

Refusal to assess pack

Advice for parents and young people appealing to the Special Educational Needs and Disability Tribunal

1. How to use this pack

This pack has been written to help you take an appeal to the First-tier Tribunal (Special Educational Needs and Disability) (the “Tribunal”) against a local authority’s (“LA’s”) refusal to assess your child or, if you are a young person, you. This pack relates to the law in England, the Children and Families Act 2014 (the “Act”).

Unfortunately IPSEA is not able to offer casework support to everyone who uses our services but we hope this pack will help you put together an effective case and benefit from our many years of supporting parents at Tribunal.

2. The LA’s decision and the right of appeal

The first step to obtaining an EHC plan is to [request an EHC needs assessment](#). Once a formal request has been made (typically by the parent or the school), the LA must decide whether to conduct an assessment and must notify you of its decision within **6 weeks**. If it decides not to conduct an assessment, it must give the reasons for its decision and notify you of your right to appeal this decision to the SEND Tribunal, together with information about time limits, the requirement to consider mediation, and the availability of disagreement resolution services and information, advice and support.

Note the time limits for appealing: you must send your appeal form to the Tribunal within two months from the date of the LA’s decision letter, or one month from obtaining a mediation certificate, whichever is later.

Mediation

The law says you have to consider whether to enter mediation before you can register your appeal, so at the very least you must ring the number the LA gives you (there should be alternatives if you cannot use a phone), talk to a mediation adviser, and get a certificate from them saying you have done so. You do not have to engage in mediation to register your appeal, only consider it. If you have had a lot of discussions already with your LA you may feel it would be of little use, and you may prefer to get your certificate and appeal right away. If you have never had a proper talk with the LA about why they have refused assessment, mediation may help. You might also consider it to give yourself more time to appeal, if it extends the deadline.

Appealing to the SEND Tribunal

The [SEND Tribunal's website](#) provides useful information on the procedures and how to submit your case. Make sure that you use the correct form for refusal to assess appeals, which can be found [here](#).

Please see our pages on [appealing to the SEND Tribunal](#) for detailed information about the process of bringing an appeal, including:

- [general advice for all appeals](#)
- [where to get help, including legal aid](#)
- [mediation](#)
- [how to submit an appeal, including time limits and how to fill out the forms](#)
- [the timetable for the appeal process](#)
- [preparing the case](#)

3. Making your case

The LA has turned down your request for an EHC needs assessment. How do you begin challenging this? What exactly are you trying to prove?

3.1 When must the LA conduct an EHC needs assessment?

The legal test is found in section 36(8) of the Act:

The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted..., the authority is of the opinion that-

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

Special educational needs (“SEN”) and **special educational provision** (“SEP”) have a broad definition in law, and are explained in more detail [here](#).

This is the only test that the LA should apply, and LAs who impose stricter criteria would be acting unlawfully. It is a provisional and predictive test, and the bar is relatively low.

The [SEN and Disability Code of Practice](#) (“the Code”), which is statutory guidance issued by the government, contains further detail on what LAs should consider. At paragraph 9.14 the Code states that the local authority should consider whether there is evidence that despite the early years provider, school or post-16 institution having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child or young person, the child or young person has not made expected progress. To inform their decision, the local authority will need to take into account a wide range of evidence, and should pay particular attention to:

- evidence of the child or young person’s academic attainment (or developmental milestones in younger children) and rate of progress;
- information about the nature, extent and context of the child or young person’s SEN;

- evidence of the action already taken by the school or other setting;
- evidence that where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided;
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies.
- For young people over 18, the LA must also consider whether they require additional time, in comparison to the majority of their peers who do not have special educational needs, to complete their education or training (section 36(10) of the Act).

However, this is guidance, not law, and it does not form part of the legal test in s36(8). While the LA should pay attention to this evidence, it cannot refuse to consider a request for assessment if certain information is not provided or is unavailable, or if certain preliminary steps are not taken.

