

# Appealing to the First Tier Tribunal about Section I (placement) of an EHC



Guide No 44

SEPTEMBER 2021



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



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



**Section Three - Evidence**



**Section Four – Mediation and starting the appeal process**

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## Section Five - Preparing for the rest of the appeal

### Key to the colours in the text

Sections

Anything about law, case law and statutory guidance

Any quotes from another text, examples, including examples of what to write

Issues you will need to consider and steps you need to take

Headings

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

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process as informal as possible although it is important to keep in mind appealing is a legal process.

**Local Authority (“LA”)** is the body who is responsible for the EHC plan and can make various decisions about EHC plans. These decisions carry a right of appeal to the SEND Tribunal.

**The Children and Families Act (“C&FA”) 2014** is the law which sets out what EHC plans must contain and details the rights parents/YP have in relation to the placement named in the 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.

## 1

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

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## The purpose

This document is intended to 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 taking 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 decision letter and time limits.
- Legal help.
- How IAS can help.
- The legal test relating to placement appeals 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 of the guide as your appeal progresses.

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

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**Section 5** deals with preparing for the deadlines once the appeal is registered. This section will also deal with considering whether there may be further evidence you can obtain to strengthen your case and the hearing.



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

### Frequently asked questions

#### When does a Section I appeal arise?

You have the right to appeal the contents of an EHC plan in the following circumstances:

- On receipt of a finalised EHC plan following an EHC assessment or a re-assessment.
- When an EHC plan is amended, typically after an annual review (and when you receive the final amended EHC plan).
- On receipt of a decision from the LA not to amend the plan following an annual review or re-assessment (and you think the plan should be amended).
- When the LA inform you that they will cease to maintain the plan, which means they believe an EHC plan is no longer necessary for your child/YP (see guide number 47 on how to appeal a cease to maintain decision).

When a parent/YP receives one of the above and disagrees with the placement named in Section I then they may wish to consider appealing.

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**Note:** When appealing the contents of the EHC plan, Sections B, F & I are the only Sections of the plan which can be appealed, and these are often appealed together as a B, F & I appeal (see guide number 45 on Sections B&F appeals). However, under the SEND Tribunal's single route of redress powers, you can request the Tribunal considers health and social care issues as part of a contents appeal (see guide number 46 on the SEND Tribunal's extended powers).

## Who can appeal to the SEND Tribunal?

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
- 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.

**The timings** - The date of the LA notification letter is the date from which the time frame for making an appeal starts to run. If you are appealing Section I only then you must send the appeal form to the SEND Tribunal within **two months** of the date of the decision you are appealing. This is different if you are appealing other Sections of the EHC plan (B&F) in addition to Section I. This is because you must consider mediation. Therefore, if you are appealing more than just Section I then you must send the appeal

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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 decision letter and it is dated 10<sup>th</sup> April. She wants to appeal Sections B&F, as well as Section I so requests and receives her mediation certificate just before the 2-month deadline on the 7<sup>th</sup> June. The mediation certificate extends Alice's right of appeal by 1 month therefore her deadline for appealing is now 7<sup>th</sup> July.

## It is the placement I am unhappy about so why should I consider appealing Sections B&F?

Sections B&F of the EHC plan are just as important as Section I. The reason for this is that case law has determined it is only when a decision has been taken as to a child/YP's SEN that it is possible to decide **what** provision is required to meet them. Similarly, it is only when a decision has been taken as to the necessary provision that it is possible to decide **which placement** can make that provision. If sections B&F do not accurately set out the SEN and the provision accurately and specifically, then it may be easier for the LA to argue that their choice of school is suitable. It is important to ensure the EHC plan is an accurate reflection of the child/YP's SEN and provision as the SEND Tribunal will name the placement they consider can meet the needs as set out in the EHC plan.

**Considering mediation** – Before bringing an appeal to the SEND Tribunal, mediation must be considered if you are appealing more than just Section I. 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. If you want to appeal more than Section I, you must contact this service to obtain a mediation

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certificate if you do not want to participate in mediation. Mediation is explained further in **section 4**.

## 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 such as a family crisis/relationship breakdown/ housing issues/illness within the family/ financial issues/problems in the workplace/exclusion of your child and/or other difficulties your child is experiencing.

