April 2025

Tribunal Procedure Committee

Reply to Consultation on possible amendments to the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 on whether Special Educational Needs appeals can be dealt with on the papers without the consent of both parties

Introduction

1. The Tribunal Procedure Committee (TPC) is responsible for making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal, each of which is divided into Chambers. The First-tier Tribunal, including the Health, Education and Social Care Chamber (HESC), replaced a number of tribunals in 2008. The Special Educational Needs and Disability Tribunal falls within HESC. Further information on the Tribunals can be found on the HMCTS website here.

2. Section 22(4) of the Tribunals, Courts and Enforcement Act 2007 requires that the TPC's rule-making powers be exercised with a view to securing that:
    a. in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done;
    b. the tribunal system is accessible and fair;
    c. proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
    d. the rules are both simple and simply expressed; and
    e. the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring the proceedings before the tribunal are handled quickly and efficiently.

    Further information on the TPC can be found at our website here.

3. The TPC seeks, among other things, to:
    a. make the rules as simple and streamlined as possible;
    b. avoid unnecessarily technical language;
    c. enable Tribunals to continue to operate tried and tested procedures which have been shown to work well; and
    d. adopt common rules across Tribunals wherever possible.

4. The TPC also has due regard to the public-sector equality duty contained in section 149 of the Equality Act 2010 when making rules.

5. The Consultation took place from October to November 2024 seeking views on a proposal to amend the procedure rules governing the First-tier Tribunal (Health Education and Social Care Chamber) ("the Tribunal") for special educational need and disability appeals. A link to the relevant Rules is here.

6. The consultation sought views on amending Rule 23(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 ("the 2008 HESC Rules") on appeals against decisions to refuse to carry out an assessment of needs ("Refusal to Assess Appeals"). The proposals are to remove the application of Rule 23(1)(a) of the 2008 HESC Rules for these Refusal to Assess Appeals. This would leave the issue of whether a decision should be made on the papers or at a hearing, in Refusal to Assess Appeals, entirely to judicial discretion or, alternatively to remove the requirement for the respondent local authority in Refusal to Assess Appeals to consent to a decision being made without a hearing. The Consultation document is here.

Background to the Proposed Changes

7. Rule 23 of the 2008 HESC Rules establishes the circumstances under which decisions can be made by the Tribunal without a hearing. Specifically, Rule 23(1)(a) requires both the appellant and the respondent to consent to the case being decided without a hearing before that may happen.

8. Rule 23 of the 2008 HESC Rules states:

> **23.**—
>
> (1) Subject to paragraphs (2) and (3), the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
>
> (a) each party has consented to the matter being decided without a hearing; and
>
> (b) the Tribunal considers that it is able to decide the matter without the hearing.
>
> (2) This rule does not apply to a decision under Part 5.
>
> (3) The Tribunal may dispose of proceedings without a hearing under rule 8 (striking out a party's case).

9. "Hearing" (defined in rule 1(3)) means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication.

10. In practice, both parties are asked to specify on the initial forms submitted to the Tribunal whether they consent for a decision to be made on the papers. If either party

does not consent, then the case will be listed for a hearing. If both parties consent to a decision being made on the papers, then the Tribunal must also determine that it is able to do justice fairly without a hearing.

The Consultation

11. The consultation was limited to SEND appeals against a local authority's refusal to secure an Education, Health and Care (EHC) needs assessment ("Refusal to Assess Appeals"). There were two options.

Option 1: Leave entirely to judicial discretion

12. Proposal 1 was to remove the application of Rule 23(1)(a) of the 2008 HESC Rules for Refusal to Assess Appeals. This would leave the matter of whether a decision should be made on the papers or at a hearing, in such cases, entirely to judicial discretion.

Option 2: Remove local authority consent

13. Proposal 2 was to remove the requirement for the respondent local authority in Refusal to Assess Appeals to consent to a decision being made without a hearing (contained in Rule 23(1)(a) of the 2008 HESC Rules). This means that the appellant's consent for the decision to be made on the papers, alongside the Tribunal's agreement, would determine whether an appeal could proceed without a hearing.

