



SENDIASS guide to appeals – school placement

Sometimes, when families receive a finalised Education Health and Care (EHC) plan they find that the local authority (LA) has not named the placement they requested. This can be worrying, particularly if you feel that the placement the LA has named is unsuitable and may not be able to meet your child or young person's needs.

This guide explains the law around placements for children and young people with EHC plans, how to prepare an appeal and what to expect during the process.

What does the law say?

Before a finalised Education Health and Care (EHC) plan is issued, the local authority (LA) must send a draft plan to the family and allow them **15 days** to review it and make representations, or comments. The LA must also ask the parents or young person to request a placement:

- after an EHC needs assessment
- when a child or young person with an existing EHC plan is moving to a new stage in their education, such as going from primary to secondary school
- or after an emergency review if a placement has broken down because it cannot meet need and a new setting is required.

After the parents' representations and requested placement are considered by the LA, education settings are consulted, including those that the LA feel may meet need. Once a decision is made, the LA will name the placement in Section I. The EHC plan is then finalised and issued. The Children and Families Act 2014 says that a parent or

The Children and Families Act 2014, Section 38 (3):

A school or other institution is within this subsection if it is—

- a) a maintained school;
- b) a maintained nursery school;
- c) an Academy;
- d) an institution within the further education sector in England;
- e) a non-maintained special school;
- f) an institution approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval)



young person has the **right to request** a placement for an EHC plan, provided that it is one of the types of setting listed in section 38(3) of the act.

Is our requested setting within section 38(3)?

As a first step, if you are unsure, check whether the school you've requested falls under the definitions in section 38(3), which includes:

Maintained schools and nurseries – these are controlled and funded by the LA and include: mainstream nurseries; community schools; voluntary-aided schools; foundation schools; trust schools, special schools; and alternative provision, which includes pupil referral units (PRUs).

Academies – these are settings that are funded directly by the Secretary of State for Education and they have more control over how they are run. They include: mainstream academies; academy special schools; alternative provision academies; free schools; university technical college schools; and studio schools.

Institutions within the further education sector – these are Further Education (FE) colleges, sixth form colleges and designated institutions.

Non-maintained special schools – these are special independent approved under section 342 of the Education Act 1996. Although they charge fees, which are paid by LAs via EHC plans, the schools are run on a not-for-profit basis. See <https://www.get-information-schools.service.gov.uk/Establishments/Search?tok=8UZ4RIYF>

Section 41 schools – these are independent specialist schools and colleges which have been approved by the Secretary of State under section 41 of the Children and Families Act.. The majority of students in section 41 schools will have a placement funded via an EHC plan. Although it is possible for families to self-fund a placement, this is unusual as they are usually very costly.

Visit <https://www.gov.uk/government/publications/independent-special-schools-and-colleges>

If you are still unclear whether the setting you've requested falls within section 38(3) of the Children and Families Act, [search for the school by name](#) to check.

Visit: <https://get-information-schools.service.gov.uk>

Which settings DON'T fall within section 38(3)?

Independent schools that charge fees and are privately run do not fall within section 38(3) of the act. These are called **wholly independent** schools and include private special schools as well as some nurseries and childcare settings.

You may wish to refer to this list of **wholly independent special schools** (<https://www.get-information-schools.service.gov.uk/Establishments/Search?tok=8UZ4FnN3>) to see whether the school you have requested falls within this category.

The duty to name a school or setting

If the setting the parents or young person has requested is one of the type specified in section 38(3) of the Children and Families Act 2014, the law says that the LA **must** name that school **unless** one of three exceptions in section 39(4) of the Act applies:

The Children and Families Act 2014, Section 39(4):

This subsection applies where—

- (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
- (b) the attendance of the child or young person at the requested school or other institution would be incompatible with—
 - (i) the provision of efficient education for others, or
 - (ii) the efficient use of resources.

These exceptions are the **only ones** that the LA can use to override the parent or young person's request, provided the setting they have asked for falls under section 38(3) of the Act.

In an appeal, the legal burden is on the LA to prove with **factual evidence** that one of the **exceptions** apply.

Does my child have the right to a mainstream education?

Section 33 of the Children and Families Act 2014 says that if a parent or young person wants to request a mainstream setting, the LA can only refuse if the placement would be **incompatible with the efficient education of others** and there are no **reasonable steps** that the LA could take to overcome this.

This right means that the LA cannot simply refuse to place a child or young person in a mainstream setting because of the complexity of their needs and/or disabilities. The LA has to show that there is nothing they can **reasonably do** to overcome the incompatibility with the efficient education of others.

