



SENDIASS Guide to Appeals – Refusal to Assess

If a school, nursery or college (the education setting) has put considerable SEN support in place for a child or young person and they are still struggling, it may be a sign that they need more support than the education setting can provide from their resources. In this situation, the education setting or the parent(s) may write to ask the local authority (LA) to consider carrying out an Education Health and Care Needs Assessment.

If the LA decides an assessment is required, it will gather evidence from numerous professionals such as the education setting, an educational psychologist, health and social care, as well as taking account of the views of the child or young person and their parents. Together, this information should provide a full picture of the child or young person's needs and it will then determine whether an Education Health and Care plan (EHC plan) is required to put provision in place to meet these needs.

When a request for an EHC Needs Assessment is made, the LA has up to **six weeks** to decide whether they should carry it out. Their decision is based on the legal test in the Children and Families Act 2014:

The Children and Families Act 2014, 36(8) says:

The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted... the authority is of the opinion that—

- a) the child or young person has or may have special educational needs, and
- b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

How is this legal test applied?

The LA must consider both parts of this legal test, firstly whether a child **has** or **may have** special educational needs and secondly whether it **may be necessary** for provision to put in place via an Education, Health and Care plan (EHC plan.)

There is additional **guidance** on information the LA should consider when they make

their decision, which is set out in the [SEND Code of Practice 2015, 9.14](https://assets.publishing.service.gov.uk/media/5a7dcb85ed915d2ac884d995/SEND_Code_of_Practice_January_2015.pdf). (https://assets.publishing.service.gov.uk/media/5a7dcb85ed915d2ac884d995/SEND_Code_of_Practice_January_2015.pdf) The Code of Practice is **statutory guidance** that LAs, schools and other organisations must have regard to.

The SEND Code of Practice, 2015 9.14 states:

In considering whether an EHC needs assessment is necessary, the local authority should consider whether there is evidence that, despite the early years provider, school or the post-16 institution having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child or young person, they have not made expected progress. To inform their decision, the local authority (LA) will need to take into account a wide range of evidence, and should pay particular attention to:

- evidence of the child or young person's academic attainment (or developmental milestones in younger children) and rate of progress
- information about the nature, extent and context of the child or young person's SEN
- evidence of the action already taken by the school or other setting
- evidence that where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies
- for young people over 18, the LA must also consider whether they require additional time, in comparison to the majority of their peers who do not have special educational needs, to complete their education or training.

Making the decision

When the LA considers the application, the first part of the legal test – that a child **has** or **may have** special educational needs – is often straightforward. The majority of children and young people applying for a needs assessment will have had some of their special educational needs identified, be on the SEN register and receiving SEN Support through their education setting.

For the second part of the test, the LA can use the above guidance in the SEND Code to help them. They will consider what support has been put in place so far, the impact of the support and how much progress the child or young person has made. However, LAs cannot refuse to **consider a request** if information is not available or certain steps have not been completed.

Agreeing to assess

If the education setting has already put considerable support in place and a child or young person is still struggling, then a formal needs assessment can provide a better picture of the child or young person's needs. This will help the LA to determine whether it is **necessary** to put provision in place via an EHC plan.

It's important to be clear that agreement to **carry out** a needs assessment **does not mean** that a plan will be issued. This decision will be made **after** the assessment, once the LA looks at the child or young person's needs and the provision that's required. If provision for the needs cannot be made through an education setting's own resources, then an EHC plan **is** necessary and should be issued.

Refusal to assess

In some cases, the LA may decide **not to assess** your child. They must send you a **notification letter** to explain the reason for their decision. For example:

- **The LA thinks more time is needed for the school to put support in place.** If a child or young person's special educational needs have only recently become apparent, the school may be in the process of putting SEN support in place and/or have asked for intervention from a specialist education service. In this scenario, the LA may feel it is reasonable to allow time for this to happen first.
- **The LA thinks provision for your child's special educational needs can be made from their own resources.** Schools, nurseries and colleges have funding to help support children and young people with special educational needs up to a notional amount of £6,000, and the local authority would usually expect the setting to be spending a significant amount before they will consider conducting an assessment. However, **there is nothing in law** that states that this figure **must** be spent by schools before an assessment can be carried out. **The LA may say that the school should be doing more to support your child.** They publish information explaining what types of support they expect settings to put in place for children and young people with SEN. You can read more about [supporting SEN in Brighton & Hove](https://www.brighton-hove.gov.uk/special-educational-needs-and-disabilities/how-schools-and-) (<https://www.brighton-hove.gov.uk/special-educational-needs-and-disabilities/how-schools-and->

[colleges-support-children-and-young](#)) or in the [East Sussex matrix](#) (<http://www.eastsussexmatrix.co.uk>). However, while these guides are helpful to schools, remember there is **nothing in law to say that the LA's own thresholds must be met** before an assessment is carried out.

If you disagree with the LA's decision not to carry out an assessment, you have the right to appeal. The LA's decision letter should include information about the **mediation service** as well as your **right to appeal** to the [First-Tier Tribunal \(SEND\)](https://www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability) (<https://www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability>)

Are there options other than mediation or tribunal?

Parents have the option to **resubmit their request for an EHC Needs Assessment** and there are no restrictions on this. For example, resubmitting might be successful if new evidence has come to light while the initial application was considered by the LA.

In some cases, the setting may have put extra support in place since you made the application, so it might be worth waiting to allow the setting to review the impact of this support on your child or young person's progress. You can use this time to gather more evidence, too before you consider whether to resubmit a request for a needs assessment.

However, if you are thinking of resubmitting, bear in mind that the LA might refuse again. With these points in mind, resubmitting needs careful consideration based on your individual circumstances.

