

Appealing to the First Tier Tribunal when the Local Authority refuses to issue an EHC plan



Guide No 43

September 2021

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Glossary

First Tier Tribunal for Special Educational Needs and Disability (“SEND Tribunal”) is independent of the local authority. The SEND Tribunal hears parents’ and young people’s (“YP”) appeals against local authority decisions about the special educational needs (“SEN”) of children and young people. The SEND Tribunal try to keep the appeal process as informal as possible although it is important to keep in mind appealing is a legal process.

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Local Authority (“LA”) is the body who has made the decision not to issue an EHC plan following an EHC needs assessment, a decision which carries a right of appeal. LAs have legal duties towards children and YP who have SEN including the duty to issue an EHC plan under certain circumstances.

The Children and Families Act (“C&FA”) 2014 is the law which sets out the test for issuing an EHC plan

Case law is law which has been made by the courts and decided by judges. In this area of law, it is typically made through the Upper Tribunal. This happens when one of the parties involved in an appeal to the SEND Tribunal has successfully appealed the decision to the Upper Tribunal. The decision from the Upper Tribunal then becomes binding and creates case law.

The Special Educational Needs and Disability Code of Practice 2015 (“The SEND Code”) is statutory guidance which explains the duties which various professionals, including LAs, have towards children and YP with SEN. When guidance is ‘statutory’ this means all the professionals it applies to must have regard to it. Put simply, they are expected to follow the guidance unless they have a good reason to depart from it.



Section One - Purpose of this guide and how to use it

The purpose

This document will give you a step-by-step guide to the appeal process. Appealing is typically a 12–14-week process from registering the appeal through to the hearing takes

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place. Therefore, the length of the guide reflects this step-by-step process but we don't expect you to read it all at once. This guide will explain the law and guidance which is relevant to the decision being appealed and can be used as a resource for challenging the decision.

How to use it

The guide contains some practical tips and next steps for starting the appeal process. Please read each section carefully. If you are coming to the guide after you have sent in your appeal to the SEND Tribunal, there is still information and guidance in **section 3** which will assist you in obtaining evidence which can be used for the rest of your appeal.

Section 2 deals with information you need to know before making your appeal including:

- Who has the right of appeal?
- Information in the refusal decision letter and time limits.
- Legal help.
- How IAS can help.
- The legal test relating to 'refusal to issue' decisions which is explained further using case law.

Section 3 deals with evidence and identifying evidence which could help your case. You may need to re-visit this section as your appeal progresses.

Section 4 deals with consideration of mediation and starting the appeal process.

Section 5 deals with preparing for the deadlines once the appeal has been registered including the hearing. This section will also deal with considering whether there may be further evidence or witnesses that could be sought to strengthen your case.

Section 6 contains appendices to this guide which includes:

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- A template parents and YP can use if their decision is not yet in writing
- A case study “Alice “where IAS supported a Parent who successfully appealed the LA’s decision to refuse to issue an EHC plan at the SEND Tribunal - this is recommended reading as it gives you a real-life example of what is involved in the process.



Section Two - Essential information you need to know and some frequently asked questions

Frequently asked questions

Who can appeal to the SEND Tribunal for a refusal to issue an EHC plan decision?

Parents (in relation to children from 0 to the end of compulsory schooling) and/or a YP (over compulsory school age until they reach age 25).

What information must the decision letter contain?

You should have been sent a letter from the LA when they made their decision. This letter must contain the following information on your rights of appeal:

- Your right to appeal that decision
- The time limits for doing so
- Information about mediation
- The availability of—Disagreement resolution services and

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- Information and Advice Support Service information, who can advise you about the process, your options and about matters relating to the special educational needs of children and young people.

If you are looking at this guide because you have been informed verbally that the LA will not be issuing an EHC plan but you have yet to receive a letter please use the model letter contained in **section 6** of this guide to get your decision in writing.

The Timings - The date of the LA notification letter is the date from which the time frame for making an appeal starts to run. You must send the appeal form to the SEND Tribunal within **two months** of the date of the decision you are appealing or **one month** from the date you obtain a mediation certificate, whichever date falls latest.

Example

Alice receives the refusal to issue decision letter and it is dated 10th April. She requests and receives her mediation certificate just before the 2-month deadline on the 7th June. The mediation certificate extends Alice's right of appeal by 1 month therefore her deadline for appealing is now 7th July.

Considering mediation – Before bringing an appeal to the SEND Tribunal, mediation must be considered. This does not mean that mediation is compulsory, but it must be considered. There is a telephone number on your decision letter from the LA which provides the details of the mediation service. You must contact this service to obtain a mediation certificate if you do not want to participate in mediation.

What if I have missed my deadline?

If you have missed the deadline, you can ask the SEND Tribunal to accept your appeal late and they have the power to register the appeal. If you need to do this, IAS recommends you seek advice first. There may be reasons for this e.g. family crisis/relationship breakdown/ housing issues/illness within the family/ financial

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issues/problems in the workplace/exclusion of your child and/or other difficulties your child is experiencing.

