



Appeals and SEND Law update

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Appeals - Where to find the law and guidance

- Children and Families Act 2014
- SEND Regulations 2014
- **SEND Code of Practice 2015 (Chapter 9)**
- First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008 – Consolidated version as amended up to 1 November 2022

See also notes on SEND35A and SEND35 Appeal forms

Terminology/abbreviations

Law	applies from age 0-25.
Distinguishes between	• Children: up to statutory school leaving age (last Friday in June in the school year they reach 16) • Young people: over statutory school leaving age
children	both children and young people, unless I say otherwise.
CYP	children and young people
Parents	parents and carers
Schools	usually include nurseries, PRUs, colleges and other educational institutions (but not universities)
LA	Local Authority
ICB	Integrated Care Board
CFA	Children and Families Act 2014

Rights of appeal

You can appeal to the tribunal against:

- Refusal to assess (RtA)
- Refusal to issue an EHCP (RtI)
- Contents of an EHCP or amended EHCP
 - May be any or all of sections B, F and I
 - Tribunal can use extended powers to consider and make recommendations about sections C, D, G and H
- Refusal to amend after annual review
- Decision to cease to maintain an EHCP
- Disability discrimination (not covered in this session)

Time limits for appeal



Two months from
date of decision letter

OR

30 days from
mediation certificate

whichever is later

Note: if deadline expires in August, you have till 31st August to lodge
The tribunal has some discretion to allow late appeals, but try to
avoid having to rely on it!

Mediation Advice



- All appeals except section I alone
- LA decision letter **must** tell parents that they are required to contact a Mediation Advisor before issuing an appeal and give contact details.
- It is not compulsory to agree to mediation.
- If mediation is refused, mediation company must issue a mediation certificate within 3 days which must be filed with appeal.
- Mediation is paid for by LA and/or ICB
- If you do not want to mediate, they must issue a Mediation Certificate within three days. You have to lodge this with the appeal.

What happens if I opt for mediation?

- Meeting must be arranged within 30 days but does not necessarily have to happen within 30 days
- If LA does not respond, mediator will issue a mediation certificate after 30 days
- Can cover health and social care issues as well as education: if so, representatives of those departments should attend
- LA must send someone with authority to make decisions, or a hotline to someone with that authority. Check with mediator that that is happening
- Currently most mediations are online, but you can ask for a face to face meeting.

Mediation 2

- Fairly informal process. Mediator will contact the parties beforehand to give information.
- If agreement is reached, it should be recorded in a mediation agreement which is enforceable. Ensure time limits are written in when relevant.
- Discussions in mediation are confidential and cannot be referred to in any subsequent appeal. If notes are taken they must be destroyed.
- If mediation does not result in settlement, mediator must issue a mediation certificate and parent then has a further 30 days to appeal.

Overriding Objective

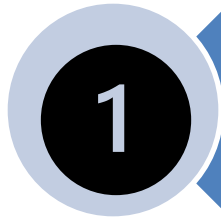
Rule 2 Tribunal Procedure rules:

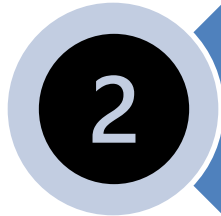
1. The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly

2. Dealing with a case fairly and justly includes:

- (a) Dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) Avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings;
- (d) Using any special expertise of the Tribunal effectively; and
- (e) Avoiding delay, so far as is compatible with proper consideration of the issues

Who can appeal?

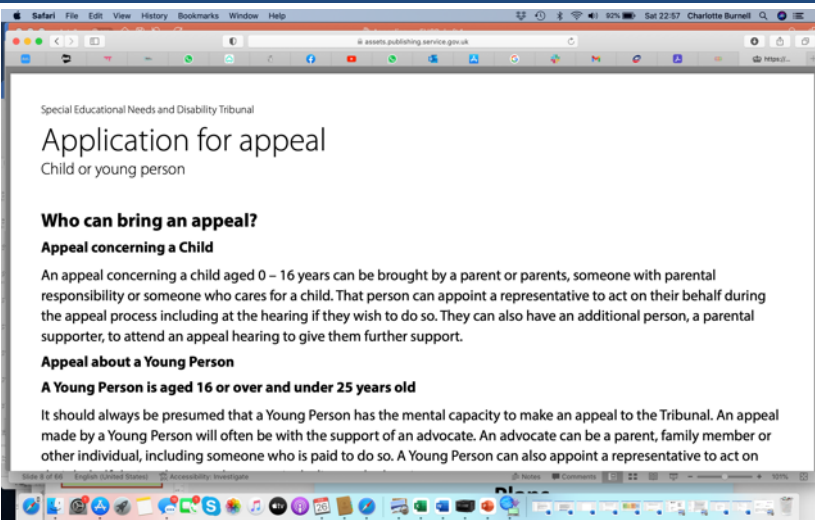
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For children:
normally the parent or carer
- 

