

Challenging the contents of an EHCP

The Education, Health and Care Plan (EHCP) is a binding document. It should detail in clear and concise language what your child / young person's (CYP's) needs are and precisely what support they can expect to receive, when, how often and where. If it lacks detail it may need to be challenged.

The following is addressed to parents of children and young people but is intended as guidance for anyone involved, including the young person themselves. "Young person" was introduced by the Children and Families Act 2014 (CFA), meaning a person from the end of the academic year that they turn 16 – 25 years of age. Young people are given a right to manage their own EHCP, make requests and decisions under the CFA, rather than their parents, provided they have sufficient mental capacity.

What can be challenged and how?

Because the EHCP covers education, health and care needs and support, what to appeal depends on which part of the EHCP you are not satisfied with.

If you are unsure about the content of the EHCP, or if you are not sure about what kind of expert or what sort of advice you need, we would recommend that you speak to a specialist solicitor.

The Special Educational Needs & Disability Tribunal (SENDIST) is a specialist Tribunal set up to determine disagreements about particular points within the EHCP. The Tribunal can look into:

- A refusal to conduct an EHC needs assessment.
- A refusal to issue an EHCP.
- A refusal to reassess your child / young person (CYP).
- The description of your CYP's special educational needs (SEN).
- The support detailed to cater for your CYP's SEN.
- The placement named within the EHCP.
- A decision to cease to maintain the EHCP.

The Tribunal cannot hear appeals about the outcomes within the EHCP. This can only be challenged by judicial review for which you will need to speak to a specialist solicitor.

Health and social care elements

The Tribunal cannot consider the health and social care aspects of the EHCP in the same way as education. For education, the Tribunal can make an order but for health and social care it is limited to making non-binding recommendations.

You cannot ask the Tribunal to consider health and / or social care as a standalone appeal. Health and / or social care can only be considered alongside an education appeal.

An appeal including health and / or social care is known as an Extended Appeal.

The Department for Education has made it clear that Tribunal recommendations are expected to be followed through by statutory health and social care. Nevertheless, a recommendation does not at present share equal rights of enforceability as in education.

If you are seeking more than a recommendation, then the health and social care elements of the EHCP may still be challenged by an application for judicial review to the High Court.

Any challenge made by judicial review will be on the basis of public law principles. These are complex and it is advisable to speak to a specialist solicitor before starting a judicial review application.

Should you want to start a judicial review, the application papers must be with the High Court as soon as possible and certainly no later than three months after the decision being challenged was made

(e.g. the date of the EHCP).

Personal budgets/direct payments

The Tribunal will not look into the personal budget or the decision of a local authority to make / refuse to make direct payments. These can be challenged by judicial review and, again, it is advisable to speak to a specialist solicitor.

The education elements

Part B

The content of Part B must adequately, accurately and fully detail your CYP's SEN. If there is anything within this section which is incorrect you will have the opportunity to challenge it to the Tribunal.

Part F

The content of Part F should detail all of the support which is necessary in order to adequately cater for all of the SEN listed within Part B and also to help the child reach the outcomes within Part E.

The wording of this section must be clear, concise and specific. Particular words such as "opportunity", "frequent" and "access" are generally seen as being insufficient to meet the requirements of detail and accuracy.

Part I

This names the school / college placement which the local authority considers can adequately cater for your CYP's SEN.

A local authority is able to direct all schools (apart from non-s41 approved independent/non-maintained schools) to admit your CYP. If you want an independent/non-maintained school/college, the placement will have to agree to the CYP's admission.

There are complex legal tests which apply when deciding which school/college a CYP with SEN should go to. The law does make a presumption that all CYPs should be educated in a mainstream placement unless:

- It is against parents' wishes; or
- It is incompatible with the efficient education of others and there are no reasonable steps that the school can take to prevent this.

Suitability and the local authority's finances are not relevant for the purposes of the right to mainstream education.

If parents are requesting a particular named school/college, then the local authority must name that placement unless:

- The school/college is unable to meet the CYP's needs (because of age, ability, aptitude or SEN of the CYP); or
- It would have a negative impact on the education of others at the school/college; or
- It would be an inefficient use of the local authority's finances.

Independent/non-maintained schools can be difficult to secure because of the additional cost to the local authority.

Mediation

The Children & Families Act 2014, along with related regulations, requires that you at least consider whether or not to enter into mediation with the local authority about the content of the EHCP. Mediation is a process whereby you and the local authority can meet to discuss your positions and try to reach an agreement. There is no judge and no 'decision' can be taken to force either party to agree to anything.

Even if you do not want to go through with mediation you must first make contact with the mediation service. You will have to do so within two months of the date on the decision letter sent by the local authority. You can take someone to support you in mediation, including a solicitor.

Whether or not you go to mediation impacts on when you need to tell the SENDIST that you want to appeal.

- If you do not want to go through mediation, you will be issued with a Mediation Certificate three days after confirming this with the mediation service. You will then have one month to send the appeal form to the Tribunal with a copy of the Mediation Certificate or two months of the local authority decision letter, whichever is the later date.
- If you do want to go through mediation, the local authority must ensure that the mediation process is completed within 30 days. Your right of appeal is preserved subject to the deadlines above. A Mediation Certificate will be issued three days after completion. You will then have one month to send an appeal to the Tribunal with a copy of the Mediation Certificate or two months of the local authority decision letter, whichever is the later date.

The only exemption to the requirement of mediation is where the appeal relates solely to the school named in the Plan. If the appeal is about placement only, there is no requirement to obtain a mediation certificate. Therefore, the deadline to appeal will be two months after the date of the decision letter.

Next steps

To appeal you will need to send a completed appeal form to the SENDIST. The appeal form is available from the website www.justice.gov.uk/forms/hmcts/send.

This is a very short form. You will also need to send to the Tribunal paperwork evidence and legal arguments to support your case.

As it can often be a difficult and daunting process to set out the legal arguments and to know which experts to approach, it can be helpful to discuss this with a specialist solicitor before sending an appeal into the Tribunal. The appeal form is the basis of the appeal. It is important for the success of the appeal that it is completed correctly and that as much evidence as possible is provided. Trying to change the appeal, evidence or arguments after the appeal form has been sent in can be very difficult and can lead to the appeal itself being brought to an early end by the Tribunal.

If you have any questions or require advice, please contact the Special Educational Needs team on **0118 467 6547** or senexpertsolicitors@boyesturner.com. Appeals to the Tribunal can be extremely difficult and expert advice should always be considered.

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