Example

Alice received the refusal to issue decision letter and intended to make an appeal. However, during the appeal window she broke her leg and her son was permanently excluded from school which meant she was incredibly stressed and could not make the appeal in time.

What is Legal Help and do I qualify?

Under the Legal help scheme, parents/YP may qualify to receive free legal help from a solicitor firm. There is a legal aid checker here: [legal help](#). It is important to check whether this is available even if you suspect you or your YP may not qualify. If you do qualify this means a solicitor's firm will do your case work free of charge.

IAS expect parents/YP to check to see whether they are eligible for legal help and take up this help if it is available so that IAS can support those families who are not eligible.

What IAS can do to help parents and YP

- IAS can help parents/YP to explore their options and rights and can provide information to help them make informed decisions/responsibilities and own any decision.
- IAS can keep the appeal focused on the legal test and ignore historical aspects of the case.
- IAS can support parents/YP to plan regarding facts and evidence.
- IAS can direct parents/YP to a model letter if there is no decision letter and the LA is out of time.
- IAS can check the LA decision letter is compliant and consider parent/YP circumstances if they are out of time for making the appeal. (See above).

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- IAS can explain the practical considerations of mediation.
- IAS can explain the use of Legal Aid, but it is always the parent/YP's responsibility to check if they are eligible.
- If IAS are supporting you through the appeal, we can check your draft reasons for appeal (time limits permitting).

IAS will expect that:

- The parent/YP to follow any guidance.
- The parent/YP attempt to draft their reasons for appealing.
- All information is given/available on time.

What IAS cannot do?

- Give personal opinions.
- Solve problems and make decisions for the parent/YP.
- Do things that parent/YP can do for themselves or could do with encouragement/support.
- Jointly support a parent/YP whilst a solicitor is advising on their case.
- Chase up the LA to ensure deadlines are adhered to.

The law

The legal test for whether the LA must issue a plan is set out in the C&FA 2014 as follows:

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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.

When the LA looks at whether an EHC plan is 'necessary' for the purpose of the test, the LA will look at whether your child/YP's needs could be met through the resources which are normally available to mainstream settings without the need for an EHC plan.

Case law

In the case of **JP v Sefton MBC [2017] UKUT 0364 (AAC)** the Upper Tribunal looked at the two-stage approach which had already been determined through earlier case law and whether it had been applied correctly in this case. This approach is relevant to the LA looking at whether your child/YP's needs can be met without an EHC plan. The two-stage approach asks the "can" question and the "will" question: 1. **Can** the child/YP's SEN be met through provision from the resources normally available to a mainstream school/college and 2. **Will** they be met? Resources are not limited to a sum of money used to fund extra support; it could include therapeutic input such as speech and language therapy and/or equipment your child/YP needs.

This leads on the issue of what is typically available in terms of 'funding' to mainstream settings. In **CB v Birmingham City Council (SEN) [2018] UKUT 13 (AAC)** the Upper Tribunal considered whether the child's SEN could be met from resources 'normally available' to mainstream schools and said:

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“In my view, there is a clear, albeit rough and ready resource line to be crossed before an EHC plan is considered to be necessary. It is based on the kinds of provision a school could make from its own notional SEN budget.”

Later, in **Nottinghamshire CC v SF and GD (SEN) [2019] UKUT 243** the Upper Tribunal (and later when the case was heard in the Court of Appeal) determined that even in cases where the LA is providing funding to a school over and above what is ‘normally available,’ an EHC plan may still be required. The Upper Tribunal stated:

“This section 37(1) test must be read with the definition of ‘special educational provision’ in section 21(1) of the CFA read in. So doing, the tribunal in my judgment was entitled to conclude, using its specialist expertise, that, notwithstanding the extensive educational provision Nottinghamshire was providing to HD and his ‘progress’, this was not educational provision that would be made generally for children of HD’s age in mainstream schools in England, and for this reason it was ‘necessary’ for an EHC Plan to be made for him.”

The above case shows that even in situations where the LA is providing ‘top-up’/extra funding to a school to help it meet a child/YP’s needs, an EHC plan could still be needed.

Why might the LA refuse to issue an EHC plan?

The LA may give various reasons as to why they haven’t issued an EHC Plan. Typically, these often refer to the school’s ability to meet your child/YP’s needs without an EHC plan, or the LA says the school can apply for ‘top up’ funding. The LA may have wrongly applied the test as to why they do not need to issue an EHC plan.