For young people with the required
mental capacity to bring the appeal
themselves: the young person
- 

For young people without capacity:
an “alternative person”, normally a
parent or carer

Appeal Forms – SEND 35a for Refusal to assess appeals



Special Educational Needs and Disability Tribunal

Application for appeal

Child or young person

Who can bring an appeal?

Appeal concerning a Child

An appeal concerning a child aged 0 – 16 years can be brought by a parent or parents, someone with parental responsibility or someone who cares for a child. That person can appoint a representative to act on their behalf during the appeal process including at the hearing if they wish to do so. They can also have an additional person, a parental supporter, to attend an appeal hearing to give them further support.

Appeal about a Young Person

A Young Person is aged 16 or over and under 25 years old

It should always be presumed that a Young Person has the mental capacity to make an appeal to the Tribunal. An appeal made by a Young Person will often be with the support of an advocate. An advocate can be a parent, family member or other individual, including someone who is paid to do so. A Young Person can also appoint a representative to act on

<https://www.gov.uk/government/publications/form-send35a-special-educational-needs-and-disability-tribunal-appeal-a-refusal-to-secure-an-ehc-needs-assessment>

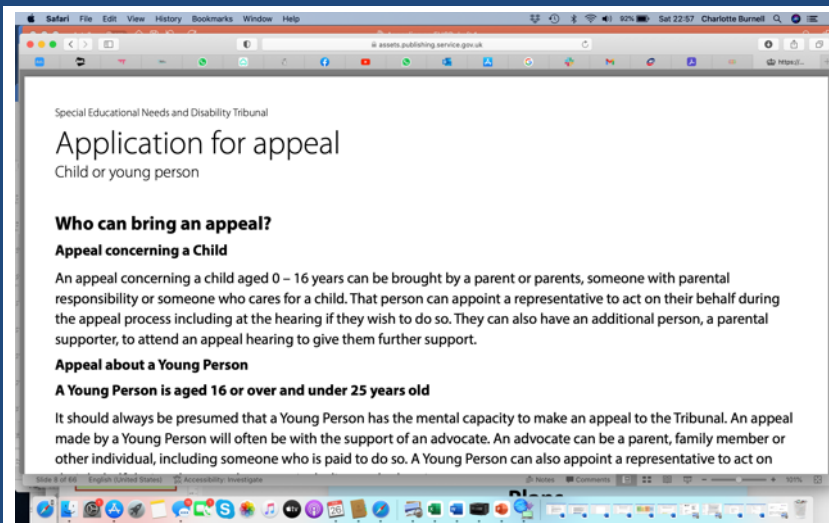
Form has some helpful notes attached

Note that “Reasons for appeal” section focuses on the s36(8) test – whether child may have SEN, and may need support through an EHCP

We suggest putting appeal grounds in a separate document and putting “See attached appeal grounds” on the form.

Appeal Forms for all other appeals except DD

SEND 35



Special Educational Needs and Disability Tribunal

Application for appeal

Child or young person

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<https://www.gov.uk/government/publications/form-send35-special-educational-needs-and-disability-tribunal-appeal>

See notes attached to form

Form covers several types of appeal.

We suggest putting appeal grounds in a separate document and putting “See attached appeal grounds” on the form.

Q: Are there rules about the format of appeal grounds?

- No! This is simply about our recommendations.
- However in general, here are a few thoughts.....

Keep it succinct and reasonably easy to read

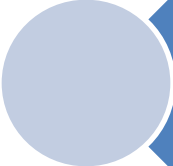
Avoid long rambling documents. It annoys the tribunal!

Avoid quoting large chunks from documents that you are filing with the appeal

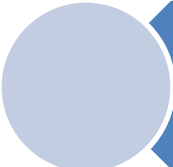
Use separate headings to break up the content, eg Background, Assessments

In contents appeals, use headings and subheadings relating to each section of the EHCP you are challenging

Appeal Grounds strategy



Anticipate points LA is likely to make in response and try to forestall them;



Don't quote acres of law. But some citations may be required to cover arguments LA is likely to make.



Keep grounds succinct.



