



## SENDIASS Guide to Appeals – refusal to issue a plan

After a local authority (LA) has carried out an Education, Health and Care (EHC) Needs Assessment, a panel of professionals will meet to look at all of the evidence that has been gathered. This will be used to help them decide whether an EHC plan is needed to make special educational provision for a child or young person.

### What does the law say?

#### ***The Children and Families Act 2014, Section 37(1):***

Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

- (a) the local authority must secure that an EHC plan is prepared for the child or young person, and
- (b) once an EHC plan has been prepared, it must maintain the plan

The LA must use the above legal test to decide whether it is **necessary** for provision to be made via an EHC plan. To consider this it can be helpful to think about whether a child or young person will receive the special educational provision they need **without** an EHC plan in place. If the panel feels that the education setting is able to make the special educational provision from their own SEN funding, it is likely to decide that an EHC plan is not necessary. This decision is known as a ‘refusal to issue an EHC plan.’

This guide will help you to understand what the law says about refusal to issue an EHC plan and explains how to appeal this decision. It also gives guidance to help you understand the process, what evidence is required and how to get further advice and support.

#### ***Is there a deadline for the LA to make the decision?***

After an EHC Needs Assessment, the LA must give you their decision on whether a plan will be issued as ‘soon as is practicable’ and within **16 weeks** of the request for a Needs Assessment being made.

### ***How will the LA tell me?***

The LA will notify you of the panel’s decision by writing to you. Along with the notification letter they should also send you copies of reports and detailed information they have gathered during the assessment process. The letter must also set out your right of appeal and give you information about the mediation service and how to get further advice and support.

If the LA decides that an EHC plan will not be issued, the letter they send to you must give **detailed reasons** for their decision. The most common reason given is that they do not feel an EHC plan is necessary because the school, nursery or college can meet a child or young person’s needs through their own special educational needs (SEN) funding, which is also known as ‘SEN Support.’

#### **TIP**

A copy of the decision letter and reports should be sent to your child or young person’s education setting, too. This will give staff a deeper understanding of your child or young person’s needs, and it can be useful to refer to the reports to ensure that targeted support is put in place while your appeal is underway.

### **Next steps**

It can be very upsetting to find out that the LA has decided it is not necessary to issue an EHC plan, especially if your child or young person is struggling to access education and you do not feel they will manage without a plan being made. This section will help you to think about your next steps.

#### ***Do you agree with the LA’s decision?***

The first thing to check is that the LA has sent copies of all of the evidence and reports they gathered for the EHC Needs Assessment – these should have been sent to you with their decision letter. If you don’t have the evidence, contact your Case Work Officer (CWO) or Assessment and Planning Officer (APO) at the LA and ask for it to be sent to you as soon as possible.

Once you have the evidence, go through it carefully and consider the points on the following page. This will help you to identify the reasons for an appeal, such as an incomplete needs assessment, as well as the evidence you will need to make your case, such as additional reports, or that the setting cannot be expected to make the provision from their own resources.

### **Who should be consulted for an EHC Needs Assessment?**

When the LA carries out an assessment, the **SEN Regulations 6(1)** say they must seek advice and information on the child or young person's **needs**, the **provision** required to meet those needs and the **outcomes that are intended to be achieved**. They must consult:

- the parent(s) and child or young person
- the education setting (school, nursery or college)
- a healthcare professional for medical advice
- an educational psychologist for psychological advice
- social care for advice and information
- any other person the LA thinks appropriate
- for children and young people in year 9 or above, advice in relation to provision for preparation for adulthood and independent living
- any person the parent or young person reasonably requests the LA seeks advice from

### **Was the EHC Needs Assessment detailed and thorough?**

- Has the LA consulted with **all** of the relevant professionals? Is anything missing?
- Did they consult any other professionals that you may have asked them to speak to?
- Has the LA received **information** and **advice** from professionals? Sometimes, services may respond to the LA's request with the statement 'not known to this service.' This is inadequate and IPSEA says it, '*does not meet the legal requirement of the LA to obtain advice and information on needs, provision and outcomes.*'
- Is the advice and information that's been provided by services suitably detailed and up to date? If information is missing or the assessment is based on incomplete or out of date information, this could explain why the LA has decided that a plan is not necessary.
- Has the Needs Assessment captured **all** of your child or young person's needs?
- Does the assessment evidence **accurately reflect** your child or young person's special educational needs? Does it downplay the impact of their needs? If so, it may mean that the identified provision is inadequate.
- Does the evidence specify **all** of the provision they require to meet each and every need? It can be helpful to go through the needs and mark each one with

a highlighter, then look for provisions to meet that need. This will highlight any gaps in provision.