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What you need to show

It is important to keep in mind that the test for issuing an EHC plan is different than the test LA's must consider before carrying out an EHC needs assessment. The test for an EHC needs assessment is lower and easier to show than the test for the LA issuing an EHC plan following the assessment. The SEND Tribunal will need evidence that the legal test is met for your appeal to succeed. This will typically involve you showing that your child/YP's mainstream setting cannot meet their needs without an EHC plan. You can see by the case law decisions that there are a variety of considerations as to whether an EHC plan is needed and it is not just a question of resources alone. However, the SEND Tribunal will need to know what resources are available to your child/YP's education setting and the funding the LA typically gives to it. We have detailed links to model letters you can use to help you obtain this evidence for your appeal later in this guide.

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Section Three - Evidence

Evidence

Any document which describes your child/YPs SEN and the support they require can be considered as evidence and it will be important to use these documents to your advantage.

What evidence has the LA used to make the decision?

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The LA will have made their decision based on the EHC needs assessment reports. The advice contained in these reports should indicate the types of support your child/YP requires and the LA will decide whether this support can be provided by their education setting. However, in our experience EHC needs assessment reports do not always describe a child/YP's needs in full and properly specify the support the child/YP requires.

If professional recommendations are vague, it will be easy for the LA to maintain its position that needs can be met in school/college without an EHC plan

Read through the reports those who have contributed to the EHC needs assessment. If the recommendations are not clear about the exact support your child/YP requires, write to the person who wrote the report and request further detail. We have drafted an example below. To give you an idea, language in recommendations such as 'access to'; 'regular'; 'may benefit from' 'as appropriate' is not acceptable as it is not clear or specific about exactly what your child/YP requires. A further issue to consider is if the advice is from a therapist who is recommending your child has a 'block' or 'episode' of therapeutic input – do they make clear recommendations about what will happen once the therapy comes to an end? If not, it will be important to ask them to clarify this.

Example letter

"I am writing to seek clarification about the contents of your report which contributed to my child's EHC needs assessment.

Regulation 6 (1) of the SEND Regulations 2014 sets out clearly the information and advice to be obtained of an EHC needs assessment: needs/provision/outcomes.

Paragraph 9.51 of the SEND Code of Practice states that the evidence and advice submitted by those providing it should be clear, accessible and specific. Therefore, I would be grateful if you could explain your recommendations. If I am unable to obtain clear recommendations about the provision my child requires, I will be submitting this to the SEND Tribunal to show that I have done all I can to work with the professionals involved and may need to seek a Direction from the SEND Tribunal to obtain

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specification of the provision my child requires which the Tribunal panel will require in order to make a decision”.

Have a read through the” Alice “Case Study in **section 6** – in the conclusions that the SEND Tribunal drew they were critical of a report that had been used by the LA and stated:

“The Educational Psychology report was not sufficiently detailed and did not contain any SMART outcomes and what outcomes were contained in the report were very time limited.”

This gives a useful insight as to what the SEND Tribunal expect from professional reports.

Examples of other evidence you may have

- School progress reports – yearly (plus termly summaries).
- Any diagnostic reports e.g. ADHD/ASC if available.
- Formal exclusion letters/disciplinary record – this can be used to show that your child/YP is not getting the right amount of support and if the right support was in place through an EHC plan the risk of exclusion would likely reduce.
- SEN support record.
- Information from health such as speech and language/occupational therapy/nurse practitioner reports.
- Any report/record if your child/YP has spent time in a “hub” or in a “resourced provision” or any alternative provision due to their behaviour.
- Remember, progress is not just academic – note all areas of difficulty your child/YP has.

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Evidence of the resources available to your child/YP's education setting

Remember, the SEND Tribunal will need to know what resources are available to your child/YP's education setting and the resources the LA gives to it. The responses you receive to the model letters below can be used as part of your evidence. The responses should show whether the education setting can comfortably meet your child/YP's needs without an EHC plan.

- Model letter you can use to send to the education setting is available [here](#).
- Model letter you can use to send to the LA is available [here](#).

Other issues to consider which could be used as reasons/evidence

- Whether your child/YP have a transition coming up e.g., transfer to secondary, which is impacting on their needs
- Are your child/YP independent/social skills appropriate to their age?
- Is going to school/college easy for them? Do you need to do much to prepare them each day?
- Can they access the teaching, facilities and resources in the same way as others who don't share their difficulties?
- Does your child/YP have low self-esteem and incidents of self-harm at home and has happened immediately before they were expected to attend school?
- Do they have sensory needs and/or behaviours at home may happen on return from school?

If any of the above are relevant to your child/YP it will be important to refer to this in your appeal reasons and if you can provide evidence.

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Getting evidence from your child/YP's education setting

Your child/YP's education setting may hold information you do not have which could help your appeal such as:

- Internal and external communication with other professionals about your child/YP's SEN
- For behaviour and/or absences – any information such as emails between staff/records of meetings/behaviour logs/attendance record

If you are having difficulties in obtaining this information or the education setting is reluctant to provide it then you could consider making a formal request for the information. There is a model letter you can use [here](#). For children over 12 it would be desirable to have a short letter from them (if appropriate) saying they consent to you requesting their information.