The **SEND Code of Practice 2015, paragraphs 9.91 to 9.95**

(<https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>)

gives helpful examples of reasonable steps that LAs could take to overcome incompatibilities and may be useful to refer to if your placement appeal is regarding mainstream versus special education.

However, parents should be clear that section 33 gives the right to a mainstream **education** and not necessarily a particular mainstream **school**; if the LA has identified another mainstream school that can make the reasonable steps to enable your child's inclusion and your preferred school cannot, then the LA would be entitled to name their proposed school in the plan.

What if I've requested a wholly independent setting?

If you request a **wholly independent setting**, you can **make representations** for it and the LA has the **power** to name the placement, as long as the setting agrees. But the LA does not have a **duty** to name the school.

It is **essential**, therefore, to be clear about whether the school is wholly independent as, unlike for cases involving section 38(3) schools, where the legal burden is on the LA to overturn your request using one of the three exceptions, for wholly independent placements it is the **responsibility of the parent** to show that none of the schools the LA has suggested can meet needs or that the cost of the placement at the independent setting is not an unreasonable public expenditure.

Also, your child or young person must have an **offer of a place** from the school, as the LA **cannot insist** that a student is accepted by a wholly independent school.

There are two provisions that the LA should **have regard to** when considering an appropriate placement if a wholly independent setting is requested. If a parent has

requested the placement, the LA must have regard to the general principle set out in section 9 of the Education Act 1996 that ‘pupils are to be educated in accordance with the wishes of their parents so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.’

If a young person has requested a wholly independent setting, then the LA should consider it as part of their duty to ‘consider the young person’s views, wishes and feelings’ under section 19(a) of the Children and Families Act 2014.

How do I appeal the LA’s decision?

When the LA sends you the finalised EHC plan, this 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>)

Which parts of the plan should I appeal?

This is an important step to consider and it should not be rushed. The law says that for placement only appeals, you **do not have to consider mediation** and **do not need a mediation certificate** and can go straight to a tribunal appeal if you wish. Your appeal must be lodged within **two months** of the date on the LA’s decision letter.

However, we would strongly advise parents to **think very carefully before opting for a placement only appeal** as it may not be effective. Placement decisions are always driven by the needs and provision identified in an EHC plan, so if an unsuitable placement has been named, it is likely that the content of the plan is weak or lacking in detail. There could be key information from professionals that hasn’t made it in to the plan at all.

To decide which sections to include in your appeal, check whether the plan is comprehensive, and clearly sets out ALL of your child or young person’s needs in section B and ALL of the provision to meet each need in section F. Each provision must be quantified and specific so that it is clear how often it takes place, which staff will provide it – is it a teacher, teaching assistant or therapist – the duration of the intervention and whether it is one to one or in a group, for example. If you feel the plan is vague or information is missing, it is advisable to widen the appeal to include needs (section B) and/or provision (section F) as well as the placement (section I).



If you do decide to appeal other sections of the plan you **will** be required to consider mediation and get a **mediation certificate** before you lodge an appeal at tribunal.

Mediation

Waiting times for tribunal appeals are currently very long, so mediation may be an opportunity for you present additional information or to convince the local authority of the need to change their decision.

Mediation is a chance for 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** and how to contact them. See <https://www.globalmediation.co.uk/>

If you decide to try mediation, the meeting should be arranged **within 30 days**. If you decide not to go to mediation, you are still required to contact the mediation service to get a mediation certificate, unless you are planning to **ONLY** appeal about the placement named in the plan.

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

Once you have your 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.

Parents may also find it helpful to read this information about **the First-Tier Tribunal (SEND)** and their general **advice for all appeals**. Visit <https://www.ipsea.org.uk/general-advice-for-all-appeals>

Which parts of a plan can be appealed?

Parents and young people can appeal:

- Section B – needs
- Section F – provision (including health and social care provision that educates or trains, as this should be included in this section)
- Section I – placement

Since 2018, parents have also been able to make what's called an **extended appeal**. This means if they are appealing Sections B, F and I they can also ask the tribunal to

look at the health (Sections C and G) and social care sections (Sections D and H) of the plan and make **non-binding recommendations**.

Do I need a legal representative?

Tribunals are **free** and most parents represent themselves. Tribunal judges know that parents are not legal experts, so hearings are less formal and there is an inquisitive rather than an adversarial approach to appeals.

It can be very expensive to instruct a lawyer or other advocate for tribunals and it is not essential. Advocates are also unregulated so check that they have qualifications in SEND law and also have experience of the tribunal process before you engage them. Some young people and families on a low income may be eligible for **legal aid to help with the appeal**, so it is worth checking to see if you qualify. 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 here**:

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

When you send this form in, you must also send your **mediation certificate** (if you are appealing other sections of the plan), the **decision letter from the local authority** 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.