For example, it would be unlawful for an LA to state that requests for assessment will only be considered if:

- external specialists have been consulted
- an educational psychologist's report has been obtained
- a certain number of cycles of school-based support have been completed
- the child is at or below a certain percentile
- the school can demonstrate that they have spent £6,000 on the child, or
- CAF (Common Assessment Framework) and/or TAF (Team around the Family) processes have been carried out.

Going back to the legal test, **you will need to convince the SEND Tribunal that the child or young person has or may have SEN, and may need provision through an EHC plan in order to access the right educational help.**

Generally there are three ways of establishing this. You can argue that:

1. a full assessment is the only way to find out what the difficulties are and what help is needed;
2. the school/institution may not be able to supply all the educational help needed unless it receives extra help from the LA;
3. the school/institution has provided all the help that could be expected but the child or young person has not made enough progress.

Now you need to plan your case around the points which fit your case.

There are at least two different approaches to take:

- a. Where point 1 (above) applies, you need to make the case that advice from a number of different professionals is needed to fully understand your child's difficulties (or yours if you are a young person). In other words, professionals do not yet understand enough about the difficulties and only a full investigation can help everyone understand the nature and severity of the difficulties and decide

what help is needed. Often this is not enough on its own to persuade the SEND Tribunal. You may also have to show that they may need an EHC plan if their needs are to be met (see B).

- b. For points 2 and 3, you need to make the case that the needs may not be met without an EHC plan. You do not have to prove that an EHC plan is necessary, only that it may be necessary.

When would an EHC plan be “necessary”? Mainstream early years providers, schools and colleges (other than fully independent settings) have duties and resources to meet the needs of most children with SEND. This is known as [SEN Support](#). **An EHC plan would be necessary if the child or young person can't get the SEP they need through SEN Support.**

In many cases both approaches will apply. Whichever you decide fits your case best, keep going back to the points as you plan your case to make sure that you are focusing on what you have to demonstrate to the SEND Tribunal.

3.2 What if the school/institution could do more?

An appeal against a refusal to assess is easiest if the early years provider, school or post-16 institution agrees an assessment is needed, but this is not essential. It may be harder if you believe that lack of progress is because of the failure of the early years provider, school or post-16 institution to provide help that is within its resources. There are some situations in which the SEND Tribunal can decide it is necessary for the LA to issue an EHC plan because the early years provider, school or post-16 institution won't or can't make provision. Often this is where the school or other setting has a different understanding of the difficulties to yours and refuses to increase the help. But it could be the result of in-setting factors such as staffing problems, where inspectors have found the setting is failing to provide a proper education, or where the special educational needs budget has been spent on something else. See the case law on this subject [here](#).

Sometimes the early years provider, school or post-16 institution will say that it has done all it can but the LA says it hasn't. This leaves you or your child in a difficult position. You may be unsure who is right. If you are dealing with a school you could begin by asking what it actually gets as funding for SEN and how that is used. Maintained schools, including maintained nursery schools and academies, must publish a great deal of information in their SEN Information Reports, but that information does not go into details of funding and you need to find those out (see section 3.5 below).

You can also ask the LA what help it normally expects local schools to provide for children with your child's learning difficulty.

The LA has to explain, on its website as part of its '[Local Offer](#)', what help it expects local and out-of-area early years providers, schools, alternative education providers and post-16

institutions to provide for children with SEN. It also has to explain its criteria for assessment. If it has failed to provide this information or has done it in an unhelpful way, you may have to press the LA for information.

You can write to the LA ask for this information using our [Model Letter 17](#)

If the LA delays in replying, do not miss your deadline for appealing. You can always think about withdrawing your appeal if the information you receive makes you think again about your case.

What the LA may reply: The LA is likely to say that it delegates (passes on) most of the money for special educational needs to its schools so the school can decide the help your child should get. Remember that although LAs across the country delegate much of the SEN budget to schools, they cannot delegate their legal duties to children and young people with special educational needs.