Evidence dos and don'ts

The SEND Tribunal can order the LA to issue an EHC plan but cannot deal with issues such as any disagreement you've had with the LA or your child/YP's school or college. For this reason, it is important not to focus on issues which are not relevant to the question in law as to whether your child/YP requires an EHC plan. It is important to keep your reasons and evidence relevant to the test as this is what the SEND Tribunal must look at.

You may not have all the evidence you would ideally like at this stage but don't worry and more importantly, **don't hang on waiting for evidence** before sending your appeal in as it is vital you do not miss your deadline for appealing. Once the appeal is registered you will have an opportunity to send further evidence in. Therefore, if you have sent any of the model letters referred to above don't wait for the responses to send in your appeal as you can send them at a later date once the appeal is registered.

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Section Four - Mediation and the SEND Tribunal appeal form

Mediation

If you wish to enter mediation, make sure you request it before your appeal time window runs out. Speak to IAS for further advice around this if you need to. If mediation goes ahead, you meet with the LA at mediation with a mediator (the current list is on the back of the LA letter). The LA may change their decision at mediation and decide to issue an EHC plan. If mediation is unsuccessful, you must be issued with a mediation certificate which will enable you to go on and appeal. Once you have your mediation certificate (whether you have chosen to mediate or not) the following steps are important for starting the appeal.

SEND Tribunal appeal form

The SEND 35 form is the form you need to use for this type of appeal and it can be obtained [here](#). This is not to be confused with the SEND 35a form which is for a refusal to carry out an EHC needs assessment appeal.

An additional sheet to the appeal form can be included. Remember the SEND Tribunal will only know your child/YP from the information you put on the form and the evidence you send in with the appeal. You could use this additional sheet to write a summary of your child/YP's history; when and how their needs were first identified; their education so far and any significant events with dates leading to the current appeal. You can also copy the 'reasons for appeal questions' (see below) from the form and answer them on your

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additional sheet rather than the form as the form doesn't have a lot of room for you to type your answers. You need to mention if you are still waiting for further reports and/or evidence.

The appeal form questions:

Section 3 - I am bringing the appeal because (to be completed in all appeals):

This question gives you the chance to explain why you think an EHC plan is needed. It would be helpful to look back through **Section 3** of this guide and refer to any evidence you have (or are in the process of getting) which suggests the school are not able to meet your child/YP's needs without an EHC plan. Remember, the reasons can include the following:

- The school cannot provide your child/YP with anything more than they are currently providing which is not enough
- Your child/YP may not be making adequate progress even with support
- The need for therapeutic support/external support such as specialist teaching which is not readily available without a re-referral and/or a waiting list for services
- Note any of your child/YP's needs which are not improving

This is the time to carefully consider how your child/YP is day to day – is going to school/college easy for them? Is it stressful? Can they access the teaching, facilities and resources in the same way as others without their difficulties? Are their independence/social skills appropriate for their age? Do they have a transition coming up – transfer to secondary school for example? It is important to give a true reflection of what life is like for your child/YP and tell the SEND Tribunal this in your reasons.

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Section 3 - The LA have not considered

Note here anything you believe the LA has not considered when making their decision. It could be issues such as the following:

- Interventions your child/YP has been provided with have not been effective
- Any increase in your child/YP's needs
- If your child/YP continues to be at risk of exclusion/school avoidance (if appropriate)
- The capacity of therapeutic services (such as speech and language therapy/occupational therapy to meet need without an EHC plan guaranteeing the level of special educational provision required

Now conclude your reasons for appeal. They could be different in every case. Below are several examples:

Example 1

"The school has struggled in the past to provide X with the provision she needs and as a result she has had gaps in provision. (GIVE EXAMPLES). Without an EHC plan to guarantee her provision I believe gaps in provision will be a real risk in the future. Plus, I believe needs greater support in the following areas (GIVE EXAMPLES) and unfortunately school is not able to provide this. I am in the process of obtaining evidence about the resources available to X's school and will submit this information as further evidence later".

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Example 2

*“The assessment report from the speech and language therapist recommends school uses a range of strategies to help X with her communication needs. Now that the advice has been provided X has been discharged from the service and the therapist recommends school can re-refer if they have any concerns. I believe X requires direct therapy due to the severity of her needs **and/or** I believe X will require the therapist to oversee her programme and amend it as her needs change on a termly basis. I also believe the therapist will need to train school staff and due to a lack of provision locally the only way X will receive this provision is through an EHC plan”.*

Example 3

*“X is unable to access her school on a regular basis as evidenced by her reduced attendance and inability to attend. There is no evidence to support non-attendance is through choice but in fact is due to her anxiety and other difficulties. I understand the questions to be considered is whether X's needs can be met through the provision normally available to a mainstream school and will they be met? At the moment the answer to both questions is no due to her inability to attend. Therefore, it is necessary for the LA to issue an EHC plan to ensure she receives the necessary special educational provision to meet her complex special educational needs”. **(Refer to any available evidence with supports what you are saying)***

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Example 4

“The assessment report from ‘XYZ’ is not clear about the special educational provision she requires. It is vague and contains phrases such as (delete/add as appropriate) ‘access to’ ‘regular support’ ‘opportunities to’ ‘may benefit from’ – none of which are specific. The provision recommended is so vague that it is difficult to tell exactly what provision she requires and whether the LA can really say she doesn’t need an EHC plan to access it. I am in the process of writing to XYZ about her recommendations and will submit this information as further evidence later”.