The Consultation Questions

Question 1: Do you agree with either of the proposed changes to Rule 23? Please give reasons for your answer.

Question 2: Do you consider that one of the two proposals is more desirable than the other? If so, please explain your reasons.

Question 3: Do you consider Proposal 1, to leave a decision on whether a refusal to assess case should be made on the papers or at a hearing entirely to judicial discretion, is appropriate?

Question 4: Do you consider Proposal 2, to remove the requirement for the respondent in Refusal Appeals to consent to a decision being made without a hearing (Rule 23(1)(a)) meaning that the appellant's consent for the decision to be made on the papers, alongside the Tribunal's agreement, would determine whether an appeal could proceed without a hearing, to be appropriate?

Summary of Responses

14. There were a total of 40 responses. One response was submitted after the deadline of 5th December 2024, received on 6 December 2024. The TPC chose to accept the response as part of the Consultation as it was only one day late. In this reply, any person or organisation that has responded to the Consultation is referred to as a Consultee (or Consultees).

15. 2 responses did not directly address the questions. These responses included reasons for their non-participation.

16. Of the 40 responses, 25 responses supported one of the proposed changes, 8 responses disagreed with both of the proposed changes, 5 offered a generalised comment or viewpoint in favour of both proposals and 2 responses explained their reasons for their non-participation (as referred to above in paragraph 15).

17. With respect to the 25 supportive responses for change, 7 Consultees preferred proposal 1 and 18 Consultees preferred proposal 2. Therefore, the majority of Consultees preferred proposal 2.

Responses in relation to Proposal 1

18. With respect to Proposal 1, responses in support stated that the amendment represented a positive step towards enhancing the efficiency and fairness of the tribunal process for SEN appeals, with the Tribunal making the overall decision without either parties consent providing a fair and equitable process for both parties.

19. It was suggested that Proposal 1 would avoid unnecessary levels of communications in relation to seeking consent for the hearing to be decided on the papers alone. Each case could be evaluated on its merits, allowing the Tribunal to determine the most suitable method for determination of the appeal.

20. Judicial discretion would provide the flexibility to consider factors such as the complexity of the case, the quality of the written evidence, and the specific needs of the parties involved. A tailored approach would promote fairness and efficiency, is proportionate and fair, ensuring that decisions are made in the best interests of all parties. Consistency was also raised as a benefit to the exercise of judicial discretion. This option was felt by some Consultees to be fairer and more equitable than Proposal 2, in allowing an unbiased assessment of the documentation available and placing both parties on an equal footing.

21. A caveat was raised that key dates within the appeal timetable (such as the further evidence deadline) should not fall within the summer holidays. If this were to be the case, schools would be unable to provide evidence by the deadline thus impacting on the ability of the Tribunal to make an informed decision on the papers alone.

22. Several responses in favour of Proposal 1 indicated that this proposal puts the child or young person at the centre of the system and any process which expedited a decision would therefore be in the child or young person's best interests.

23. Further supportive responses relied on the fact that that Proposal 1 continued to provide a 'fair and just' system for both parties because they would be treated in the same way and offered the same opportunities on the issue of a hearing decided on the papers alone. These Consultees also considered that Proposal 1 would reduce the use of Rule 23 as a tactic to delay measures for children and would avoid prolonging a decision unnecessarily.

24. One Consultee considered that that there would need to be clarity around the mechanism for seeking a review of any Tribunal decision to proceed to a hearing on the papers, if needed.

25. Consultees in favour of both proposals considered that it was necessary to ensure that all appellants, particularly those with additional needs, are able to fully understand their options and provide informed consent to a hearing on the papers.

26. It was noted that a Consultee considered that the Judicial Office Holders in the Tribunal, dealing with SEND appeals and considering the directions to be made, can be relied on to deal with this issue appropriately. If either party had reasons to want an oral hearing it would be open to the party to make an application for one, putting their reasons forward if they were not already clear from the papers and original appeal form.