TIPS

- Make sure you have ticked all of the relevant boxes in section 2 of the form if you want to appeal the contents of the plan as well as the placement.
- If you want the tribunal to make recommendations about health and social care, make sure you fill in section 4 of the form, too.
- If you are sending reports and other evidence, send copies rather than originals.

Evidence for your appeal

Building a case for your requested setting needs **careful research** so you can demonstrate **why** it is the more appropriate placement and how it can meet your child's needs. You will need to provide **evidence** to support your case and give reasons why you think that the school named by the LA cannot meet your child's needs.

You should provide copies of your child's school reports and current attainment levels to evidence their level of need and copies of all **professional reports**, including information from therapists working with your child or young person and an educational psychologist, if your child has been assessed recently.

Suitability arguments

If the LA is relying on unsuitability of your requested placement for the child or young person, it is helpful to gather evidence about the type of children and young people who are admitted to the setting. You might want to include a copy of the **school prospectus** and **latest Ofsted report** in your paperwork.

Sometimes, professionals working with the child or young person may have recommended that a certain type of setting would be appropriate for them, which could support your case. You could also ask a senior member of staff from your requested setting to attend the tribunal as a witness, or send a witness statement that outlines the provision that they can put in place for your child or young person.

You may have gathered evidence during your visits to the setting and, if your child or young person likes the setting, it can be helpful to get them to write down or record their views on the placement so they can be shared with the tribunal.

Sometimes, parents tell us they haven't seen the placement named by the LA in the plan. Make sure that you visit it, if you haven't already done so. Being able to give concrete examples of why it cannot meet need is essential – if you haven't seen the school, your arguments won't carry weight and the tribunal may feel your views are based on assumptions rather than facts.

Remember, that the LA's preferred placement can only be considered if it is **suitable** so you may be able to dislodge the LA's named placement because it cannot meet your child's needs, even if your requested placement is more costly. If the LA's named placement is deemed unsuitable, then the parental request should be named in the plan.

Arguments around incompatibility with the efficient education of others

For appeals where this is the basis of the LA's decision, you will need evidence of the incompatibility. There must be a tangible reason for this decision, such as a child or young person who shows distressed behaviour that would disrupt their peers and mean they were unable to learn. As mentioned earlier in the guide, the LA will have to show that there **are no reasonable steps** to overcome this incompatibility. You may wish to refer back to the link to the SEND Code of Practice, see page 3, for examples of measures the LA could take, as these may be relevant to your case.

Arguments around unreasonable public expenditure

Often, **cost** may be the reason why the LA has decided not to name your requested placement. However, as mentioned above cost comparisons are only relevant when comparing two **suitable placements** that can meet need.

If both schools are suitable then the costs of both will need to be analysed carefully. You should ensure that **all the additional costs**, including hidden expenditures, are factored in as, at first glance, the difference between the settings may seem large.

But it's important to ensure they consider all aspects of your child's education, health or social care provision. This might include the cost of transport to and from the schools, therapy provision – including travel to the setting if the therapists are not on site - teaching assistants or the cost of a residential place versus the cost of a social care respite package.

When these are all added together, there may be a much smaller gap between the costs of a maintained school and the school of your choice. However, be mindful when calculating costs that, for maintained schools, the first £10,000 of funding is seen as a nil cost to the LA. If you want your child to go to a wholly independent school, the cost of this may be **considerably higher** than a maintained school.

Remember that the tribunal cannot order an independent school to admit your child, so you will need the school to have a place agreed before the tribunal.

TIPS

- Highlight points in the documents that you specifically want to raise at the hearing.
- Only send up to date and relevant evidence that shows current needs and provision required.
- Be mindful of page limits for evidence. You can submit 75 pages for placement only appeals, or 175 pages if you also appeal sections B and F, although it is possible to ask the tribunal to waive this.

What happens once I have lodged my appeal?

Once the tribunal has received your appeal, they must register your appeal within **10 working days**. They will let you know when the case will be heard and how long you have to send any additional evidence.

The tribunal will send a copy of your appeal to the LA. They must respond within **30 days** and **up to 10 days** before the hearing and send you a copy of the response paperwork. If you haven't received the response within 30 days, contact the tribunal.

In some situations, the LA may concede before the case is heard at tribunal. If this happens, it is advisable to **get their decision in writing** so that you are clear about what has been agreed.

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.

Following the hearing

The tribunal's decision is **legally binding**, and they must notify you of the outcome **within 10 days** of the hearing. If the tribunal rules that your school of choice is named in section I, then the local authority must do this within **2 weeks** of the hearing decision.

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 if you would like further advice and support