For school appeals, school named must be able to deliver requirement of section F. Therefore, if evidence supports it, section F ideally needs provision that the preferred school can deliver and LA one cannot.

Appeal Grounds 1

We suggest using a separate document including:

Relevant background information – e.g:

- problems at or after birth
 - delay in reaching developmental milestones
 - when you and/or others first noticed problems
 - what diagnoses were made when
 - Nursery/pre-school/school history including support given in school
 - Interventions to date, e.g. therapies/other specialist programmes /support
-
- Set out what SEN you consider your child has or may have, bearing in mind all areas of possible need:
 - Cognition and learning
 - Communication and interaction
 - Sensory and Physical
 - Social, Emotional and Mental health

Appeal grounds 2

For RtA and Rtl appeals, address the relevant legal tests. Basically these are:

- Refusal to assess: whether your child may have SEN, and may need support through an EHC Plan
- Refusal to issue: whether your child may need support above what is usually available through normal mainstream school resources.

Refer to all evidence supporting your arguments, but don't quote large chunks of reports you are attaching anyway.

Appeal grounds 3 - contents

- Have separate headings for sections B (needs) and F (provision), and sub-headings for sections within them relating to Cognition; Communication; Social, Emotional and mental health; Sensory and physical
- Section B: are all needs properly described, particularly as to how severe they are and how they affect learning?
- Section F:
 - Provision for each and every need?
 - Did the LA carry out adequate assessments:
 - Up to date?
 - Adequately detailed and specific? Highlight use of vague terms like “may benefit from”, “as appropriate”, “regular”
 - Are reports properly reflected, especially recommendations for expensive/special school provision?
 - Can the school nominated deliver provision in this section?

Appeal grounds 4 – health and social care

- If you are asking for recommendations on C, D, G and H, have sub-headings for these
- If you are appealing in relation to social care and no care assessment has taken place, ask for one immediately.
 - Quote s17 Children Act 1989 for under 18s; Care Act 2014 for adults
- Recommendations can be a realistic remedy, as LAs/ICBs must state whether they are prepared to comply and give reasons if they are not. Unreasonable refusal to comply can be taken to Ombudsman or judicial review (see below).

Appeal grounds 5 - placement

- S39 CFA: LA must meet parental preference if it is for a maintained school, academy or free school/college, non-maintained special school, or s41 school unless:
 - School is unsuitable for child's age, ability or aptitude or SEN;
 - Placement is incompatible with efficient use of resources, or efficient education of other pupils
- S33 CFA: If parent prefers a mainstream school preference must be met unless:
 - Placement is incompatible with efficient education of other pupils and
 - There are no reasonable steps that can be taken that would overcome the incompatibility.
- School must be capable of delivering what is in section F. Point out if that is not the case, especially if specialist provision is recommended and mainstream school is named.
- Therefore ideally you need provision in F that only your preferred school can provide. You are likely to need professional evidence to support this, e.g. from independent experts.

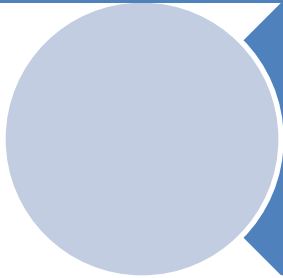
Documents to lodge with appeal

- Decision letter
- Mediation certificate
- For appeals against contents, the EHCP and annexes, if available
- Other relevant evidence, e.g.:
 - School request for assessment or supporting evidence
 - Medical and other reports, e.g. CAMHS, paediatrician etc
 - Relevant letters etc from school and others
 - Relevant correspondence with LA
 - Relevant pages from home/school book
 - Samples of work illustrating problems
 - Video recordings

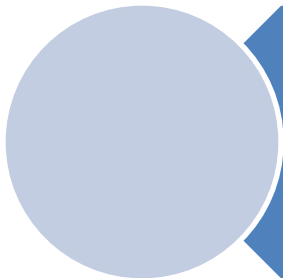
Evidence supporting appeal

- May be filed with appeal or later – deadline usually 14 weeks after appeal is registered – but the earlier the better.
- Remember page cap:
 - RtA: 100 pages for each side
 - Rtl: 100 pages each
 - Appeals against B and/or F: 100 pages for each side
 - Section I: further 75 pages each
 - Health issues under Extended Powers: further 50 pages each
 - Social care issues under Extended Powers: further 50 pages each
- Page cap does not include appeal forms, response, orders etc, or the original EHCP and annexes.
- For section I appeals, file prospectus and Ofsted and, if possible, details of costs
- So keep to **relevant, up to date** evidence
- Can include short sound or video recordings, e.g. by link to private YouTube video.
- **New directions due soon** – likely to be stricter about enforcing limits.