The LA may say you as a young person or your child does not fit its criteria for making an EHC needs assessment. The SEND Tribunal is not bound by the LA's criteria, however, and, while it will take into account the way the LA or a college organises its SEN support, it will want to be sure that the school/college fully understands the special educational needs in this individual case and can make all the provision needed. If it is not convinced it can, then it may order an assessment. Remember that you only have to show that you or your child 'may' need special educational provision to be provided in accordance with an EHC plan, not that this is probably or definitely the case.

Some authorities may say they never issue EHC plans for children and young people in mainstream schools or for children and young people with a particular disability, or for anyone who does not fall into the bottom 2 per cent of abilities. These are blanket policies and are unlawful and the SEND Tribunal will know this. The SEND Code of Practice also makes this clear at paragraph 9.16:

*“Local authorities **must not** apply a ‘blanket’ policy to particular groups of children or certain types of need, as this would prevent the consideration of a child’s or young person’s needs individually and on their merits.”*

You can complain to the Secretary of State (the Government minister for education) if your LA continues to use this 'reason' after you have pointed out what is wrong with it.

If after considering all these points you decide that your school/college should be providing more, then seek further advice about what to do. If you decide that the LA must assess what help your child should get, then you will need to proceed with an appeal against their decision to refuse your request for an EHC needs assessment.

3.3 Your reasons for appeal

You will need to set out your reasons for appeal in section 2 of the SEND 35a [appeal form](#). This asks two questions, which reflect the two limbs of the legal test explained under heading 3.1 above:

Question 1: Whether the child or young person has or may have SEN?

- *Describe any special educational needs that the child or young person has:*
- *Describe any special educational needs which you consider the child or young person may have which have not yet been fully identified*

Question 2: Whether the child or young person may require an EHC plan? Explain why you think the child or young person may require an EHC plan.

The form only gives small boxes for you to write in, so it is best to write “Please see attached” in the boxes and set your reasons out properly in a separate document (preferably in Arial 12-point font).

Here are some general tips:

DO:

- Keep it short and to the point.
- Separate your points into paragraphs.
- Number your paragraphs or organise them under headings.
- Refer to the legal issues.
- Back up your points with **evidence**. The SEND Tribunal will decide your appeal on the evidence that you and the LA put before it, so it is vital that you produce the best possible evidence.

DON'T:

- Get bogged down on history. If there is a long history of difficulties between you and the LA, let the evidence (e.g. letters between you and the LA) speak for itself.

3.4 Answering Question 1: Whether the child or young person has or may have SEN

Explain why you think that your child has, or may have, special educational needs, and back this up with evidence.

Begin by looking at the evidence the LA used to make its decision. This is likely to include documentation from the early years provider, school or post-16 institution, such as school/college reports; the records of any assessments done by the early years provider, school or post-16 institution, what they then did and what effect that had; any advice from the LA’s educational psychologist or other professionals who may have been involved. If the decision seems at odds with the evidence you may need to look no further than the documentation and reports of the LA’s own professionals.

If the evidence supports the LA’s decision you will have to look elsewhere for evidence to back up your case. Reports from professionals such as educational psychologists can be

extremely important to your case but they can also be very expensive. A medical diagnosis (e.g. of autism or ADHD) will be helpful, but is not essential.

If you are eligible for Legal Help (part of Legal Aid) because you are on benefits or on a low income, it may be possible for a solicitor to arrange free reports from professionals. (See our web page on [where to get help](#)).

Other sources of written evidence may be available from:

- Teachers: ask them to be precise and to quantify exactly what is needed for your child.
- Health service, e.g. speech therapist, paediatrician, clinical psychologist or occupational therapist may write a report. Get your GP to refer you.
- Others involved with you or your child, e.g. social workers, youth workers, careers advisers.
- Information from voluntary groups relating to the learning difficulty/disability concerned.
- References to relevant research and findings.
- Extracts from books, magazines etc.
- School reports, including results of national tests and assessments.
- The school/college's own assessments and review reports.
- Details of any adjustments or access arrangements made for internal or external examinations.
- Home-school diaries.
- Your own evidence: for example, has a younger brother or sister overtaken your child? Is he or she anxious about going to school? Do you get bed-wetting, particularly in term time?
- Evidence from your child or the young person, written via a third party when necessary.
- Your or your child's school/college work if this demonstrates a point you want to make, such as the limited progress they have made, or a particular difficulty which is in dispute.
- If there has been little progress over a period of time, it sometimes makes it clearer if you can show this visually by a chart or graph. You may also be able to show uneven achievement between one particular subject or skill and another.