### Example

Alice received the 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. Sections B, F and I appeals may require independent reports and funding for these reports may be available through legal aid.

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.

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## 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).
- 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.

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- 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 C&FA 2014 gives parents and young people the right to request certain ‘types’ of placements. It is important to identify the ‘type’ you are asking for. This is because the law for some ‘types’ is different. There are other ‘types’ of nurseries, schools and colleges which are not part of the C&FA 2014 framework – we will consider these later on in the guide, for the moment we are only considering the types of placement you have a **specific right to request** which are as follows:

### **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).

If you are not sure whether the nursery, school or college you have asked for falls into one of the above ‘types’ you can check [here](#). Section 41 schools and colleges referred to above are independent specialist placements which have chosen to be part of the C&FA 2014 framework. You can find the list of schools and colleges [here](#).

If you have asked for one of the above ‘types’ of placement, the LA **must** name the placement you have requested. There are some exceptions to this which are contained in Section 39(4) C&FA 2014:

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## 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.

It is important to note that these are the only exceptions the LA can rely on to say no to your preference, and it is up to the LA to show the exception applies. For example, the exceptions do not say anything about a placement being ‘full’ or that the placement you want named cannot be named because it is in another LA area. Each exception is detailed below so you can see what it means in practical terms.

### 1. ‘Suitability’

The placement you have asked for must be suitable otherwise the LA can say no to naming in in the EHC plan. Consider the following example:

Piotr has Autistic Spectrum Condition (ASC) and struggles with his social and communication skills. Academically, Piotr is performing within age related expectations. Piotr’s parents are concerned that he is not coping within a mainstream school and have asked the LA to name an academy special school catering for children with ASD and severe learning difficulties. The LA has said no because Piotr does not have severe learning difficulties. Although the LA cannot reject his parents’ preferred school based on the school’s ‘designated range’ of pupils alone, the fact that the school has indicated it cannot meet Piotr’s academic needs or provide him with an appropriate peer group is an indication that the LA, in this type of scenario, may be able to show the school is unsuitable for Piotr.

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## 2. 'Incompatible with the provision of efficient education for others'

This is the test LAs often refer to when a placement is full. However, the legal test of 'incompatibility' does not refer to schools being 'full'. Sometimes LAs also rely on this test when a child or young person has behaviour problems which they claim will interfere with the learning of others. There is case law about this test.

### Case law

The courts have said the LA must show it is likely that adding just one more child to the school will create incompatibility with the education of others. This is not the same as showing that the addition of a child or young person will in some way *impact* on the education of others. The test is whether the impact is so great that the child or young person attending the school would result in the incompatibility. The test is a high threshold for LAs to cross. In **NA v London Borough of Barnet (SEN)** [2010] UKUT 180 (AAC) the Upper Tribunal stated:

*"There needed in the circumstances to be some clear identification of just what difference it was found that D's admission (not the admission of all four children with appeals pending) would have and to the efficient education of which children... so as to meet the strong test of incompatibility."*

## 3. 'Incompatible with the efficient use of resources'

This is the test LAs sometimes rely on to say that naming the placement you want will be too costly. The test can only be relied upon if in fact the LA is able to identify another placement which is suitable for the child or young person where the costs of that placement and your preferred placement can be compared.

In the case of **Essex County Council v the Special Educational Disability Tribunal** [2006] EWHC 1105, the court said it is not a case of saying no to the parents' preferred

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placement simply because it may cost more than a suitable alternative the LA has identified; it is only where the extra cost is 'significant' or 'disproportionate' that the LA can say no.