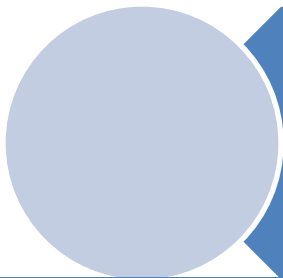
Appeal process



Appeals can be lodged by post or email. If you email, put child's name, date of birth and "NEW APPEAL" in the title section



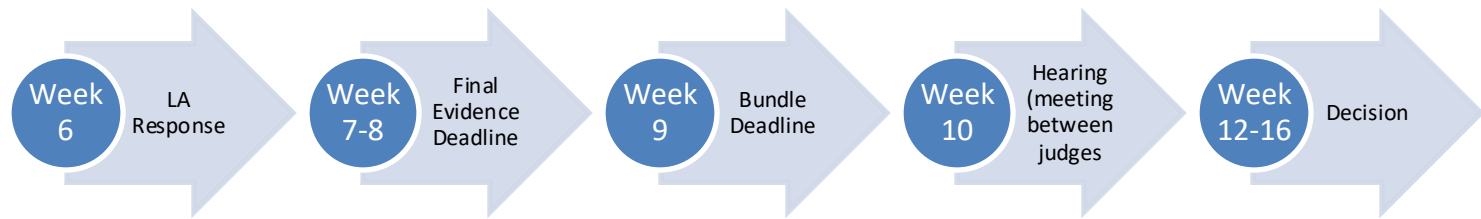
Appeals generally take around two weeks to be registered



Once registered, papers are sent by the tribunal to the LA and you will be sent a registration letter explaining what happens next, deadlines etc

Timetable for RtA paper appeals

From date of registration of appeal, normally:



- When appeal is registered, tribunal issues letters to each side setting these out and making various other orders re preparation of appeal.

Timetable for other appeals

6 weeks – LA response

14 weeks – Final evidence

16 weeks – Case Review forms

16 weeks – LA must lodge hearing bundles

16-18 weeks – Case management review

18-50 weeks – hearing

Two weeks later – Decision

- Urgent appeals – mainly change of phase and children out of school – will be expedited – usually around 18 weeks
- You may be able to ask for an early hearing if your case is urgent. Either side can apply for variations.
- Section I only appeals will also have an expedited process of 16-18 weeks
- Appeals may be brought forward if the tribunal has slots available

LA response

- Standard directions (you will receive a copy) require LA to address the legal tests they are required to use and explain their decisions by reference to those tests
- Don't be worried or put off by long, legalistic responses
- Response must include the child's views

Documents LAs are ordered to file with response

- All information LA considered when making the original decision (unless already provided when appeal was registered)
- Copy of the panel's reasons for decision
- CYP's attendance record for last complete year
- Details of provision, progress and outcomes at SEN support as recording in SEN support plan or equivalent (if applicable)
- Signed, dated witness statement from SENCO or member of leadership team at current placement addressing issues in the appeal
- Short chronology of events leading to appeal.
- Last annual review documents if relevant
- For school appeals, consultation responses and witness statements from proposed schools which should include actual costs to the school of delivering provision in the EHCP or requested in the appeal grounds

Check directions carefully, note deadlines, and flag up with LA if they do not comply. If necessary, raise this with Tribunal in Case Review form.

Witnesses

Limited to three on each side, not including parents or representatives.

Parties can apply for leave to bring more, but consider the increased risk of adjournment.

For school appeals, usually parties will need someone from their chosen school.

Parties will be asked to list witnesses. Tribunal will no longer accept “TBA” or similar.

Parties can ask for leave to bring an observer to support them. They cannot speak during the hearing or give evidence.

Children can be called. Usually heard at beginning of the hearing informally and not expected to stay

Neither side can call witnesses without filing a signed/dated witness statement/report setting out what evidence they will be giving.

Applications

Each side has the right to make applications, e.g. for extension of evidence deadline, postponement of hearing, production of relevant documents

Before making any application, parties must raise the issue with the other side first and seek their views. If not, application will be rejected unless it is very urgent.

If LA objects, you can deal with their objection in their application. Allow about 5 days for a reply.

Use SEND7 form. Copy application must be sent to LA when it is sent to the tribunal.

Tribunal takes at least two weeks to deal with them unless they are urgent. If they are urgent, note that in the heading to email and explain why, and phone to follow up.