Example 5

“X has been excluded on a number of occasions (note whether they are formal or ‘informal’ exclusions/reduced timetable). X continues to be at risk of exclusion as evidenced by the phone calls/detentions/behaviour sanctions etc she receives at school. Without a greater level on in school support and staff training alongside outside intervention from a specialist X cannot have her needs met. Therefore, it is necessary for the LA to issue an EHC plan to ensure she receives the support she requires to meet those needs”.

Section 4 of the form – Single Route of Redress

The SEND Tribunal now represents a single right of redress and allows the Tribunal to look at health and social care as well as education issues. There must be an educational component to the appeal for it to be considered.

Using the single route of redress allows the SEND Tribunal to make non-binding ‘recommendations’ to health and social care about your child/YP’s needs and provision. Although these are non-binding but there is an expectation they will be followed. If they are not going to be followed, then the LA (for social care) or the Clinical Commissioning

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Group (for health) will need to write to the parent/YP and the SEND Tribunal within 5 weeks of the decision explaining why they have decided not to follow the recommendations. We have a separate guide on the SEND Tribunal's extended powers (Guide 46) if you want to know more about this. For the purpose of this guide, we will keep the information brief and limited to why you may want to consider using the single route of redress as part of your appeal.

Why use the Single Route of Redress?

There are several reasons to consider. For example, advice not obtained as part of the EHC needs assessment or outdated advice from a professional where there is a waiting list to access a further assessment. This could be from a health care professional such as an Occupational Therapist, a professional from children and young people's mental health services or a Speech and Language Therapist. Although these are healthcare professionals, their findings after an assessment may identify needs which leads to provision for your child/YP which 'educates or trains' them. For the purpose of the law, any health or social care provision which 'educates or trains' becomes special educational provision. This may lead to further evidence that your child/YP requires such provision which may not be available without an EHC plan.

Consider the examples answers below. If any of these reflect your circumstances, then you may want to ask the SEND Tribunal to list your appeal under the single route of redress.

Question - I disagree with the health care needs and health provision (Section C and G if concerning an EHC plan) because:

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Example

“X has had difficulties with mental health for the past 18 months and despite a referral from school/GP we have been informed she does not meet the threshold to access services in our area. To properly identify her mental health needs, which are impacting on her education, we maintain a mental health assessment by suitably qualified practitioner who has skill and experience in meeting the needs of children with ASD and mental health needs should have been carried out”.

Question - I want the Tribunal to make a recommendation about the health care needs and health provision (Section C and G if concerning an EHC plan) follows:

Example

“Although X has yet to have a full and comprehensive mental health assessment, we believe she will require support from a suitably skilled and experienced professional to meet her ongoing needs. We also believe school staff will require training from such a professional, so they are able to properly understand and respond to her mental health needs in the education setting.”

The above examples could also relate/be adapted to other therapies such as Speech and Language, Occupational Therapy and/or Physiotherapy.

Once the form is complete

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Have the information the Tribunal requires in Section 12 of the appeal form and have any evidence you wish to send with the form ready. Your appeal and documentation can be sent by email to the address specified in Section 12 of the form - write in the subject line of your email 'New Appeal' to ensure it is dealt with quickly. The document limit for each email is 14MB so if your documents amount to more than this you will need to spread them over more than one email making sure you note in the subject bar 'New Appeal email 1 of 1; then in a new email making sure it is marked as email 1 of 2' - so on and so forth.

Tip – There are page limit numbers for all types of appeals so it is important to ensure the evidence you plan to send reflects the 'refusal to issue an EHC plan' issues. The form asks specifically 'why' the evidence you are sending is relevant to the appeal. Guidance on the page limit for each type of appeal can be found [here](#).

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Section Five - Once the appeal is registered and preparing for the process

What happens next

The SEND Tribunal will write to you – typically by email. **Always** check your junk mail as sometimes their emails will go to a junk folder.

The SEND Tribunal will register your appeal and send a timetable of what should happen next and when.

Key Dates- this is an example of the key actions and dates applicable.