## What if the placement you are asking for is mainstream and the LA has named a specialist placement?

If you have asked for a mainstream school or college but the LA has said no using one of the exceptions above and wants to name a specialist placement, then there is a further test in law the LA must go on to apply. The C&FA 2014 states that children and YP with an EHC plan **must** be educated in a mainstream setting. This is detailed in Section 33 of the C&FA 2014:

(2) In a case within section 39(5) or 40(2), the local authority must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with—  
(a) the wishes of the child's parent or the young person, or  
(b) the provision of efficient education for others.  
(3) A local authority may rely on the exception in subsection (2)(b) in relation to maintained nursery schools, mainstream schools or mainstream post-16 institutions in its area taken as a whole only if it shows that there are no reasonable steps that it could take to prevent the incompatibility.  
(4) A local authority may rely on the exception in subsection (2)(b) in relation to a particular maintained nursery school, mainstream school or mainstream post-16 institution only if it shows that there are no reasonable steps that it or the governing body, proprietor or principal could take to prevent the incompatibility.  
(5) The governing body, proprietor or principal of a maintained nursery school, mainstream school or mainstream post-16 institution may rely on the exception in subsection (2)(b) only if they show that there are no reasonable steps that they or the local authority could take to prevent the incompatibility.

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In short, the law makes clear that children and YP with EHC plans **must** be educated in a mainstream setting unless it is against the wishes of the child's parent or the YP; or it is incompatible with the provision of efficient education for others **and** there are no reasonable steps the LA or placement could take to prevent the incompatibility.

It is important to note that the above test will only apply if the LA is saying no to 'mainstream education' as a whole. If the LA says no to the mainstream placement of your choice but is willing to name another mainstream placement, then it is only the first set of tests set out under section 39(4) C&FA 2014 which apply and **not** the test set out in section 33 C&FA 2014.

## What about early years, schools and colleges which are not C&FA 2014 'types'?

These types of settings are sometimes referred to as 'wholly independent types' as they are outside of the C&FA 2014. Parents/YP do not have a right to request a wholly independent placement in the same way that they can request the 'types' of placements identified in the C&FA 2014. However, they can make what are known as 'representations' for such a placement to be named.

Under an older piece of law (Education Act 1996), LAs are expected to have regard to the general principle 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**. Although this covers the wishes of parents, if a YP requests a wholly independent placement, the LA should consider this as part of their duty to consider the YP's views, wishes and feelings under section 19 C&FA 2014.

It is important to know that if you have requested a wholly independent setting you will need to show the placement the LA is offering cannot meet your child's needs, or, if the placement the LA is proposing can meet your child's needs, that the cost of the placement will not amount to what is known as 'unreasonable public expenditure'.

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## What does 'public expenditure' mean?

Public expenditure includes all the costs to the public purse of the placement not just those incurred by the LA. The courts have said that the term 'public expenditure' is to be widely interpreted and includes costs 'savings' to the public purse. This could be health or social care provision. Consider the following example:

Adam's parents have a social care package and respite provision which will not be needed if he goes into a 52-week residential placement. When his parents appeal to the SEND Tribunal to request the residential placement is named, they will argue that the cost of the social care package is a cost 'saved' to the public purse which can be balanced against the cost of the residential placement.

An additional consideration is the wholly independent setting will need to be offering a place. The LA, or SEND Tribunal on appeal, cannot name them in an EHC plan unless they are offering a place. If the setting is offering a place you will need to ask them for a 'provision of place' letter to prove that they are offering a place and agree to be named in the EHC plan by the SEND tribunal if your appeal succeeds. This letter will need submitting as evidence. The SEND Tribunal appeal form specifically asks for this letter.

## What is the LA relying on to say no to my requested placement?

If the LA hasn't provided you with the exception they are relying on, or it is different to the legal exceptions listed above then contact us for further advice. It will be essential to find out why the LA is not naming the placement you have requested so you can properly prepare the appeal.

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## C&FA 2014 'type' appeals

### What you need to do next

Remember, it is up to the LA to show one of the exceptions applies. However, it is likely to strengthen your case if you can obtain evidence to support your appeal. Please now read the 'evidence' section below.

## Early years, schools and colleges which are not C&FA 2014 'types'

### What you need to do next

You will need to show the placement the LA is offering cannot meet your child/YP's needs, or, if the placement the LA is proposing can meet your child/YP's needs, that the cost of the placement will not amount to what is known as 'unreasonable public expenditure'. Please now read the 'evidence' section below.

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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. Key evidence about SEN and provision to meet SEN will usually be found in reports from professionals.

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Useful sources of expert opinions can be found in:

- Health reports – any specialists your child/YP is seeing. For example, Child and Adolescent Mental Health, Speech and Language, Occupational Therapy, Physiotherapy.
- Reports from the education setting (including early years provider or post 16 setting).
- Educational Psychology reports.
- Privately obtained independent reports (by parents).