27. Consultees in favour of both proposals raised concerns that some appellants may not be able to fully provide their evidence in support of an appeal on paper only but they might be able to articulate their appeal more efficiently at an oral hearing and that they could therefore be disadvantaged without the Tribunal being aware that this is the case. Appellants may experience challenges in expressing themselves in written English or have other circumstances that would result in a disadvantage with a hearing on the papers. These Consultees also noted a need for some safeguarding measures to exist, to protect such appellants.

28. A general comment made by a Consultee was that a decision should not be made by the Tribunal because the final decision should rest with the people who know the child or young person best – the appellant who is pursuing the appeal on behalf of the child or young person.

29. Other Consultees felt that Proposal 1 would have the effect of silencing the voices of parents and carers in a procedure that should be reasonable and impartial and that it was imperative that the autonomy they have in the lives of their children is preserved and protected in law. One Consultee raised a concern that the Tribunal might feel under undue pressure to decide an appeal should be heard on the papers alone, that the proposal increases the judicial workload and was unnecessary.

Responses in relation to Proposal 2

30. Several responses to Proposal 2 also indicated that it would put the child or young person at the centre of the system and any process which expedited a decision would therefore be in the child or young person's best interests.

31. Consultees to Proposal 2 acknowledged the inequality of one party having the automatic right to a hearing when the other party does not, however they considered this was equitable given the imbalance of power, knowledge of the system and access to resources between an appellant and a Local Authority.

32. Consultees supported Proposal 2 in order to reduce the backlog of Refusal to Assess Appeals, reduce the time between an appeal and a final decision which, together with any additional delays incurred, impacted negatively on children and young people's education as well as causing stress and expense to families. Supportive responses to Proposal 2 included the fact that making decisions on appeals more quickly might encourage Local Authorities to consider at an earlier stage whether they had correctly applied the legal test. This might lead to a reduction in decisions to refuse being overturned by the Local Authority just before an oral hearing which in turn was suggested that it would reduce the need for appellants to take time off work and/or make replacement care arrangements for an oral hearing.

33. One Consultee considered that Proposal 2 would free up time for critical and more complex SEND appeals which necessitated an in-person hearing, meaning that those other types of appeal would be heard earlier, thereby benefitting children and young people and reducing the time for which they are left in uncertainty and without their potentially necessary SEND provision.

34. Consultees preferring Proposal 2 considered that it would recognise supporting the needs of an appellant where the appellant's literacy skills might be limited and that it more adequately preserved the interests of justice in retaining the option for appellants to require an in-person hearing. They considered that this increased fairness and open access to justice for parents or young people, who might have limited knowledge or literacy skills, and who might be able to better present their appeal in an oral hearing. Contrary to this, some Consultees considered that Proposal 2 would lead to the opposite effect and that the proposal would reduce the ability of appellants to articulate themselves in their appeal.

35. Consultees also stated that any shift towards empowering the appellant should be balanced by safeguards to ensure that it does not inadvertently reduce fairness or the quality of the decision-making process. One safeguard suggested was that the question of a hearing on the papers needed to be specifically drawn to the appellant's attention by means of a question in the appeal form; it was suggested that if it was left to the appellant to make an application later in the process, then unrepresented parents with little or no experience of Tribunal procedure may not realise that this possibility is open to them and may struggle to put their case forward effectively.

36. When Consultees preferred Proposal 2, they included their reasons as aligning with the guiding principle of an "accessible and fair" system and that appellants should be afforded the opportunity to present their cases in whichever way supports them best.
37. One Consultee stated that the proposals should also encompass refusals to issue Education, Health and Care needs assessment appeals as well as Refusal to Assess Appeals.

38. A Consultee suggested that the rule change should be temporary and reviewed after 12 months to assess if there had been any unintended consequences or disadvantages to appellants.