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| Action and party required to respond | Date for compliance |
|---|------------------------------|
| The LA must send its response so that it is received by: | 12 noon on 20/10/2019 |
| The Parent(s) and LA must send to each other and to the Tribunal any further written information, including professional reports, upon which they intend to rely as soon as it is available and at the latest, it must be received by: | 12 noon on 14/11/2019 |
| No further evidence without express permission of the Tribunal from either party will be accepted after: | 12 noon on 14/11/2019 |
| The LA must produce and send to the Tribunal either four copies of the bundle in hard copy, or one copy electronically and at the same time send one copy to the Parent(s) so that it is received by: | 12 noon on 20/11/2019 |
| The date of the final hearing | 09/12/2019 |

Put your deadlines in a calendar/diary/smart phone straight away so you do not miss these important dates.

It is very important to comply with tribunal directions such as sending in any missing information and responding to deadlines. Otherwise, you risk the appeal being struck out (ended). If you are having difficulties with this, please contact us.

If IAS are assisting you with the appeal, you need to keep them informed as and when you receive instructions from the SEND Tribunal or communications from the LA. If you are continuing to receive advice/support and leave it to the last minute to share the information and get advice, it may not be possible for IAS to support you before the next deadline.

Communicating with the SEND Tribunal

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Once an appeal is registered the SEND7 form is the tool to use if you need to communicate with the SEND Tribunal for certain issues. (Click [here](#) or search SEND tribunal forms). Examples include:

- Applying for more time to comply with a tribunal direction
- Order for the other side to provide more information or documents
- Adjournment of the hearing
- Asking for appeal to be extended to National Trial if you did not ask for this when making your appeal

Before making an application, the parties must contact the other side for their views - if this has not been done the application will be **rejected**. The form does explain this clearly.

LA's response to the appeal

The LA's response to the appeal is the very first deadline which must be complied with. At this stage the LA may well concede (agree to issue an EHC plan). If this is the case, it is treated as an 'unopposed appeal' meaning the LA **must** issue a draft EHC plan within 5 weeks of the date it notified the SEND Tribunal it was not opposing the appeal. The LA must then send a copy of the finalised EHC plan within 11 weeks of the date it notified the SEND Tribunal it was not opposing the appeal.

If the LA do decide to defend the appeal, then they must give their reasons. It will be important to read their reasons carefully and share the information with IAS if we are supporting/advising you. The LA's reasons for defending the appeal are likely to point to any further evidence and/or information you may need for your evidence deadline.

This is also the LA's deadline to send their attendance form although this is likely to be replaced soon with a 'case review form'.

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What if the LA's response to the appeal is late?

If the LA is late, it is important for you to chase this as soon as possible as there is the potential to request that the LA is barred from taking part in the appeal further. You could use the following example wording to send in an email to the LA:

"We have not received the LA's response to our appeal on the deadline set by SEND Tribunal. We are considering asking the SEND Tribunal to bar the LA from the remainder of the proceedings. Therefore, we request the response within 5 working days. If there is no response or an inadequate response, we will request that the LA is barred from the proceedings"

Attendance form and witnesses

The next deadline is the attendance form although this is likely to be replaced soon with a 'case review form'. Only bring/list witnesses if they can give evidence about your child/YP's needs and the type of provision they will require. This will help the SEND Tribunal decide whether your child/YP requires an EHC plan. It is not vital to have witnesses. However, if you do decide to bring witnesses it is important to keep liaising with them at each stage of the appeal, so the witness is fully informed and prepared if the hearing goes ahead.

The information the SEND Tribunal sends about your appeal will only be sent to you and the LA, not the witnesses. Therefore, they will be relying on you to keep them informed about what is happening with the appeal.

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Further/final evidence deadline

The next deadline is for you to send in any further evidence and/or further information/reasons to support your appeal – the LA has the same deadline if they wish to send in further evidence/reasons they are relying on to defend the appeal.

You can use this to respond to any reasons the LA has given in their response for saying an EHC plan is not necessary. If you have responses from the model letters, we recommend you send (see **Section 2** of this guide) you can send these in as your additional evidence. Although you can use this opportunity to send any evidence in which you did not have at the start of the appeal – only send it in if it is relevant to the test.

If you have come to use this guide after you have sent in your appeal, please look at the types of evidence we recommend you get which is detailed in **Section 3** of the guide – this includes links to model letters you can use.

Tribunal bundle

This contains all the documents the parties to the appeal (you and the LA) have sent into the SEND Tribunal as part of the appeal. The LA is responsible for preparing the bundle and must send a copy to you and the SEND Tribunal by the deadline. If you do not receive it by the deadline or receive it but there is information missing it will be important to telephone the SEND Tribunal.

Sending in evidence once the final evidence deadline has passed

It is possible to apply for late evidence to be submitted after your deadline, including bringing late evidence on the day of the hearing. It will be up to the SEND Tribunal whether this should be accepted. It is always best to tell them in advance and any late evidence must be sent to the LA as soon as you have it. Reasons must be given for why

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the evidence is late. There is no guarantee that the evidence will be accepted by the SEND Tribunal hearing your appeal, it is important to make sure you detail your reasons carefully. Seek advice if you are not sure.