Reports can come from a variety of professionals including private professionals you have commissioned to carry out an assessment. The SEND Tribunal is entitled to attach a greater degree of 'weight' on one report over another; regardless of who has written the report (private or LA professional). Although there is no statutory 'age' to a report before it can be said to be outdated, it is important to bear in mind that the older a report is, the less 'weight' the SEND Tribunal is likely to attach to it, especially if there reports which are more up to date.

## Evidence specific to the reason the LA is using to reject naming the placement you have asked for.

### 1. 'Suitability'

If the LA is saying the placement you want is not suitable then a good starting point would be having a look at the prospectus and OFSTED report and use this as evidence. This should tell you more about the range of needs the school can provide which it will do if it is a special school. Although some specialist placements say they do not admit children/YP unless they have a diagnosis of a particular condition, such as ASC, your child /YP not having the diagnosis does not prevent them from being suitable – it is about whether the placement can meet their SEN.

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## 2. Incompatible with the efficient education of others

Remember, it is not enough for the LA to say the school is 'full'. However, if the LA are saying the school is full it will assist your appeal to find out further information about this such and how many children or young people the school is over in terms of their numbers. It would be important to find out whether the school or college has exceeded their number of children or young people in the past and by how many – it would be sensible to ask for this information in writing. You could use the following:

### Example letter

*"I am appealing to the SEND Tribunal to have your school named in my child/YP's EHC plan. The LA won't name your setting because they say it is full. I would be grateful if you could provide me with the following information so the SEND Tribunal can decide whether to name your setting:*

- *The number of places your setting has in total*
- *The number of places your setting has for my child/YP's particular year or age range group*
- *Whether you have exceeded these numbers in the past 3 years and if so, by how many children/YP".*

The reply to this letter can form part of your evidence. If the LA are relying on the exception to say the behaviour of your child/YP would be incompatible with the education of others, then it will be important for Section F of the EHC plan to specify the provision your child/YP requires for their behaviour – if the right support is in place, then the behaviour may not be at a level where it amounts to the inefficient education of others and this is what you can state in your reasons for appealing. The 'evidence' section of our Guide 45 for Section B&F appeals will help you decide what evidence is needed.

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## 3. Incompatible with the efficient use of resources

The SEND Tribunal will require information about costs for appeals which concern placements. Remember, the LA can only rely on this exception if the placement they have identified for your child/YP is in fact suitable to meet their needs.

Although the LA will likely provide costs information to the SEND Tribunal it will be important to request information from them yourself. You should ask for the precise details of the costs the LA say they will incur at the placement of your choice which should include transport costs if your child/YP is eligible for transport. You will also need to request the precise details of the cost at the placement the LA has named, including transport costs and other support from outside of the placement which needs to come in such as speech and language therapy and other types of support.

You can obtain this information by asking specific questions about costs in writing to the LA. If you need help with drafting your questions please contact us for advice.

## 4. 'Incompatibility' and the right to mainstream education

If your appeal concerns the 'right to mainstream education' because the LA has named a special school against your wishes, then the LA will not only need to show 'incompatible with the efficient education of others'; they will also need to show there are 'no reasonable steps' which can be taken to remove the incompatibility. The same applies to the governing body of the placement. For both, this is a high threshold. Chapter 9 of the SEND Code details a non-exhaustive list of 'reasonable steps' which could be taken to cover a wide range of circumstances. Again, it will be important for Section F of the EHC plan to specify the provision your child or young person requires and specifying extra provision may constitute a 'reasonable step' the LA could take to remove any incompatibility. The 'evidence' section of our guide number 45 for Section B&F appeals will help you decide what evidence will be needed.

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## 5. Wholly independent placements where the LA is claiming it will be 'unreasonable public expenditure'

If you are claiming it is **only** your placement that can meet need then it will be important to have evidence which supports this. You will need to consider carefully what it is about the LA's choice of placement which you believe cannot meet your child/YP's needs. Ask the placement you want whether they can offer any assessment of your child/YP which you can use as evidence to support your case.