39. Those Consultees opposed to Proposal 2 considered that it undermined the principle of balanced participation in the Tribunal process, would not be fair and equitable to both parties, that there was an implied bias in the proposal and that it would prevent the Local Authority from having a fair hearing. They went further in some responses and stated that there was a risk of decisions being made without comprehensive consideration of all perspectives, leading to less informed outcomes and potentially compromising the quality and fairness of the Tribunal's decisions. They considered that maintaining the requirement for both parties' consent ensured that the process

remained equitable and that all voices were heard. One Consultee considered that it discriminated against Local Authorities.

40. One Consultee considered that proposal 2 would cause unnecessary confusion and anxiety for appellants when deciding whether a particular hearing type would potentially be advantageous to their appeal.

41. Concerns were raised that Proposal 2 would impede access to justice and create an unhelpful narrative that presupposes the local authority would seek to delay matters, which would be unhelpful for collaborative working and would prevent agreed resolutions from being reached. Some Consultees further considered that denying the local authority any say in the decision was fundamentally contrary to equal treatment of the parties, was biased towards the position of local authorities and would drive demand and workload up in an area of already stretched resource. This directly conflicted with other developments the Department of Education was taking to promote and improve the SEND system. It might also set a precedent for future amendments, where one party has more rights than the other, which was not in the interests of justice within Tribunal proceedings.

42. Responses that disagreed with both Proposals

43. There were 8 Responses that disagreed with both proposals and the issues identified are summarised as follows.

44. There are significant challenges in the SEND system and a need for reform. Any changes to the Tribunals and appeals process should not be undertaken in isolation and should instead be undertaken as part of wider reform to the SEND system to avoid destabilising the system and further unintended consequences.

45. The Consultees considered both proposals were not consistent with the Department for Education's approach to SEND reform. They stated that implementing the proposals were likely to confuse central government's existing communications with the councils and their partners in local SEND systems, including parents and carers, as well as causing further anxiety and conflict in an already highly adversarial system. This in turn risks damaging the Government's plans for broader reform which are still in development.

46. They stated that when both parties agree for the SEND Tribunal decision to be made on the papers, it removes their opportunity to provide additional evidence to support their cases. For councils, this puts them at a disadvantage because they are unable

to share additional information about their decision-making process and means they are less likely to be successful. They contend that this is likely to only cause further distrust, making it harder for central government to reform the system into one which is effective and sustainable, where all partners are confident that decisions are being made with children and young persons' best interests at heart.

47. Some Consultees went further in their consultation responses and stated that if hearings were to only be held on paper, it would make a difficult appeals system even more challenging to navigate and would make the first stage of decision making effectively unnecessary if almost all cases were to proceed to assessment. They suggested that a more effective way to tackle the backlog in the short to medium term while long term reform gets underway would be to remove requests to assess from the appealable decisions list.

48. Some Consultees believed that the proposals were not necessarily in the interests of the child, family or Local Authority but rather intended to address a Tribunal workload and that they were weighted against local authorities and the workforce involved. They considered that whilst the proposals were efficient for the SEND Tribunal Service, they would negatively impact on the Local Authorities' ability to work with parents/carers and restorative working achieved through the process. Longer term this could lead to breakdown in communications between parties and does not lead to efficiency for SEND Services in Local Authorities.

49. Consultees stated that the current requirement for agreement from both parties ensures that each party retains the right to object to a hearing on the papers. They considered this right was fundamental to ensuring that all parties feel their concerns and preferences are adequately considered. Additionally, ensuring that both parties agreed to a hearing on the papers was crucial for maintaining fairness and equity in the process. Removing the right to object could disproportionately disadvantage one party, particularly if they feel that an oral hearing is necessary to fully present their case. The only fair and equitable process, they suggested, is for this to be a mutual decision.

50. The proposed amendments state that the changes to Rule 23 would be in the interests of justice, as this may allow appeals to be heard in a shorter timeframe. However, these Consultees considered that the right to request an oral hearing was essential in the interests of justice. They went on to state that oral hearings provided an opportunity for more thorough examination and cross-examination of evidence and witnesses, which is vital for a fair and just resolution of disputes.

