

SEND Challenges and Appeals

What issues commonly arise?

Drafting and agreeing an EHCP is a lengthy and complex process. Ensuring a child or young person receives provision to meet Special Educational Needs ("SEN") can be challenging. Sadly, disputes often arise in relation to:

- Failures to gather sufficient, specific, detailed and appropriate evidence to inform the EHC needs assessment. This often leads to an EHCP which is not fit for purpose.
- Delays which cause an EHCP not to be issued within the 20-week time limit.
- Failure to record health and/or social care provision correctly.
- Disagreements in respect of Section F (special educational provision) and Section I (named education institution). Frequently education placements named in Section I are rejected because a Local Authority does not begin discussions early enough, or an authority fails to gather sufficient financial information to facilitate proper consideration.
- The assessment process and implementation of provision is not conducted in a person-centred, open and collaborative manner.
- The amount of any Personal Budget required to personalise care.

How can disagreements be resolved?

There are 4 ways SEND disputes can be resolved:

- 1) A complaint.
- 2) Use of disagreement resolution services.
- 3) Mediation.
- 4) An appeal to the Special Educational and Disability Tribunal, known as the First Tier Tribunal.

When is a complaint appropriate?

- If an education provider has not behaved in a person-centred manner. A complaint should be raised with the education provider. Unresolved matters can be escalated to the Local Authority, Department for Education, Ofsted or Local Government Ombudsman.
- A decision not to assess or to issue an EHCP, a failure to conduct an EHC needs assessment appropriately, or draft the contents accurately. A complaint may be raised with the Local Authority. Unresolved concerns can be escalated to the Local Government and Social Care Ombudsman.

What are disagreement resolution services?

Local Authorities must make independent disagreement resolution services available to all children and young persons with SEN. These services should act as a mechanism to resolve 4 principal types of disagreements about SEN provision:

1. Compliance with statutory duties to deliver EHC provision.
2. Delivery of special educational provision regardless of whether or not an EHCP is in place.
3. The health or social care provision to be included within an EHC needs assessment, when an EHCP is drafted, or at an Annual Review.
4. Disputes between Local Authorities and CCGs.

Details of the services available can be found in your Local Offer. Use of resolution services does not impact any right of appeal to the First Tier Tribunal.

What is mediation?

Mediation is an informal way of attempting to settle a dispute about how to meet SEN needs. It involves a meeting between the child's parents and/or young person, representatives from an education institution, and the Local Authority. An independent, accredited mediator will lead the discussion in a structured way to deal with the issues raised point by point. Details of mediation can be found in your Local Offer.

The two paths to Resolution

1. Matters which can be appealed to the Tribunal.

Matters which can be appealed to a Tribunal include the named school or educational setting along with special educational provision. Before a dispute can proceed to a Tribunal, advice from a mediator must be obtained to consider the suitability of mediation. If mediation is not appropriate, you will need a certificate to confirm mediation advice has been considered before lodging an appeal.

If mediation is suitable, the mediator will notify the Local Authority who must arrange mediation within 30 days. If this is not possible, the mediator must be notified and a certificate should be provided within 3 working days to enable an appeal to the Tribunal.

2. Matters which relate to the health and social care elements of an EHCP.

If there is agreement on the named educational setting and provision but a dispute solely with regard to the health and social care elements of an EHCP, these cannot be appealed in isolation to a Tribunal. If disagreement resolution services are unlikely to be effective, mediation or a challenge to the decision of a health or social care body by way of Judicial Review may be possible.

Notice of the desire to mediate along with the issues to be discussed should be provided to the Local Authority. If the issues relate to healthcare provision, the Local Authority must inform the Clinical Commissioning Group ("CCG") within 3 working days. Health related disputes require mediation to be organised by a CCG. Social care disputes require mediation to be organised by a Local Authority.

Is a certificate always required to lodge an appeal?

No. A certificate is not required if the appeal relates to Section I (the named education institution).

What is the First Tier Tribunal (“FTT”)?

In this context, the FTT is part of the Education, Health and Social Care Chamber that is responsible for handling appeals against Local Authority decisions regarding SEN and disability discrimination claims.

What decisions can be appealed to the FTT?

- A refusal to carry out an EHC needs assessment.
- A refusal to issue an EHCP.
- The named school or educational setting
- SEN and provision.
- A refusal to make requested amendments to an EHCP post Annual Review.
- A refusal to carry out a re-assessment of EHC needs.
- A decision to cease to maintain an EHCP. The plan must be maintained until the Tribunal has made a decision.

If the appeal is part of the National Trial, the Tribunal can make non-binding recommendations in relation to the health and social care aspects of an EHCP when considering an appeal in respect of the above decisions.

Personal Budget disputes are excluded unless the challenge involves special educational provision.

What is the time limit to appeal to the FTT?

An appeal must be lodged within 2 months of the date of the Local Authority’s decision letter. Alternatively, within 1 month of the date of a mediation certificate.

What conditions must be satisfied to appeal to the FTT?

- Unless the appeal relates solely to Section I (the named education institution), an independent, accredited mediator must be consulted to discuss the suitability of mediation. A certificate to confirm that either mediation was not successful, or is not considered suitable must be lodged.
- A copy of the certificate, the Local Authority’s decision letter, and a completed Appeal Form which explains the reasons for the appeal should be lodged. A copy of the EHCP and any appendices should be provided.

The Tribunal Procedure

If the conditions to appeal are satisfied, an appeal must be registered by the Tribunal within 10 working days.

A registration letter which details the approximate hearing date, the standard directions to be complied with (this means what each party must do to assist the Tribunal), and the right to case management should be provided.

Upon receipt of the registration letter, an Attendance Form or Request for Changes Form must be returned within 9 weeks of the hearing date’s receipt.

At the same time as the registration letter, the Local Authority will be sent a copy of the papers filed along with a deadline for a response. The Local Authority should provide a bundle for the Judge, each Panel member, and the parents or young person. Each party will be asked to provide details of witnesses to be called.

The appeal will be considered by a Judge and a Panel of Tribunal members whom are knowledgeable and have experience of SEN and disabilities.

What powers does the FTT have?

A Tribunal can dismiss the appeal, or order a Local Authority to:

- Arrange an EHC needs assessment or re-assessment.
- Make and maintain, or continue to make a plan.
- Name a specified education institution in Section I.
- Maintain a plan with specified amendments.

Local Authorities must comply with decisions of the Tribunal within specified time limits. The time limits will vary depending on the Order made.

Will I be responsible for paying the Local Authority’s costs?

No. The general rule is that each party meets their own costs, unless a party or representative has acted unreasonably.

How can Lester Aldridge Assist?

We can provide:

- An initial, free consultation to determine the merits of a complaint, alternative resolution or mediation, appealing a decision to the Tribunal, or challenging the decisions of health and social care bodies by way of Judicial Review. We can also recommend how to strengthen the prospects of success. This may include obtaining expert evidence.
- Advice and representation throughout any form of challenge. We can attend resolution meetings or mediation to ensure your views are clearly articulated.
- In the case of appeals to the Tribunal, we can recommend expert Barristers whom by virtue of their profession, can provide top tier advocacy, to strengthen the oral presentation of an appeal and maximise the prospects of success.
- Detailed, written submissions in support of a complaint, resolution meeting, mediation or appeal.
- On-going support to negotiate with a Local Authority throughout the dispute resolution processes.
- Advice at each key stage and in respect of any next steps required.