Although the LA will likely provide costs information to the SEND Tribunal it will be important to request information from them yourself. You should ask for the precise details of the costs the LA say they will incur at the placement of your choice which should include transport costs if your child/YP is eligible for transport. The placement you are asking for should be able to provide you with a breakdown of what their fees include such as additional support and/or therapies.

You will also need to request the precise details of the cost at the placement the LA has named, including transport costs and other support from outside of the placement which needs to come in such as speech and language therapy and other types of support.

You can obtain this information by asking specific questions about costs in writing to the LA and to the placement you want. If you need help with drafting your questions please contact us for advice.

### Other evidence

- School progress reports – yearly (plus termly summaries).
- Any diagnostic reports e.g. ADHD/ASC if available.
- Formal exclusion letters/disciplinary record/attendance record.
- 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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# Appealing to the First Tier Tribunal about Section I (placement) of an EHC



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- Your child/YP's views – preferably taken by a third party

## Evidence dos and don'ts

The SEND Tribunal can order the LA to make changes to the 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 what amendments are required to the 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 the model letter referred to above and/or have requested further information from anyone else to support your appeal 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

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# Appealing to the First Tier Tribunal about Section I (placement) of an EHC



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## Mediation

If you wish to enter mediation because you are also appealing Sections B&F, 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). During mediation the parent/YP meets with the LA representative with a mediator present. Your child does not need to be present.

The case will be discussed in an informal, conversational manner and the mediator will lead the discussion. In B&F appeals, you will be able to state what changes you want and why. Bring your evidence/reports along with you. The LA representative must have the power to decide on behalf of the LA.

If mediation is successful and the LA agrees to make all the proposed changes, including the placement you have asked for – there will be a mediation outcome form which all parties sign. This is legally binding and the LA must comply with the actions agreed.

If mediation is unsuccessful and you also want to appeal Sections B&F (rather than Section I alone) 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.

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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 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 are appealing. You could say something along the following lines:

#### **Example**

*"The LA are required to specify all of my child's SEN and the special educational provision required to meet those needs. At present, Sections B and F are not as specific as they could be. This means it is not clear to anyone working with my child what exactly will be provided to meet his needs. The LA has named X school in the EHC plan and we disagree with this and want Y school named instead".*

If you are appealing Sections B&F, guide number 45 will help you through the questions on the form which are relevant to appealing Sections B&F.

### ***Section 3 - The LA have not considered***

Note here anything you believe the LA has not considered when making their decision. It could be evidence which would suggest the placement the LA has named is not suitable for your child/YP.

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# Appealing to the First Tier Tribunal about Section 1 (placement) of an EHC



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## Example

*"The LA do not seem to have considered the report from XYZ which clearly outlines the difficulties in anxiety our child experiences and that they require a calm educational environment with peers who can provide positive role models. We do not believe the LA's choice of placement can provide this. As XYZ has expertise in children with anxiety we believe their evidence is key to understanding our child's difficulties and the placement he requires".*

### **Section 3 - I disagree with the LA's choice of school/college/institution (Section 1 of the EHCP) because:**

If you can describe the school using the description from its prospectus/Ofsted report and any other information about the school you have. Describe pupil numbers/types of needs they have and keep it factual.

If you do not believe the LA's choice of school can meet your child/YP's needs describe why and reference any evidence you have which supports this.

## Example

*"X school is a larger than average mainstream school as detailed in their Ofsted report. Although it is rated as a good school, we do not believe it can provide the specialist teaching and onsite speech and language therapy which Adam has been assessed as requiring".*

### **Section 3 question - I prefer my choice of school/college/institution (Section 1 of the EHCP) because:**

Describe your choice using the description from prospectus/Ofsted reports and any other information). Describe pupil numbers and types of needs they cater for/ keep factual.

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List the reasons you prefer your chosen school and include anything which supports the school can meet your child/YP's need such as specialism of school/staff/therapies/peer group/small size/small class groups.

## Example

*"X school is a 110-place school which caters for pupils between the age of 2 and 11 years who have a wide range of disabilities including ASC. The school has a variety of resources including an onsite SALT, sensory room and soft play. Their prospectus describes provision of autism specific bases within an autism friendly school environment. We believe this is the school which can meet Adam's needs. The LA say X School is 'full', but we understand being full does not satisfy the test the LA must show to say no to our preference".*

Now conclude your reasons for appeal. They could be different in every case.