51. It was disputed that the change would make a significant positive difference to capacity or timeliness for the Tribunal or for appellants, and therefore they stated that

it was not a justifiable reason to remove either party's right to request an oral hearing if the circumstances necessitate this.

52. Overall, it was felt by these Consultees that the current requirement for mutual agreement for a hearing on the papers should be maintained to protect the rights of all parties involved and to ensure a fair, equitable, and just process.

53. The responses to Proposal 1 included that an independent determination made entirely on judicial discretion may also lead to a higher number of decision appeals by both parties. This is because determination on the papers may preclude further detail that could have been given orally, and either party may feel that the lack of this had a direct impact on the judgement.

54. One Consultee stated that they would expect that a further implication of implementing these proposals would be a significant increase in administration overhead to their SEND Service to coordinate and facilitate all the extra Education Health and Care Needs Assessments.

55. Finally, these Consultees considered that the proposals reinforced the message that they said is already promoted by the current appeal system that Local Authorities are always wrong and a Judge needs to make them do the right thing. They stated that this was not an impartial, fair and equitable system to review decisions. Neither proposal would reduce the number of Tribunals, it may in fact incentivise more people to appeal as they will see it as a fast track "yes" to assess. They felt that both proposals are problematic and not addressing the real issue, that the law needs to be reviewed, particularly around thresholds for Education Health and Care Needs Assessments and what decisions should be appealable to a Tribunal.

The TPC's reply to the points made in relation to both Proposals

56. The TPC fully considered the contents of the consultation responses and were grateful for the time and effort made by so many Consultees.

57. The TPC considers that both proposals would enhance the efficiency of the SEND Tribunal and that this is a relevant factor to be taken into account when considering an amendment to the HESC Rules. Further, the TPC agrees that the exercise of judicial discretion (Proposal 1) would provide flexibility, with the Tribunal taking into account factors such as the complexity of the case, the quality, relevancy and timing of the written evidence, and the specific needs of the parties involved. This approach would promote fairness and efficiency and is proportionate and fair, ensuring that

decisions are made in the best interests of all parties. Consistency of approach would also benefit the Parties to appeals in the SEND Tribunal on a long-term basis.

58. The TPC did not agree that deciding an appeal on the papers prevents the parties from providing further evidence or updating the Tribunal on developments. Both parties are able to provide evidence until the final evidence deadline. Any late developments can be dealt with by way of an application for late evidence or an updated position statement.

59. The Judiciary retains listing responsibility for appeals and, therefore, the TPC did not consider that it needed to introduce any safeguards for Refusal to Assess Appeals with respect to the timetabling of Directions in order to avoid school holidays. This remains a Judicial responsibility.

60. The TPC agrees that any change needs to be in the best interests of the child or young person. The proposals, in reducing delays and the time taken from receipt of the appeal to an outcome, would benefit the children and young persons in the SEND Tribunal, not only those who are pursuing a Refusal Appeal but also others in the Tribunal who are pursuing other types of appeals and whose appeals are heard earlier because a proportion of Refusal to Assess Appeals will have been dealt with on the papers. Although, disputed by some responses from Local Authorities, the overwhelming number of Consultees considered that both proposals would reduce the likelihood of delay being used as a tactic by the Local Authorities and that this would be an advantage of any amendment.

61. The TPC preferred Proposal 1 because it places both parties on an equal footing, as against Proposal 2 which would introduce an inequality of arms and a potential imbalance within the system not counter-balanced by the knowledge and resources available to each party. As now, both parties will be able to seek an oral hearing on the relevant form and give the particular reasons for their request. The request for an oral hearing can be taken into account by the Tribunal when the appeal is considered for listing.

62. Further, the TPC was satisfied that the HESC Rules sufficiently allow all parties to make an application or to ask for a decision to be reviewed by the Tribunal with respect to whether a Refusal Appeal was to be decided on the papers. There were adequate safeguards in place in this respect. No further safeguards needed to be considered.