- Information from the school/college record. You have a legal right to a copy of this. Put your request in writing to the chair of the governing body at the school or the equivalent for a college. (See our [Model Letter 18](#).) You may be charged for photocopying. The record includes school/college reports, attendance record and details of any exclusions. If behaviour is a difficulty, the disciplinary record may help you show whether this is getting worse, whether for instance the school and your child needs more help to manage it and whether there is a pattern.

The Code says that LAs should look for evidence of a child's progress when deciding whether to make an EHC needs assessment. The suggestions listed above may help you to demonstrate that your child's progress is slow or uneven, or that they have complex needs involving more than one difficulty. The Code says your child's attainment is a factor, but this must be considered in the context of their peers' attainment, their progress over time and what is expected of your child's performance. If you can show, for example, that their performance in some areas is much lower than other areas or below what their general intelligence indicates is possible, then this should be a factor in deciding whether to assess.

As noted above, SEN covers a wide range of needs, and a child can be progressing academically and still have difficulties in other areas. The Code also talks about four "broad areas of need" (paras 6.28-35): communication and interaction, cognition and learning, social, emotional and mental health difficulties, and sensory and/or physical needs.

3.5 Answering Question 2: Whether the child or young person may require an EHC plan

Remember that an EHC plan is only required where the child or young person's needs cannot be met by their early years provider, school or post-16 institution through SEN Support. You need to explain why that *may* be the case for your child, and provide supporting evidence.

Go back to points 1–3 listed under heading 3.1. Now set out your reasons using the points that fit your case, giving at least a little detail about why you believe this.

For example:

Example 1

A full assessment is the only way to identify my child's difficulties and find out what my child needs. Jack has been excluded from school twice in the past term. Although he receives a lot of extra help for his behaviour, Jack doesn't seem to understand what he has done wrong. I believe difficulty with understanding school work may be a factor but nobody seems sure about why Jack has difficulty learning or why he behaves as he does.

Example 2

The school could not normally give all the educational help my child needs unless it receives extra help from the LA. The nursery school has had to provide much more help for Riath than they would normally provide for children with special needs without EHC plans. The staff at the nursery believe Riath will need an EHC plan to manage mainstream school.

Example 3(a)

The school has given my child all the help that could be expected but she has not made enough progress. Leila has received a high level of help for over a year and her progress is very slow. The other children are leaving her further and further behind.

Example 3(b)

The school has been able to give my child all the help that could be expected and she has made progress, but only with a great deal of extra help. Now she is coming up to the year she's 16, the college she wants to go to cannot do all the things she needs without getting extra help.

Now you will need to back up your points with evidence.

In some cases it will be enough to provide evidence of problems in learning or to show educators' or trainers' difficulty in understanding the problems and the help they need.

However, in most appeals against a refusal to assess, you will need the early years provider, school or post-16 institution to provide evidence of what help they have provided and be able to show why this may not be enough in the future. The Code mentions three potential triggers for assessment where resources are critical:

- Lack of progress: the Code at paragraph 9.14 says: *"In considering whether an EHC needs assessment is necessary, the local authority should consider whether there is evidence that despite the early years provider, school or post-16 institution having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child or young person, the child or young person has not made expected progress."*
- Progress but only with unsustainable support: if the school or other setting has provided a lot of support which has ensured progress, but which is over and above what would normally be provided without an EHC plan, the Code rightly says this is also a trigger for assessment.
- Transfer to a college or other post-16 provider which may not have the SEN resources a school has.

Case law has also established that the LA must consider not only the present situation but must take into account future changes such as an upcoming change of school.

As well as the help provided by the school/institution, you will need to know what outside help the early years provider, school or post-16 institution can call in, for example the LA's educational psychologist, their behaviour support team, health service speech therapists, and specialist teachers.

