

## **Appealing to the Special Educational Needs and Disability Tribunal - SENDIST**

This is a basic account of the procedure involved in an appeal to the Tribunal.

### **What can you appeal against?**

- A refusal to make an EHC needs assessment or reassessment (in the latter event, provided there has been no new assessment within the preceding 6 months)
- Following assessment, a refusal to issue an EHC Plan
- The contents of an EHC Plan
- A refusal to amend an EHCP following a review and/or reassessment
- A decision to cease to maintain an EHCP

The tribunal is currently running a trial whereby it can consider the social care and health sections of EHC Plans and make recommendations on them. However, this only applies where the Education sections (B, F and I) are also being appealed.

The time limit for appealing is two months from the date the decision complained of was sent out, or 30 days from the date of a mediation certificate, whichever is later.

Appeals against refusal to assess are normally dealt with on the papers unless there is good reason for a hearing, and usually take 10 weeks. For other appeals there is the option to ask for them to be dealt with on the papers, but this is not usually advisable. They generally take 12 weeks to be heard.

Due to the increase in numbers of appeals being lodged with SENDIST, we are aware that it may take longer for cases to be heard. Those appeals of Sections B, F and I and relating to key stage transfers are prioritised and the Tribunal has been offering cases to be heard in August if both parties agree. However, it should be noted that it may be challenging to secure availability of all parties so be sure to ask the LA and any witnesses for their availability if this is offered to you.

For any appeal on behalf of a child of compulsory school age (i.e. before the last Friday in June in the school year they reach the age of 16), the appeal must be brought by a parent or carer. Young people over school age who have capacity to understand what is involved in bringing an appeal must bring the appeal in their own name: they can however authorise parents or advocates to deal with the appeal for them. For young people over school age who lack the required mental capacity, the appeal

must be brought for them in the name of the person doing so on their behalf, referred to as the “alternate person”.

For ease of reference, this document refers to appellants as parents, but it should be assumed that this term includes carers and young people.

## **Mediation**

The decision letter from your LA will give details of a mediation adviser whom you must contact if you wish to appeal, unless your appeal is only in respect of the school named in section I of the EHC Plan. Their function is to give you information about mediation to enable you to decide whether you want to try this. If you say no, they will issue a mediation certificate within three days: it will not be held against you if you refuse to mediate.

If you do want to mediate, a meeting must be arranged within 30 days (but need not take place within 30 days). You can opt for mediation on health and social care issues as well as education. The meeting will take place in a neutral venue, and the mediator’s role is simply to try to facilitate agreement about the matters in issue. Anything said during the meeting is confidential. If you reach agreement, this should be recorded in writing and the agreement is legally binding.

If you do not reach final agreement, the mediator must issue a mediation certificate and you have 30 days from then to issue an appeal. You must lodge a certificate with your appeal, unless you are appealing only against the school place named in an EHCP (which is inadvisable).

## **Initial procedure**

The parent fills in an appeal form (SEND35 or, for refusal to assess appeals, SEND35A) which can be found on the Tribunal website, <https://www.gov.uk/government/collections/special-educational-needs-and-disability-tribunal-forms>. Appeal grounds should be reasonably thorough, and it may well be helpful to put them into a separate document, inserting in the relevant part of the appeal form “See attached appeal grounds”. The appeal should be accompanied by all relevant documents, but you should take care to ensure that they are relevant: out of date reports, for example, will not be required, nor will correspondence between you and the LA unless this is directly relevant to any point you want to make.

If you are appealing against the school named, you will need file the OFSTED report and prospectus for the school you prefer. You do not need to delay entering your appeal whilst trying to obtain documents such as independent experts’ reports, because there is provision for these to be filed at a later stage. Bear in mind that there are overall page limits for certain elements of the bundle, set out here –

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/739230/send40-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739230/send40-eng.pdf).

Once the appeal is registered, the Tribunal will send the papers to parents/a representative, and the local authority (LA) along with further information including the proposed hearing date. The LA normally has six weeks to respond and must serve the response on the parents as well as the tribunal.

The Tribunal will send automatic directions covering such matters as when documents and details of witnesses have to be filed. They will also order that specific information be filed by one or both of the parties, for example as to the costs of school placements.

The LA's response must state whether they oppose the appeal and, if so, it must give grounds for doing so. Overall, the parents are entitled to know what case they have to meet and if it is not clear they can apply for an order that the LA clarify its case (see below).

The Tribunal will also send out attendance forms to be returned by a defined date, setting out the names of the parents' witnesses and representative. However, if attendees have not been finalised by the relevant date, it is usually acceptable to say that some are "to be advised" or something similar: the tribunal is normally fairly flexible about changes in witnesses in any event. However, they will contact you if you have not confirmed your witnesses ahead of a hearing. The maximum number of witnesses is usually three: it is possible to apply for permission to call more, but good reasons have to be given, and parties should be aware that this might increase the risk of the case lasting more than one day which can lead to long adjournments. It is also possible to bring someone along as an observer but again specific permission has to be sought.