- Is any evidence in the reports inconsistent or contradictory? For example, is one professional saying that your child or young person needs a significant level of provision to meet a need, while another is saying there are no concerns?

### ***Have there been any significant changes since the Needs Assessment?***

- This is particularly important to consider when a child or young person is struggling to attend school, they are receiving regular detentions or suspensions, or if they have recently been permanently excluded.
- Perhaps you have new information available about your child or young person's needs. Have they had a new diagnosis, or is there a new professional working with your child or young person? They may have information that could provide a deeper understanding of their needs.

### ***Will the education setting be able to meet needs without a plan?***

- If the education setting has already put a **significant amount of targeted SEN support** in place and consulted **specialist professionals** (such as BHISS in Brighton & Hove and CLASS/CLASS+ in East Sussex) without success, has the EHC Needs Assessment identified **additional provision** that the setting could realistically put in place?
- Can your child or young person's education setting **reasonably be expected** to put the provision in place from their own resources?
- Will your child or young person be able to **make progress** if provision is not made via a plan?
- Do your child or young person's needs mean that a **specialist setting** is required – for example do they need small class sizes or on-site therapies that cannot be provided by their current setting?

The LA's decision letter should include information about the **mediation service** as well as your **right to appeal** to the **First-Tier Tribunal (SEND)**. See <https://www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability>. You have **two months** from the date of the notification letter or **one month** from the issue of a mediation certificate, whichever is the later, to lodge your appeal.

## **Considering mediation**

As part of the appeals process, you are required to think about **mediation**. Waiting times for tribunal appeals are currently very long, so mediation can be a chance for

you to have a face-to-face discussion with the LA. This option may be worth considering if you haven't had much dialogue with the LA, or if you have new or additional information that you want to present for their consideration.

### ***What happens at mediation?***

Mediation is a chance for a **formal meeting** with the local authority to discuss the decision. It is **free** and the meeting is chaired by an independent facilitator who is there to help you and the LA try to reach an agreement.

The letter sent to you by the local authority should have included information about the mediation service (<https://www.globalmediation.co.uk>) and how to contact them. If you decide to try mediation, the meeting should be arranged **within 30 days**. You may wish to look at our in-depth guide to mediation which explains it in more detail. Find the guide at <https://amazesussex.org.uk/resources/in-depth-guides/>

If you decide **not** to go to mediation and want to go straight to a tribunal appeal, you must contact the mediation service to **get a mediation certificate**, to show that you have considered this option. You will be asked to submit a copy of the mediation certificate with your paperwork when you lodge the appeal.

### ***What happens if we try mediation but it isn't successful?***

Sometimes, when a family decides to try mediation, a decision cannot be reached during the meeting with the LA. In this scenario, the mediator will then issue a mediation certificate, which will enable you to lodge an appeal with the First-Tier Tribunal (SEND).

## **When can I appeal to the First-Tier Tribunal (SEND)?**

Once you have a mediation certificate you can lodge an appeal with the First Tier Tribunal (SEND). You have **two months** to lodge your appeal with the First-Tier Tribunal from the date on the local authority's decision letter or **one month** from the date on the mediation certificate, whichever is later. It's helpful to note down the dates on your calendar to help you keep track of important deadlines.

### ***Lodging a tribunal appeal***

If you are the parent of a child aged 0 to 15 years then you can lodge the appeal with the tribunal. If the appeal concerns a young person aged 16 to 25, and they have mental capacity, they can lodge an appeal themselves and ask an advocate or representative to act on their behalf. If they do not have the capacity to lodge an appeal themselves, then it is possible for a representative to lodge the appeal on their behalf. This is usually their parent.



The idea of going to tribunal can feel very daunting. However, tribunal judges are aware that parents are not legal experts. Hearings are much less formal and there is an inquisitive rather than an adversarial approach to cases.

### ***Do I need a legal representative?***

Tribunals are **free** and many parents represent themselves – it is not essential to instruct a lawyer or other advocate. Bear in mind that SEND advocates can also be expensive and they are unregulated. So, if you are considering paying an advocate to help you, it is advisable to check that they have qualifications in SEND law and also have detailed knowledge and experience of the tribunal process.