Pre-hearing

The LA may concede (agree to issue an EHC plan) after the response deadline but prior to the hearing. This **must** be done via a consent order, which is signed by both parties and sent to the tribunal by the LA and parent/YP. This is to ensure the deadlines for issuing the draft and then final EHC plan are protected. If you are unsure about this process please seek advice. The form used for withdrawing the appeal is the SEND8 withdrawal form which can be found [here](#). The SEND Tribunal will not normally allow an appeal to be withdrawn when there are less than 5 working days before the appeal hearing.

The hearing

An important point to bear in mind is the SEND Tribunal process is going to be less formal than typical courts and **Tribunals should be accessible and parent friendly**. They are presided over by judges who are trained in this area of law and specialist panel members who are experts in SEND. Our experience is that whilst there is some formality to the process, the SEND Tribunal understand that most parents attending do not have any form of legal representation. Whilst it is important for you to have an idea of what you are arguing you will not need to refer to points of law. Currently due to COVID, all appeals are being undertaken remotely, which is enabling the SEND Tribunal to carry on hearing appeals.

Having a quiet and private space, including a good wi-fi connection is essential. If you don't have either, then ask the SEND Tribunal about this prior to your hearing as they may be able to help with access issues.

Practical tips:

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- Keep off other equipment/apps such as XBOX/Netflix
- Use Google Chrome – not Explorer or Firefox
- Test connection and link to the hearing beforehand – this is contained in your ‘notice of hearing’ letter
- Give this information to witnesses so they can access the hearing

There is a You Tube video which shows what a Tribunal hearing is like. Although it is a little out of date, it provides a good example of what a hearing looks like in terms of structure. The video can be accessed [here](#).

The judge will start by explaining the procedure to the parties and what the issues are. The Tribunal panel will have already decided the order of the issues prior to the hearing and they will ask the witnesses questions. Make a list of your important points but make sure they are relevant to the issues the SEND Tribunal needs to decide. Have all your paperwork and evidence to hand and organised – it’s essential to know where your key information/evidence is and be able to access it quickly. The more prepared and familiar with ‘the bundle’ the more confident you will feel.

The decision

You will receive a decision around 2 weeks following the hearing. The decision made will reflect both the written evidence and the oral evidence the SEND Tribunal panel hears on the day.

What happens if my appeal is successful?

The LA **must** issue a draft EHC plan within 5 weeks of the SEND Tribunal’s decision. The LA must then send a copy of the finalised EHC plan within 11 weeks of the SEND Tribunal’s decision.

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If the appeal succeeds you may wish to look at the following resources which will tell you what the EHC plan must contain and your rights about the types of education placements you can ask for:

- Information on what EHC plans should contain and an 'EHC plan checklist' [here](#).
- Asking for particular education placement rights [here](#).

What if my appeal is dismissed?

If the appeal is dismissed, then you may wish to come back to the service for advice and information.

Contact details for (IASS) Manchester

Parent Confidential Helpline: **0161 209 8356** (Monday to Friday 8.30 am-4pm)

Answer phone available when lines are closed: 0161 209 8356

Email: parents@manchester.gov.uk

Website: www.iasmanchester.org

Address:

Information, Advice and Support Service (IASS) Manchester
Hulme District Office
323 Stretford Road
Hulme
M15 4UW

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Section Six - Appendices and further information

If you are looking for advocacy support for the SEND Tribunal there is a short guide to this [here](#).

Appendix 1 Model letter if you have not received the decision from the LA

(Your name, address and contact details here)

Manchester Local Authority
Directorate for Children and Families
Fourth floor,
Town Hall Extension,
Manchester
M60 2LA

For the attention of *[insert name of the LA officer who last dealt with the EHC plan]*

email to: sen@manchester.gov.uk

[Date]

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Childs name

Childs Date of Birth

Subject: Local Authority delay in decision on whether to issue an EHCP

Dear Sir / Madam

X has recently undergone an EHC needs assessment.

The request for an EHC needs assessment was made on **[date]**

Delete one of the next two statements as appropriate:

We/I have been informed verbally the LA will not be making an EHC plan

More than 16 weeks have elapsed since the LA became aware of a request for assessment

If the LA decide not to issue an EHC plan following assessment –there is a requirement to notify in writing under SEN Regulation 10(1) as soon as practical and in any event within 16 weeks of the LA receiving the request for the EHC needs assessment. This deadline has now passed.

Note none of the exceptions contained in SEN Regulation 10(4)(a) to (d) apply to my case

Given the fact that I have had no notification from the Local Authority as to whether a plan will be issued, I feel my right to appeal is being frustrated.

I request your decision on whether you will be issuing an EHCP in writing within 5 working days.

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Kind regards

Your name

Appendix 2 – IAS Case Study – Refusal to Issue “Alice”

Alice

EHCP Refusal to Issue: Tribunal.

This case study reflects advice and assistance given to a Parent who challenged the Local Authorities decision not to issue an EHCP after Statutory Assessment.

