at least 14 days' notice of a hearing date, unless the parties consent to shorter notice or the case is urgent. Hearings will normally be in public. They usually take the form of purely legal argument, with no witnesses being called. The Tribunal Judge may give the decision immediately, or may reserve the decision and give it orally later. In any event written notice of the decision must be given together with reasons and notification of further rights of appeal. However, if the decision is given by consent (which may happen if the appellant decides to withdraw or the opponent decides to concede, or there is some other form of compromise) there is no need to give reasons.

Costs

The power to award costs is the same as it is in the First-tier Tribunal: i.e. costs will only be awarded if one of the parties has acted unreasonably. In practice this may well mean that costs orders will be even rarer in the Upper Tribunal than they are in the First-tier Tribunal; it would be difficult to argue that an appellant was acting unreasonably if the Tribunal has given permission to appeal, and it would be equally difficult in most cases to say that the respondent is being unreasonable in supporting the decision of the First-tier judge.

If the Tribunal decision was deemed correct, this has the benefit for parents that they are probably at little risk of having a costs order made against them, but also means that they are unlikely to recover their costs from the other side if they succeed.

Note that full legal aid is available to parents who are eligible for it for appeals to the Upper Tribunal - i.e., it will cover legal representation at the appeal hearing.

Case law

The vast majority of the case law available relates to the old procedure when appeals from SEND went to the High Court, but the law is equally applicable to the Upper Tribunal.

Reasons arguments

The majority of case law on appeals from SEND relates to cases where it is argued that the original Tribunal has failed to give adequate reasons for its decision, or its reasons ignore or are incorrect in relation to some of the issues before the Tribunal.

The courts have repeatedly stated that the basic rule is that adequate reasons must be given by SENDIST so that the parties know, at least in broad terms, why they won or lost (*R (L) v Waltham Forest 2004*). They should give reasons "in summary form". SEND is not expected to produce something like a detailed court decision, and the courts have been prepared to allow a fair degree of latitude.

Examples of decisions on this issue include:

1. *T v London Borough of Islington 2002*

The LA made a late proposal for a Pupil Referral Unit to be named in Part 4. The court overturned this because there had not been sufficient evidence before the Tribunal to enable them to decide whether the PRU was or was not suitable. The court held that if there had been sufficient documentary evidence this would have made a difference to the decision.

2. *L v Waltham Forest 2003*

The court held that the Tribunal can use its own expertise in deciding the issues before it, including a decision to reject expert evidence. If it does reject expert evidence it should say so specifically, and if it is using its own expertise it should again say so and give the parties the opportunity to make representations and challenge this.

The courts have held in a number of cases that the Tribunal can use its own expertise to decide between competing experts and to come to a decision somewhere in between competing views.

3. *R (M) v Brighton and Hove City Council and SENDIST 2003*

The Court quashed a Tribunal decision because the provision set out in Part 3 did not correlate with the school named in Part 4, and also held that inadequate reasons had been given for the decision.

4. *K v Wandsworth 2003*

A Tribunal decision was quashed because notes prepared by the Chair were contrary to the decision that the Tribunal gave.

Other cases

There have been numerous appeals on specific points of law which have been instrumental in developing the law. Some examples are given here.

5. *L v Clarke and Somerset County Council 1998*

This is a helpful decision for parents underlying the importance of quantifying and particularising amounts of support required in Part 3 of Statements. Although the requirement to be specific is not an absolute and universal one, the court held that there is a presumption in favour of specificity and therefore in most cases such detail is required. Provision should normally be so specific and clear as to leave no room for doubt about what is necessary for the child.

6. *Oxfordshire County Council v GB 2002*

The court held that, in considering the costs of a maintained school, the costs to be considered are the marginal costs of the child attending there, not the inherent costs

which the LA may have already provided. As the LA will be paying to maintain the school whether the child is placed there or not, then only the extra costs of placing that child there should be taken into account, and these may well be marginal.

7. *Coventry v Browne 2007*

The LA argued that, where the costs of extra provision in a school came from a school's delegated budget, the fact that this would cause extra expense to the school were irrelevant as there would be no extra expense to the LA which would provide the same budget figure to the school. The court rejected this argument, finding that if there was a cost to public funds, irrespective of where they came from, this should be taken into account.

On this basis it is arguable that, where a child is placed in a maintained special school, then the actual costs of each place at the school must be relevant - this is a cost to public funds which must be taken into account.

8. *O v Lewisham 2007*

The Court held that, when deciding on the costs involved in any particular school provision, the Tribunal should take into account all costs to public funds including, where applicable, the costs of providing respite care and possible costs to other public authorities such as the NHS. This is particularly relevant in relation to appeals arguing for a place at a residential school.

However, the Upper Tribunal has recently purported to overrule the effects of this decision in *H v Warrington 2013*. The decision appears to be seriously flawed and is the subject of an appeal to the Court of Appeal.

9. *E v Rotherham Metropolitan Borough Council 2002*

A Tribunal's decision was quashed because it allowed for speech and language therapy provision to be changed in the future without the need for a formal amendment to the statement, which would mean the parents would have no right of appeal.

Note that statements quite often contain provision of this nature - e.g., "X will receive one hour per week direct speech and language therapy for one term, after which this will be reviewed and may be altered in accordance with the advice of the therapist." Any such provision should always be challenged, and the *Rotherham* case is a very useful one to cite in this connection.

10. *E v Flintshire County Council and SENT 2002*

The court held that specificity in Part 3 is necessary to ensure enforceability.

11. *CR v Merton London Borough Council and SENT 2002*

The Tribunal found in favour of the LA in ordering a residential school placement. The parents appealed unsuccessfully, raising human rights grounds in relation to the right to

private and family life, and the right to education, but the court held that none of these

rights were infringed. However, this was in part affected by the lack of any effective alternative to a residential school.

12. *E v London Borough of Newham and SENT 2002*

The court held that the duty to specify Part 3 provision is less strict where the child is attending a special school.

13. *Wandsworth London Borough Council v K and SENDIST 2003*

The court confirmed that the Tribunal is entitled to order a home-based programme in Part 3.

14. *Wardle Heron v London Borough of Newham and SENDIST 2004*

A Tribunal decision was quashed because it did not properly balance the costs of the two schools in question, having regard to parental preference. If the relative costs are not far apart, the Tribunal should not necessarily simply opt for the cheaper option; it must weigh in the balance other factors, e.g., whether one school is more specialist than another, availability of facilities needed for the child in question, on-site therapists, etc., and may decide that such benefits are capable of outweighing a relatively small difference in costs.

15. *A v Barnet and SENDIST 2003*

The court held that religious denomination is a relevant factor in deciding whether a school is capable of meeting a child's needs.

16. *Aladay v Richmond 2004*

Parents cannot compel LAs to pay the costs of special educational provision where they have decided to send the child at their own expense to an independent school that they have selected themselves.

17. *Wolverhampton v Smith 2007*

This concerned provision for a child over the age of 16 who was no longer in school, and the council therefore determined that the statement had lapsed and they were no longer responsible. The court held that the reality was that the council had decided to cease to maintain the statement and there was therefore still a right of appeal to SENDIST.