Challenging the refusal to assess – 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 present additional information to the LA and ask them to reconsider their decision.

Mediation is a **formal meeting** with the local authority to discuss their 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) (<https://www.globalmediation.co.uk>) and how to contact them. If you decide to **try mediation**, the meeting should be **arranged within 30 days**. We have a guide to the

mediation process, which explains it in more detail. See our [SENDIASS in-depth guides](https://preview.moocowmedia.co.uk/amaze/resources/in-depth-guides) page (<https://preview.moocowmedia.co.uk/amaze/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.

Going to tribunal

Once you have your mediation certificate you can lodge an appeal with the First-Tier Tribunal. 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 an 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 can 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.

Additionally, as long as the parents and the LA agree, most refusal to assess appeals are now heard at a **paper hearing**. This means that you will not be required to attend the tribunal in person as the decision can be made using the evidence that's sent in. An oral hearing – where you attend in person – may be needed if there is disagreement over whether a child has special educational needs or there is inconsistent evidence submitted, but this is not necessary for a decision to be made in most cases.

Tribunals are **free** and many parents represent themselves – it is not essential to instruct a lawyer or other advocate. Bear in mind that 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 experience of the tribunal process. You may also wish to check to see whether you are eligible for [legal aid to help with the appeal](#)

<https://www.ipsea.org.uk/where-can-i-get-help-with-making-an-appeal>), as some young people and families on a low income may be eligible.

It can be helpful to read information about [the First-Tier Tribunal \(SEND\)](#) and their general [advice for all appeals](#) (<https://www.ipsea.org.uk/general-advice-for-all-appeals>) before you start your appeal.

To lodge an appeal you will need to fill in a [SEND35a form](#). (<https://www.gov.uk/government/publications/form-send35a-special-educational-needs-and-disability-tribunal-appeal-a-refusal-to-secure-an-ehc-needs-assessment>) Explain why you want to appeal the decision and why you feel your child or young person requires an assessment.

Helpful tips

- The question boxes on the **SEND35a** appeal form are quite small. If you want to provide more detail, use continuation sheets and label the pages with your child's name, date of birth and specify which question you are answering.
- Page 9 of the form has a **checklist of information that you must include** when you send in your form, including the decision letter from the LA giving you the right of appeal and your mediation certificate. Make sure you have attached **all the information** that is required and ticked all the boxes.
- You will need evidence of your child's **special educational needs** and why it **may be necessary** for provision to be made via a plan. Page 11 of the SEND35a form has a table in which you should list **all the evidence** that you are sending. The instructions give examples of useful documents to send such as reports or relevant correspondence from the education setting, for example. This will help the tribunal to understand your child's needs.
- **Think carefully about the evidence you submit and how it supports your case** because there are **page limits** for evidence. For refusal to assess appeal this is **usually 100 pages**.
- Keep copies of everything you send to the tribunal. If you receive further evidence after you send the paperwork in you can send this later, up to the evidence deadline.
- If the parent or the LA wishes to submit more than 100 pages in evidence, a **request for change** must be submitted to the tribunal by filling in a [SEND7 form](#) explaining why this is necessary. The LA must submit this additional evidence as part of the **tribunal bundle**, but it is the hearing panel's decision whether it will be included in the evidence they consider.
- If it is difficult to get relevant information for your case from the LA, fill in the request for change [SEND7 form](#). Explain what the information is and ask the

Tribunal to make a direction for the LA to release it. Unless the LA has a good reason for not providing it, the SEND Tribunal will order the LA to do so.

Get the SEND7 form here:

https://assets.publishing.service.gov.uk/media/6569bb951104cf0013fa732d/SEND7_0823.pdf

- The tribunal has an [advice line](#) that can help you with queries about filling in the **SEND 35a appeal form** and tribunal processes. You can call the advice line on **0300 303 5857**.

Amaze SENDIASS has a guide to tribunals that you may find helpful to refer to when you are preparing your case. Visit the [In-depth guides page](#) in our Resources section to download it (<https://preview.moocowmedia.co.uk/amaze/resources/in-depth-guides>).

What happens once an appeal is lodged?

When the tribunal receives your appeal they must respond within **10 working days** to register it. The tribunal will tell you important dates, such as when the LA must respond to your appeal, the deadline for sending further evidence and the date that your case will be heard.

A copy of your appeal will then be sent to the local authority who must usually send you a copy of their response within **30 working days**. Sometimes, when the LA considers your evidence they may decide **that they agree and they will carry out the assessment**. This must happen before the 30 day deadline and is called ‘conceding.’ In this situation, the LA writes to notify the tribunal that they will carry out the assessment. If this happens the notification ends the tribunal. You do not need to do anything. The LA must then carry out the assessment.

Alternatively, if the LA **does not agree with your evidence**, their response letter should give detailed reasons why. If you do not receive their response within the 30 day timeframe let the tribunal know.

At the hearing, the panel looks at all the paperwork to decide if the LA have been acting in accordance with the law and if your child has or may have special educational needs that may require provision to be made through an EHC plan. If they feel that potentially your child may require this level of support then an order will be issued instructing the local authority to carry out the assessment.

The tribunal must let you know the outcome within **10 days** of the hearing. If your appeal is successful and the LA is instructed to assess your child, the LA must let you



know that an assessment is to take place within **two weeks** of the court order and, the decision on whether an EHC plan is required must be made within **10 weeks** of the tribunal order.

Amaze SENDIASS is the Special Educational Needs and Disability Information, Advice and Support service for Brighton & Hove and East Sussex. 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 if you would like further advice and support.