Names have been changed for anonymity.

The case was decided at Tribunal and centred around the legal test set out in The Children and Families Act 2014 s. 37(1), which states:

“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.

Background

Miriam’s daughter Alice attends a mainstream primary school and was placed on the SEN register.

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Alice had an access plan from school, but it was Miriam's belief that the access plan was insufficient to meet Alice's level of need. Miriam felt that school had underestimated Alice's level of need and therefore had not put in the correct level of support she required. Moreover, Miriam felt that there was enough evidence within the numerous reports provided by professionals to warrant an EHC needs assessment.

Miriam felt that for Alice to bridge the gap against her peers, build confidence self-esteem and to be able to make significant progress she would need an EHC Plan to clearly specify the support needed.

Miriam decided to request an EHC needs assessment and sent in a Parental request to the LA. The LA carried out the assessment but declined to issue an EHC Plan.

IAS support

IAS supported Miriam to understand her right of appeal and firstly the necessity of considering mediation. Miriam chose to enter mediation with the LA and IAS supported her at that meeting. Although Miriam strongly articulated her case in mediation and was persuasive with her arguments the LA declined to alter their decision.

Miriam submitted her Tribunal application and the case went to a formal hearing.

Before the hearing IAS supported Miriam with preparing her arguments for the hearing.

IAS supported Miriam at the hearing on the day and Miriam was able to confidently, accurately and convincingly articulate her points to the panel.

Outcomes

The Tribunal panel concluded that:

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The school and the LA had underestimated the extent of Alice's special educational needs.

The Educational Psychology report was not sufficiently detailed and did not contain any SMART outcomes and what outcomes were contained in the report were very time limited.

On the Panel decision letter when refusing to issue an EHC plan, no special educational needs were specified on the form, which casted doubt on precisely what information was before the Panel when they concluded that Alice's needs were well known, that the provision provided by the school continued to meet her needs and that the provision was well within the school's resources.

Despite being exempted from Year 2 SATs, and her well documented difficulties with reading and handwriting, no special arrangements had been contemplated by the school for Alice about exams, even though she would be disadvantaged without such support. They concluded for all these reasons that the complexity of Alice's needs had been underestimated.

The provision put in place so far had not resulted in Alice making adequate progress. The LA acknowledged that the outcomes proposed by the Educational Psychologist had not been met and seemed content to wait until the end of Year 6 to see if they had been achieved.

At the hearing, neither the LA nor the school were able to tell the panel whether they thought Alice was of average or low average ability. The SENCo herself cast doubt on the accuracy of the Discussion Report which said that Alice was now meeting age related expectations in Maths.

Apart from the sparse information contained in the school reports, (which have all merely indicated that Alice was working towards age related expectations), and two Access Plans which date from the Summer Term 2019, the school provided little evidence of a

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graduated approach or specific, detailed and quantified termly targets and progress made.

The LA had not been able to demonstrate with any clarity or certainty that with the specific provision in place Alice has made adequate progress

It was not clear why the LA had not yet implemented all the recommendations from the professional reports it commissioned. The LA accepted that neither of the recommended individualised programmes for spelling or handwriting was being provided. In the absence of a satisfactory explanation from the school, the panel concluded that it had carried out the recommendations to the extent that they can be accommodated with the existing staffing levels within the classroom. The provision that had been made to date is inadequate and an EHC Plan is needed to ensure that adequate provision will be made.

The panel had been given no detailed costings or a breakdown of hourly support being provided to Miriam. The little information that they saw was to the effect that the money would be available from within the school's resources without the need for an EHC Plan. However, resources are not available just because they exist if the LA is unwilling to use them because, wrongly as here, it did not consider that they were needed. The benefit of an EHC Plan is not just that money will be available for the provision, but also that the precise terms of the provision can be agreed, or if not, can be the subject of an appeal procedure.

In any event, just because provision may cost less than the age weighted pupil unit plus £6,000, does not automatically equate to refusal to issue an EHC Plan. For the reasons set out above, the panel were satisfied on the balance of probabilities that Miriam demonstrated that unless the special educational provision is provided for Alice via an EHC Plan, the necessary provision is not in fact going to be made.

The panel also concluded that we must look to Alice's future transfer to secondary school. The panel followed the reasoning in *Wilkin v Goldthorpe and Coventry City Council* [1998] ELR 345, because the same approach is appropriate; we cannot realistically limit ourselves to the immediate present. The evidence presented to us does

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not demonstrate that provision at Alice's current school is enough to meet her needs and those needs are likely to increase at secondary school.

On the evidence presented the panel concluded that the LA must issue an EHC Plan for Alice.

Reflection

This case was successful as the parent had a detailed knowledge of her child's needs and was able to argue her case particularly well. From the start the school had consistently argued that they had identified and met need and as such the LA called them as a witness at the Tribunal.

IAS provided support to the parent to prepare for the hearing, but it was the parents' arguments that ultimately settled the case.