The tribunal is generally now keeping all applications to be dealt with as part of case management after evidence deadline.

Working Documents for appeals against EHCPs

Process and key

- Each side is asked to submit a document showing amendments to EHCP they are asking for.
- LA starts process by sending electronic version to parents.
- Parent notes additions in bold font and deletions in bold font struck through.
- If LA agrees amendments, it should underline them and change to ordinary font.
- If LA suggests different amendments, it should use italics.

Important to remember

- All substantive amendments must be referenced in footnotes to show the source
- Keep WD to sections tribunal has to deal with to keep the length down – delete frontsheets, sections A, J, K and any other extraneous sections. Consider deleting superfluous columns/changing their width.
- **Try to keep document succinct.**
- Copy should be filed with tribunal bundle but parties can and should continue negotiating to try to reduce areas of disagreement.
- Idea is to end up with a document that shows at a glance the main issues

Working documents

- Tribunal expects both parties to start working on these once the LA response is in.
- If you can't finalise, e.g. because you are waiting for an expert's report, say so but try to do as much work on the WD as possible.
- Be prepared to be flexible where possible.
- You can instead work with the LA to produce a list of issues you want the tribunal to decide on.
- If the LA is not engaging in this process, raise it in the case review form.

Document bundle

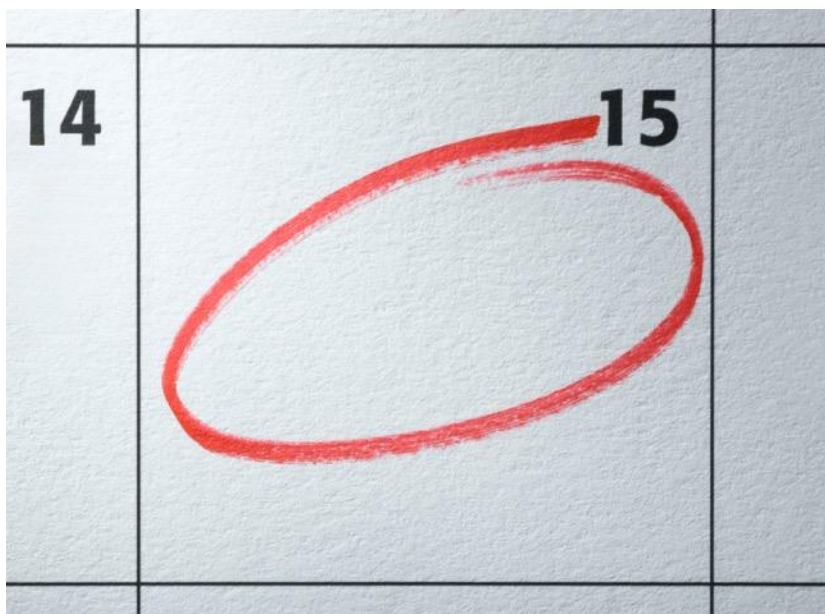
LA must produce a bundle of all documents lodged and produced in relation to the appeal comprising:

- The core bundle – appeal form and grounds, directions given on registration, response, applications and orders
- Parents' evidence
- LA evidence

They can produce supplementary bundles with late evidence and orders.

- If they don't, original directions warn them they can be debarred. Let tribunal know immediately.
- If LA is debarred, it can apply for bar to be lifted but must do so quickly, have a reasonable excuse **and** have served bundles
- Check bundles **very** carefully for missing or illegible documents – if necessary, let tribunal and LA know without delay.
- If documents exceed page limits, they must still be in the bundle. If either side wants to object, they should do so at the hearing.

Late evidence



Either side can seek permission to lodge evidence after the final deadline.

- Send copies to LA and tribunal **as soon as the evidence is available** – the more time the other side has to read and consider your evidence, the better.
- Explain why you did not lodge it earlier e.g. it was not available or it deals with new issues raised unexpectedly by the LA
- Phone tribunal to ensure copies have gone to judges dealing with the appeal
- The tribunal will consider whether to admit the evidence on the day of the hearing .
- Evidence sent less than 5 days before hearing is very unlikely to be accepted.

Case Review Forms

Required a week after evidence deadline. Questions such as:

- What are the current issues between the parties?
- Ready for hearing? If not, when will it be?
- Representative – including status/occupation
- Parental supporters
- Names and occupations of witnesses
 - Have they produced written statement/ report, if not why not
- Special requirements, e.g. for disability
- Hearing format
- **Anything else.** This is possibly the most important one –
 - mention any applications you have already entered
 - highlight other issues, e.g. failure by LA to comply with original directions or engage in working document, whether you need time to file late evidence, permission to bring an extra witness etc.