## Example

*"We request the Tribunal upholds our appeal and makes the requested changes to Adam's EHC plan. We are waiting for further reports and information to support our case and will make this available when we receive it later".*

## 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 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.

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We have a separate guide on the SEND Tribunal's extended powers (guide 46) if you want to know more about this and how the SEND Tribunal's extended powers could help your appeal.

## Once the form is complete

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 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

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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 and send a timetable of what should happen next and when.

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

Action and party required to respond	Date for compliance
The LA must send its response so that it is received by:	<b>12 noon on 20/10/2019</b>
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 <b>as soon as it is available</b> and at the latest, it must be received by:	<b>12 noon on 14/11/2019</b>
No further evidence without express permission of the Tribunal from either party will be accepted after:	<b>12 noon on 14/11/2019</b>
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:	<b>12 noon on 20/11/2019</b>
The date of the final hearing	<b>Between 09/12/2019 and 21/12/2019</b>

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.

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# Appealing to the First Tier Tribunal about Section 1 (placement) of an EHC



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If IAS are assisting you with the appeal, you need to keep them informed as and when you receive instructions from the 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 before the next deadline.

## Communicating with the SEND Tribunal

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 make the amendments you requested and name the placement you want). If this is the case, it is treated as an 'unopposed appeal' meaning the LA **must** issue the amended EHC plan within 5 weeks of the date it notified the SEND Tribunal it was not opposing the appeal. If your appeal has been about Section 1 only then the above deadline is 2 weeks. to 2 weeks.

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.

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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'. The LA must send you an electronic version of the EHC plan at this stage which will form the 'working document'.

## 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 which will help the SEND Tribunal decide which placement should be named in the 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 you receive about your appeal will only be sent to you and the LA, not the witnesses. Therefore, witnesses and anyone supporting you 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 defending the appeal. If you have responses from any letters you have sent to the placements concerned and/or the LA, 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 appeal issues.

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. There is still time for you to make a start on building further evidence.

## 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.

## The Working Document

The working document is an important part of an appeal which concerns Sections B, F and I. It is an electronic version of the EHC plan which can be amended by both parties in the run up to the hearing.

You should have been given a Word version of the final EHC plan at the time the LA issued their response to your appeal (if not, ask the LA to send you one). The SEND

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Tribunal directions will include a deadline for when the working document with both parties' amendments needs to be submitted to the SEND Tribunal, although you can continue to negotiate it after that date.

It usually makes sense to wait until all the evidence has been filed by both parties and then work through the evidence to see what amendments are needed.

Mark up your suggested amendments to the EHC plan on the working document using the recommended key set by the SEND Tribunal (see below). The LA should then come back to you accepting anything that they agree with; they may also suggest other amendments. In this way the document will go back and forth between you and the LA before the hearing.

The reason for doing this is to try and narrow down the key issues which you and the LA disagree about. This will make the hearing more efficient.

The Key for amendments to the working document:

Normal type	Original EHC plan
<u>Underlined type / underlined strikethrough type</u>	Amendments agreed by both parties
<b>Bold type</b>	Parent's proposed amendments
<b>Bold strikethrough</b>	Parent's proposed deletions
<i>Italic type</i>	LA's proposed amendments
<i>Italic strikethrough</i>	LA's proposed deletions

## 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 the evidence is late. There is no guarantee that the evidence will be accepted by the

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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 make all the amendments you have asked for to the 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. 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:

- 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

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- 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. You will not need to refer to points of law. Have all your paperwork, evidence and the latest version of the working document 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.

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.

## The decision

### What happens if my appeal is successful?

If you have appealed **Section I only** then the LA must issue the amended EHC plan within 2 weeks of the SEND Tribunal's decision. If you have appealed other Sections of the EHC plan (B&F) the LA **must** issue the amended EHC plan within 5 weeks of the SEND Tribunal's decision.

### What happens if my appeal is dismissed?

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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](mailto:parents@manchester.gov.uk)

**Website:** [www.iasmanchester.org](http://www.iasmanchester.org)

### Address:

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

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

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