63. The TPC recognised that appellants might experience challenges in appealing if they had any issues in expressing themselves clearly in writing. It was considered that the Judicial Office Holders within the SEND Tribunal were sufficiently skilled and experienced to recognise where this may be a relevant factor in their decision making

on whether to hold an oral hearing or not. The TPC rejected the assertion that the best decision maker was the appellant alone. It was not in the interests of justice to have one party determine whether the appeal was to be heard at an oral hearing or decided on the papers.

64. As the HESC had raised the issue of this potential amendment with the TPC, the TPC considered that any amendment would not overburden the Tribunal or increase its workload unnecessarily. The TPC did not consider that undue pressure would be placed on the Tribunal to decide an appeal on the papers rather than at an oral hearing.

65. Accessibility, access to justice, fairness and equality of arms led the TPC to consider that Proposal 1 was to be preferred. Proposal 2 introduced an imbalance into the system, and it was acknowledged that such an imbalance might be perceived as bias or impartiality towards that party.

66. Proposal 2 might also cause unnecessary confusion for Parties not familiar with the Tribunal system, whereas Proposal 1 was clearer and easier to explain.

67. The TPC rejected the assertion that a refusal to issue an Education, Health and Care plan was part of the amendments to the HESC Rule. This had not been requested by HESC and only a refusal to assess was the subject of this consultation.

68. Further, the TPC did not see any benefit of amending the HESC Rules only on a temporary basis. Any amendment is to be made on a permanent basis in order to increase both effectiveness and certainty for the Parties using the Tribunal. There is nothing to prevent the TPC reviewing any amendment and its effectiveness later but certainty in rulemaking is imperative.

69. The TPC did not agree with the responses that stated that the HESC Rules should be amended as part of a wider reform of the SEND system. The decision-making for the HESC Rules is governed by Statute, making this the responsibility of the Committee, and is entirely separate from Government proposals. Further, it is outside the remit of the TPC to consider whether Refusal to Assess Appeals should be an appealable decision or not. That is for Government and not this Committee.

70. The TPC did not consider that the workload of a Local Authority was relevant to a decision to amend the HESC Rules. Any amendment to the HESC Rules would not encourage or incentivise appeals. The Local Authority would not be prevented from providing further evidence to the Tribunal as part of the process. This was not part of the TPC proposals. The Local Authority could still ask for an oral hearing from the Tribunal and explain their reasons for doing so, including that further evidence or

experts might be required. The Proposals do not seek to remove the ability of either party to make an application for an oral hearing, if they wish.

71. The TPC, in agreeing that Proposal 1 was preferred over Proposal 2, took on board the responses that Proposal 2 might create an unhelpful narrative for Local Authorities. With both parties placed on an equal footing under Proposal 1, this might also aid collaborative working between the parties to an appeal. Contrasting with this, the TPC considered that where one party could insist on an oral hearing when the other does not consider an oral hearing is required, is also an inequality of arms and therefore this factor was also taken into account by the TPC.

72. The Consultation and this Reply applies to appeals in the HESC in England. Education is a devolved matter in Wales, covered by the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (the 2018 Act), the Education Tribunal Wales makes decisions on appeals about additional learning needs or special education needs and claims of disability discrimination in schools, not HESC.

73. The Education Tribunal Wales constitution and procedures are governed by the Education Tribunal Wales Regulations 2021 made under the 2018 Act.

The TPC's Decision

74. The TPC, having carefully considered the responses, and reaching conclusions as set out above, has decided to make the changes proposed under Option 1.

75. The TPC recognises the specialist nature of the SEND Tribunal and its role to protect the interests of children and young people in education. The changes will ensure appeals are dealt with efficiently, fairly, without delay and with the parties on an equal footing.

76. The TPC has had due regard to the public-sector equality duty in reaching its conclusion as set out above.

77. The TPC wishes to thank those who contributed to the Consultation process. The TPC has benefited from the responses.

Keeping the Rules under review

The remit of the TPC is to keep rules under review.

Contact details

Please send any suggestions for further amendments to Rules to:
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Further copies of this Reply can be obtained from the Secretariat. The Consultation paper, this Reply and the Rules are available on the Secretariat's website here.