Case Management

- File will go to a judge who will consider whether appeal is ready for hearing and/or whether further directions are needed to make it ready or facilitate the appeal;
- Judge may order a case management hearing. This will normally be online before a senior judge who will have read the papers but won't necessarily hear the appeal itself. The judge will solely be concerned with practicalities of making the case ready for hearing and will make directions accordingly.

Settling appeals

- This is very much encouraged.
- If parents settle, LA may want them to withdraw. **Don't**. Settlements should always be in the form of consent orders – form now available for this
- Order can be fairly simple. For contents appeals, they attach final agreed working document and requiring LA to issue EHCP in that form and arrange school placement by a defined date.
- If case is settled less than 5 working days before hearing, hearing goes ahead & parties may be required to explain why it is late.
- Tribunal will scrutinise agreed working documents and may not agree them (though this is rare).



Hearings

Timings

- Before two or three judges, one of whom is legally qualified.
- Normally full day for school appeals, half a day for B and F appeals.
- Two days assigned for Extended Powers appeals, but second day may be reserved for consideration of decision so parties don't have to be present.
- If hearing can't be completed within one day, adjourned hearing may be some time later. For complex cases, consider applying for two day hearing from the outset.

What happens

- Currently almost all online, but parties can request an in-person hearing.
- For online hearings, parties are asked to log on early to check connections etc.
- Usually hearing begins with introductions, preliminary issues like late evidence, change of witnesses etc. Tribunal then identifies the issues and they will be worked through in that order.
- Intended to be reasonably informal and user-friendly. If parents are not represented, tribunal should consider asking questions a legal representative might have asked on their behalf but have to remain independent.

Hearing 2

- You can bring your child as a witness. Usually the tribunal will talk to them first without other witnesses, but typically the child does not stay
- Make sure you know the bundle very well beforehand, and put tabs on important documents you may need to refer to quickly. Consider also making a separate list of these.
- Don't read out prepared speeches. Make a bullet point list of points you want to cover.
- Prepare a draft summing up – primarily you should summarise how the evidence shows your child meets the legal criteria. Be prepared to adapt this to include useful points that come up during the hearing and addressing anything that seems to be bothering the tribunal.

Decision

- Usually within two weeks
- Should address the legal criteria for assessing or issuing
- Should set out enough reasons to allow each side to know why they won or lost
- Will include information about time scales if you win, and appeal rights if you lose
- Appeal only available on a point of law, or exceptionally if there is clear evidence of a serious error about the facts



Update – Recent developments in SEND law

- DfE Change Programme
- Revised Transport guidance
- Guidance on Behaviour and Exclusions
- Case law including:
 - Mentoring as educational provision
 - Education outside school terms
 - Failure to meet deadlines
 - Whether admitting a child will prejudice efficient education
 - EOTAS/EOTIS

Change Programme 1

- Change Programme Partnerships are (lead LAs named first):

North East: Hartlepool, Durham, Gateshead, Stockton on Tees

North West: Manchester, Oldham, Rochdale, Trafford

Yorkshire and Humber: Wakefield, Bradford, Calderdale, Leeds

East Midlands: Leicester, Leicestershire, Rutland

West Midlands: Telford & Wrekin, Herefordshire, Shropshire

East: Bedford, Central Bedfordshire, Luton

London: Barnet, Camden, Enfield, Islington

South East: Portsmouth, Brighton, East Sussex, West Sussex

South West: Gloucestershire and Swindon (joint leads)

Change programme 2

- Change Programme Partners will be involved in developing and trialling Improvement Plan proposals including:
 - National Standards
 - New universal EHPC templates (now being used)
 - Tailored lists of placements
 - Greater use of mediation

Change programme – advice to parents in partnership areas

- Partnerships are only trialling proposals, and none of the underlying law has changed.
- No guarantee at all that any proposals will come into effect
- LAs in CPP areas should make it clear to parents that they do not have to comply with trials
 - In particular, they can nominate schools outside tailored lists
 - Use of mediation remains voluntary
 - We suggest encouraging parents to feedback on use of new EHCP templates

Home to school transport

- New guidance published last year and changed again in January 2024
- Some improvements, e.g.:
 - Confirmation that each case must be considered on its own, i.e. no rigid adherence to policy, especially when exercising a discretion
 - Reminder to LAs of public sector equality duty
 - Reminder that children with SEND/mobility difficulties may be eligible despite living within statutory walking distance, and don't have to have an EHCP.