You will also need details about their special needs budget and the number of children and young people it covers. The LA may tell you that schools should have up to £10,000 available for each child or young person with SEN (this is made up of the cost of the place plus £6,000 for SEN). However, this amount is a notional one, not based on an assessment of current pupils' needs and the real cost of providing for them. The actual amount of money available depends on what the school is already committed to spending, so you need to find out how much money it actually gets and how they plan to spend it to see what they can and cannot do. Colleges are funded differently.

You may not be able to find all this information easily. Ask someone from the early years provider, school or post-16 institution to tell you about it. You could point out to them that in this kind of appeal you are likely to be unsuccessful without this information. It may help to put your request in writing using our [Model Letter 19](#).

Schools are also required to publish an SEN Information Report containing detailed information about the support and policies applicable to children with SEN and disabilities at the school (as prescribed in [Schedule 1 to the SEND Regulations 2014](#)). This should be available on the school website.

It may also be helpful to use [Model Letter 17](#) to ask the LA for details of how much funding it delegates to schools and what help it expects schools to make. (See section 3.2: What if the school/institution could do more?) If there appears to be a mismatch between what the school is saying it can do and the LA expects it to do, this may help your case.

3.6 Evidence – general points

It is important to obtain any written evidence as soon as you can. It is best to send in all your written evidence with your appeal form because this means you have the main substance of the case set out with supporting evidence right from the start and you may discover more about the LA's arguments if it is able to respond fully. If you have a good case and evidence, the LA may give in rather than fight the appeal.

If you think you need to send in evidence later in the process, tell the SEND Tribunal what you expect to obtain and when and submit it by the deadline you are given.

If you are having difficulty getting information which is relevant to your case from the LA, you can write to the SEND Tribunal explaining what it is and ask the SEND Tribunal for a 'direction' to make the LA release it: you should use the ['Request for Changes' form](#). Unless

the LA has a good reason for not providing the document the SEND Tribunal will order the LA to release it.

4. Case law

The SEND Tribunal does not expect sophisticated legal arguments or references to case law. However, there are some useful cases which confirm the relevant principles to be applied, which you can find [here](#).

5. The hearing

If you and the LA consent, the appeal will be dealt with by way of a 'paper hearing' and you will not be required to attend an oral hearing. Most refusal to assess appeals are now dealt with in this way. In the vast majority of cases there would appear to be no advantage in an oral hearing, and it is likely to simply increase the time taken to reach a decision in your case (rather than it resulting in a different outcome). An oral hearing might be appropriate where, for example, there was genuine dispute as to whether the child had special educational needs, or the expert evidence on the nature of the special educational provision required was not consistent.

The Tribunal looks at the evidence put before it and decides whether the LA decision followed the law and the Code. It will also make a decision based on what is right for the child at the date of the hearing.

The Tribunal is governed by the law, both the Act and its associated regulations, and has to follow the interpretation of that law by higher courts in judgments about previous SEN disputes. It must also have regard to the Code and generally accepts the Code's guidance in coming to its decisions.

6. Outcomes of an appeal against a refusal to conduct an EHC needs assessment

There are limits to what the Tribunal can decide in a "refusal to assess" appeal.

If you win your appeal it can order your LA to conduct an EHC needs assessment. It cannot order the LA to draw up an EHC plan, or what it should say. It cannot make any orders or recommendations with regard to health and/or social care.

The LA must start the assessment process within four weeks of the Tribunal's order. More information on what happens during an assessment may be found [here](#).

If you lose your appeal, the LA will not have to conduct an EHC needs assessment. The Tribunal cannot order a school to make provision (extra help for you or your child) if it concludes that an EHC needs assessment is not needed. However, the school should continue to support your child through the SEN Support framework.

You can start another request for assessment immediately, but you are unlikely to get a different outcome unless you can show that things have changed or that new evidence is available. You should keep careful records over the coming months of the support that your

child is receiving, the progress they are making, and the difficulties they are experiencing, so that you will have the evidence to support a new request if necessary.