## **Applications**

The parties can make applications at any time for directions in relation to the appeal – for example, applying for more time to comply with a tribunal direction, leave to call extra witnesses, an order for the other side to provide more information or documents, or an adjournment of the hearing. Before making an application the parties must contact the other side to see whether they will agree: if this has not been done, the application will be rejected.

Applications should be made using the Request for Changes form – SEND 7. Details of the LA's response to the initial request should be given, and of course the parents can make comments on that response. If the LA has not replied within five days to the initial request, you can go ahead anyway. The Request for Changes form must be served on the other side, and it is usually simplest to email the application copying the LA in at the same time. If the application is urgent, that should be shown in the heading to the email, otherwise it can take up to two weeks to process.

The Tribunal can order the production of relevant evidence, and has the power to require that a child be made available for examination or assessment by a professional. If the parents refuse to comply the Tribunal is entitled to draw adverse inferences. It can also order schools to allow access to

experts to assess the child or the provision to be made in the school, again only if this has been requested and refused. Failure to comply with a Tribunal direction may result in the case being struck out provided that there has been a prior warning of this; or parties may be prevented or restricted from further involvement in the appeal.

The Tribunal directions will set a deadline for the submission of any further evidence, usually four weeks before the hearing date. In relation to appeals against sections B and F of an EHC Plan, they will also include a direction for the parties to co-operate in producing a working document which should be filed 10 days before the hearing. This is a document based on the EHCP being appealed in which each side indicates by the use of different fonts the changes they are requesting, and also any agreed changes. The aim is to try to narrow down areas of disagreement, and to produce a document which clearly illustrates the changes being requested. All suggested changes need to be based on the written evidence available and references showing where the evidence needs to be included.

Occasionally the Tribunal will order a Telephone Case Management Conference/Case Review, for example if there are a number of Requests for Changes to be dealt with. In addition to dealing with applications, they will want to check whether the appeal is going to be ready for hearing, and therefore the Tribunal Judge is likely to want to talk about whether any further evidence is to be filed, whether the parties are ready, whether there are any changes in witnesses, progress with any working document, and in particular whether there is any likelihood of the case being settled.

## **Document bundles**

LAs are required to prepare and serve numbered and indexed bundles of all the documents filed in the case for use at the hearing, and a deadline for this will be set in the original directions, usually two weeks before the hearing. They must serve a hard copy on the parent. If LAs fail to meet this deadline they may be debarred from taking further part in the appeal: however, if they are debarred, they are usually given an opportunity to be reinstated if they appeal within a few days, give a good reason for the failure, and if the bundle has been served before the application for reinstatement.

Parents should check each page of the bundle very carefully on receipt to ensure that all the documents filed have been included, that everything is legible, and that no unfixed documents have been added in. If there are any problems the tribunal should be informed as soon as possible.

## **Settling the appeal**

It is always possible to settle the case by agreement. If you do so, you should always ask the tribunal to record the settlement in a Consent Order: many LAs invite parents to withdraw the appeal, but this should be refused.

However, if the settlement takes place less than five days before the hearing the tribunal will not consent to an application for withdrawal or concession and will direct the parties to attend to explain the reasons why the case could not have been settled earlier.

## **The hearing**

The Tribunal sends details of the proposed hearing date when it first registers the appeal, but it is open to the parties to apply to change this if necessary. All hearings other than appeals against sections B, F and I and appeals under the trial scheme involving care and health issues will be listed for half a day unless it appears that the case is likely to be unusually complex.

B, F and I appeals will be listed for one day, and those involving health and care will be listed for two days but this will be reviewed to check whether a full two days is still necessary. If a hearing cannot be completed within the time allocated, it will be adjourned and will need to be relisted when all concerned are available, which may not be for several weeks.

The appeal is usually heard by a panel of two, a legally-qualified chairman plus one wing member who has experience in SEN: however, in more complex appeals, a second wing member may be appointed. You will only receive details of who is on the panel on the day of the hearing. If the hearing has to be adjourned, another date will need to be found when panel members and witnesses are available, and this may involve quite considerable delay.

At the outset of the hearing, the Tribunal Judges will normally introduce themselves and set out which issues they consider they have to deal with. They will then go through those issues one by one with the parties and the witnesses. They usually do not make a decision on the day, but consider it separately and send it to each side within two weeks after the hearing. This will be accompanied by a notice giving details of the timetable for putting the decision into effect if relevant, and about appeals.