Transport - Improvements 2

- Clarification that if child could not go to nearest suitable school because it is full but a place later becomes available, LA should not expect them to move and refuse transport if they don't.
- Confirmation that:
 - travel allowances must cover all elements of the journey, not just journeys when the child is in the vehicle.
 - Means including benefits not to be taken into account
 - LAs must take reasonable steps to meet medical needs during journeys
 - Bad behaviour on transport does not justify failure to meet education duties and transport should be withdrawn only as a last resort.
 - LAs should give as much notice of changes as possible.

Transport - Improvements 3

- Guidance on risk assessments
- Clarifies that if children are placed elsewhere (e.g. PRU) and would otherwise be eligible then transport should be provided
- Reminds LAs of need for parental consent before providing escort or paying travel expenses for them to transport the child (i.e. they cannot impose the duty to provide travel on parents of eligible children)

Transport – parental preference school for children with EHCPs

- LAs may refuse to name parental preference placement if cost of travel would mean it is incompatible with efficient use of resources but must take into account whether other educational benefits and advantages outweigh the cost difference.
- LA may name a different school, or name the preferred school conditionally on parent arranging or paying for some or all travel costs. If the latter, the condition should be set out in section I, and the LA **can** name a different school which they say would be appropriate.

Transport – children with EHCPs 2

- When deciding whether to name the parent's preferred school conditionally, LA can take account of the risk of the parent becoming unable later to arrange or pay for travel.
- If parent is later unable to provide transport, LA can review plan and reconsider school named, and may amend it to name a nearer school able to meet child's needs.
- LA should make it clear to parent that this may happen – guidance suggests a formal letter.

Transport – children with EHCPs 3

Practical effect if LA names a school conditionally on parent providing transport:

- This is lawful but following *S and another v Dudley MBC [2012]* the LA must name in section I the nearer alternative school or type of school they claim would be able to meet needs
 - If so, parent can appeal against section I to challenge LA's view that the school is suitable
- * If the LA names the school conditionally but fails to name the alternative, there is a strong argument following *Dudley* that the LA must still provide transport.

When can the LA expect parents to accompany children to school?

- If children are within walking distance and could walk if accompanied, they will not be eligible for transport even if they have SEND or mobility problems
- General expectation is that parent will accompany them or make “other suitable arrangements”
- Child will not normally be eligible solely because of parents’ work commitments or caring responsibilities but LA must act reasonably.

Transport - accompanying children to school 2

- LA should not have a blanket policy that they will never arrange free travel for a child who would be able to walk if accompanied. They must consider cases where parent put forward reasons for being unable to accompany the child and make decisions based on the circumstances of the case.
- LAs should take into account various matters including parental disability or mobility problems.

Transport – accompaniment 3

- Guidance says that issues such as work or fact that parents have children at more than one school will not normally be considered good reasons – they apply to many parents and it is reasonable to expect parents to make suitable arrangements
- Guidance notes that parents of secondary age children may expect e.g. to be able to increase working hours as children can travel on their own, so lack of transport may impact on parents of children with SEND who cannot. LAs should be sensitive to this. However, examples given in the guidance clearly indicate that transport should not normally be provided without other reasons, e.g. parents having a disability.

Challenging expectation that child will be accompanied

- Criterion under the previous guidance was whether it would normally be expected that a parent would accompany a child of that age – this has disappeared
- The statute only refers to whether child is able to walk, not whether parent can make “other suitable arrangements” so requirement to take this into account is likely to be unlawful.
- S508B Education Act 1996 states that travel arrangements can only include arrangements made by the parent if those arrangements are made by the parent voluntarily.
- Guidance is contrary to case law (*R v Devon CC ex p. G* [1989] indicating that LA must consider whether it is reasonable to expect parent to accompany child.
- It is also likely to be discriminatory under the Equality Act 2010.

Behaviour in School Guidance

- Issued February 2024 but this is a fairly minor update on 2022 guidance
- Guidance on what should be in schools' behaviour policies
- Frequent reminders of the need to take SEND and other personal circumstances into account and duties under Equality Act 2010.