You may also wish to check to see whether you qualify for **legal aid** to help with the appeal, as some young people and families on a low income may be eligible. See <https://www.ipsea.org.uk/where-can-i-get-help-with-making-an-appeal>

### **How do I lodge an appeal?**

To lodge an appeal with the First-Tier Tribunal (Special Educational Needs and Disability) you need to fill out a **SEND35 form**. Download it here: <https://www.gov.uk/government/publications/form-send35-special-educational-needs-and-disability-tribunal-appeal>

If you have questions, or you are unsure about the process, you may find it helpful to get information from IPSEA on the First-Tier Tribunal (SEND): <https://www.ipsea.org.uk/what-is-the-send-tribunal> or see their general advice about appeals <https://www.ipsea.org.uk/general-advice-for-all-appeals>.

When you send the SEND35 form in, you must also send your **mediation certificate**, the **decision letter from the LA** and **all of the evidence** that you have. The Tribunal will not have seen any of this information so you can go into as much detail as you wish to on the SEND35 form.

### **The appeal process**

Once the tribunal has lodged your appeal, they will send a registration letter to notify you of the hearing date and the date by which they need to receive all your supporting evidence. Make sure you add the dates in the notification letter to your calendar so that you can keep track of important deadlines during the process.

Once the appeal is lodged, the LA must prepare a response to your appeal **within 30 days**. This will help you to get a better understanding of the LA's position. If 30 days



has passed and you have not received the LA response, we advise you to contact the Tribunal.

Occasionally, the local authority concedes before the case gets as far as a hearing. If they do, it is advisable to get this in writing so that you have evidence of this change in decision. Most cases, however, will progress to a hearing.

### ***Evidence deadlines***

You will be given a deadline for evidence to be submitted for your appeal, which is usually around **ten days** before the hearing date. It is advisable to send as much as you can when you initially register the appeal.

If you are waiting for additional evidence, such as a professional report, and it won't be available before the deadline, you can fill in a **SEND7 Request for Change form** (<https://www.gov.uk/government/publications/form-send7-request-for-change>) to ask the Tribunal to extend the deadline and explain what is awaited and when you expect to receive it. It is up to the Tribunal to decide whether this late evidence will be considered at the hearing.

A copy of the SEND7 form must be sent to the LA before it goes to the Tribunal to give them a chance to respond, although they don't have to agree. If the request is urgent and the LA has not replied, submit the SEND7 form to the Tribunal with a copy of the email you sent to the LA and explain that you have not had a response.

### **Tribunal hearings**

A judge and a specialist member, who has specific knowledge of special educational needs, will oversee the hearing. Some hearings are face to face, while others are held remotely - over video or by telephone. If you would like a friend or representative to support you on the day, you must let the tribunal know beforehand.

During the hearing, the judge will do their best to ensure your voice is heard and that you are treated fairly. The aim of the hearing is to question both parties and their witnesses so that the judge and specialist member can gather as much evidence as possible. They will have already read the paperwork and will have decided which areas they would like to find out more about. Throughout the hearing they will ask questions to each party and make sure that each person has time to respond and is not interrupted.

At the end of the hearing, each party will be allowed to summarise their views. The tribunal judge will ensure that the process is followed and will make their decision



based on the paperwork submitted before the hearing and the evidence they have heard on the day.

Sometimes the judge will give a verbal decision on the day of the hearing but, in most cases, they will write to you with their decision and the reasons behind this **within 10 days** of the hearing.

## Following the hearing

The Tribunal’s decision is legally binding and, if they decide the local authority should issue an EHC plan, the LA have up to **5 weeks** from the order to issue a draft plan and **11 weeks** from the order to finalise the plan.

If you feel the tribunal has made an error in their judgement, then you have up to **28 days** to appeal their decision.

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Amaze SENDIASS is the Special Educational Needs and Disability Information, Advice and Support service for East Sussex and Brighton & Hove. We offer impartial and confidential support with anything to do with special educational needs and disabilities for 0 to 25 year olds.

Please contact us on 01273 772289 or by email on [sendiass@amazesussex.org.uk](mailto:sendiass@amazesussex.org.uk) if you would like further advice and support.