Behaviour guidance – provisions relevant to SEND

- Reminder – school's duty to use best endeavours to meet SEND
- Anticipate likely triggers and put in place support to prevent, e.g. movement breaks, adjust uniform rules for sensory issues, staff training
- Notes disciplinary action does not prevent consideration of putting support in place
- If SEND affects behaviour, school must consider legal requirements (e.g. not punishing for disability)

Behaviour/SEND guidance

- No automatic assumption that SEND has affected behaviour
- But school should consider if SEND has contributed and whether punishment is appropriate and lawful
- Consider reasonable adjustments to the sanction, including trying to understand underlying cause and whether additional support is needed
- Case law (*CC v Governing Body of A School [2018]*) says that a condition likely to result in a tendency to physical abuse may be a disability, so punishing may be disability discrimination – but not always.

Use of reasonable force

- See separate guidance: Use of Reasonable Force 2013
- Covers broad range of actions by staff involving some physical contact to control or restrain children.
- Power to use to prevent pupils committing an offence, injuring themselves or damaging property, and to maintain good order and discipline
- Authorised staff may use RF when conducting searches for articles they reasonably suspect have been or are likely to be used to commit an offence or cause harm
- Must consider specific vulnerabilities of pupils including SEND, MH needs, medical conditions.

Removal from classrooms 1

- **Only** to be used when necessary and as a last resort unless behaviour is so extreme as to warrant immediate removal
- Should allow for continuation of education in a supervised setting
- Only:
 - To maintain safety and restore stability following unreasonably high level of disruption
 - To enable disruptive pupils to be taken to a place where education can continue in a managed environment;
 - To allow the pupils to regain calm in a safe place

Removal 2

Behaviour policy should include:

- Only to be used in response to serious misbehaviour;
- Reasons that lead to removal must be clear;
- Principles re length of time of removal
- Requirement that removal room is in an appropriate area and has appropriate resources, is a suitable place to learn and focus, and supervised by trained staff members.
- Clear reintegration process for pupils.

Removal 3

Schools should:

- Collect, monitor and analyse data about use of removal including its effectiveness. This should be used in part to consider whether additional or alternative approaches should be used for frequently removed pupils
- Analyse data to identify patterns amongst pupils with protected characteristics to ensure they are not being removed disproportionately
- Pupils should never be locked in a removal room
- They should not be removed for long periods without head's explicit agreement, and should be given extensive support to continue education.

Case law 1

- *Westminster City Council v First-tier Tribunal and A* [2023] UKUT 177
 - Mentoring to support education can be special educational provision – provision can be educational without itself educating the child;
 - Confirmed that the Tribunal/LA can lawfully decide that there is an educational need for provision beyond the normal school day and during holidays

Case law 2

OO and BO v LB Bexley [2023] UKUT 223

- Confirmation of test whether admitting a child will prejudice efficient education
 - LA/school must show that admitting the child will materially affect quality of provision for others so that it will fall below the “efficient education” threshold.
 - (Following *NA v Barnet*), test requires details of:
 - Which other children’s education would be affected:
 - Was the standard of those children’s education currently at or above “efficient education” standard:
 - What effect would new child’s attendance have on that standard?
 - If it would reduce the standard below “efficient education”, was that unavoidable, including by reasonable adjustments?

Case law 3

R(W) v Hertfordshire CC [2023] EWHC 3138

- JR of refusal of assessment on the basis that there was “a more suitable pathway to support the needs of W” and “the level of behaviour is not at the intensity and frequency expected” – it did not address the statutory test.
- Parent had appealed and LA conceded. Judge referred to fact that Herts had conceded 79 out of 91 appeals in 21/22 and lost all but one of the remaining cases. He found this raised serious questions about the LA’s exercise of decision-making functions.
- Herts failed to complete assessment within statutory time limits, referring to national shortage of EPs

Case law – Hertfordshire 2

- “Whilst I accept that the Regulations place onerous obligations on local authorities, these are not duties to use “best endeavours” ... but are hard edged legal duties.... The local authority would be acting unlawfully each time that it fails to complete an assessment and prepare the EHC Plan within the time limit specified in the Regulations.”
- Parent’s claim that LA was using unlawful RtAs to manage demand was adjourned and has now been settled on terms requiring independent barrister to review their practices

Case law - EOTAS

NN v Cheshire East Council [2021] UKUT 220

Guidance on EOTAS:

- First consider s61 CFA: is LA/tribunal satisfied that it would be inappropriate for any SEP necessary for the child to be given in any school, or any part of that provision.
- Ask whether school would not be “suitable” or “proper” taking into account all circumstances, e.g. child’s background, medical history, SEN, school facilities, facilities that could be provided outside school, costs of possible alternatives, parents’ wishes, other particular circumstances.
- Leave section I blank if EOTAS is required. SEP to be set out in section F.