

Appealing a Refusal to Issue an EHCP decision

Information Fact Sheet

You have received notice from the Local Authority (LA) that, following an EHC Needs Assessment (EHCNA), they have refused to issue an EHC Plan for your child. This can feel frustrating and some might be inclined to give up there and then. Below are the potential reasons for this decision and what the legal grounds around them should be. If you are unhappy with the LA's decision not to issue an EHC Plan and you wish to lodge an appeal, then you will need to follow the correct legal process.

Why can the LA refuse to issue an EHC plan?

It is important to remember that an EHC needs assessment does not guarantee an EHC plan being written. The legal test the LA must apply is in Section (S.) 37(1) of the **Children & Families Act 2014 (CAFA 2014)**:

“Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan –

- (a) the local authority must secure that an EHC plan is prepared for the child or young person, and
- (b) once an EHC plan has been prepared, it must maintain the plan.”

The test is simply whether it is **necessary** for the child or young person to receive special educational provision through an EHC Plan.

The LA can **only** refuse to issue an EHCP if the information and advice gathered during the EHC assessment determines that an EHCP is not necessary.

The LA must notify you within 16 weeks of the date of the EHC request. When appealing this decision, the onus is on the parent or young person to prove that the school's ordinarily available provision is not enough. The SEND Tribunal can either; dismiss the case, order the LA to issue an EHCP, or refer the case back to the LA to reconsider their decision in light of observations made by the SEND Tribunal.

Make a note of your appeal deadline



This is the first thing you should do. Mark any deadlines on your calendar and in your diary. You must send an appeal form to the SEND Tribunal within **two months** of the final amended EHC plan, or **one month** from the date you obtain a mediation certificate, whichever is the later. (If the two months/one month ends in August, then you have until the first working day in September to submit the form).

What you will need to submit for your appeal



Local Authority decision letter

A signed and dated letter from the LA giving you the right of appeal to HM Courts & Tribunals Service



Mediation certificate

A signed copy after taking part or not



Completed SEND35 appeal form

With your reasons for making the appeal
(form can be found on the gov.co.uk website or google SEND35)



Evidence documents

To support your appeal (you can add to this later up until the Tribunal's evidence deadline, so don't let this delay your appeal submission)



A list of all the documents

Of those enclosed with the application (it will be helpful to the SEND Tribunal if you put your evidence in chronological order, and then write out a list explaining what each document is).

Do not send your original documents to the Tribunal. Use photocopies or scanned documents and keep the originals. If you do not have access to a scanner, you can download free document scanning apps onto your phone e.g. DocScan Free. Do not send photos of reports as they can easily cause your report to exceed the Tribunal's 14MB attachment data limit and may not be received.

What is Mediation?



A less formal way of trying to settle the dispute between you and the LA. It involves a meeting between you, the LA and an independent mediator, who will try to help you reach agreement on the points of dispute. The mediation may also be attended by other relevant parties such as representatives from the child or young person's school or college. It is free of charge.

How do I get a Mediation certificate?

You need to either:

1. Undertake mediation, and if this does not settle all of the points in dispute, you will be issued with a certificate confirming you took part in mediation; or
2. Speak to a mediation advisor, and you will be issued with a certificate confirming you have been told about your right to mediate but you do not want to do so

You will need to obtain a mediation certificate before you appeal a refusal to issue decision.

Where to submit your appeal



Email

(currently the Tribunal's preferred option):

send@hmcts.gsi.gov.uk

write in the subject line of your email:
'New Appeal'

****It is important to note that the data limit for attachments is 14MB***

Telephone number to ask questions
or to confirm receipt: 01325 289350

Postal Address

(it is recommended that you send it recorded delivery):

**HM Courts & Tribunals Service
Special Educational Needs and
Disability Tribunal
1st Floor, Darlington Magistrates Court
Parkgate
Darlington
DL1 1RU**

Filling in the SEND35 appeal form

Ensure that you fill in the form using black ink if doing it by hand.

Section 1: Who

Enter your child's name and date of birth, or yours if you are a young person, and gender

Section 1: Who is the appeal about?

- A **child** under 16 years old
- A **young person** aged 16 or over and under 25 years old

Surname

First name(s)

Gender

- Male Female Other

Date of birth

Section 2: What are you appealing against?

I am asking the Tribunal make a decision on the following issues (please tick all those that apply)

- The Local Authority secured an EHC assessment but refused to make an EHC plan
- The Local Authority has issued an EHC plan following an EHC Needs Assessment
- The Local Authority has refused to secure a Re-Assessment of EHC Needs
- The Local Authority has carried out an annual review of the EHC plan
- The Local Authority has refused to amend the EHC plan after an EHC Needs Re-Assessment
- The Local Authority has decided that the EHC plan is no longer necessary and are going to 'Cease to Maintain' the plan
- and**
- I disagree with what the EHC plan says about the child or young persons special educational needs (Section B)
- I disagree with what the EHC plan says about the educational help/provision the child or Young Person requires (Section F)
- I disagree with the school/college/institution named in the EHC plan (Section I)
- or**
- The Local Authority has not named a school/college/institution in the EHC plan (Section I)

Section 2: What

Enter your situation and decision(s) you are appealing against. Tick all that apply to you.

Section 3: Why

You will need to explain which decision you are appealing against (or which parts of the EHC plan you disagree with). This is called your reasons for appeal.

It is often easier to put your reasons for appeal on a separate sheet and write 'See separate sheet headed Reasons for Appeal' in the box on the form. This also prevents possible loss of information when the form is printed and turned into the Tribunal bundle.

This is where you set out why you think the LA's decision is wrong. Try to put in everything you need to say, your full case, at this point.

Section 3: Reasons for appeal

I am bringing the appeal because (to be completed in all appeals):

I disagree with the description of special educational needs (Section B of the EHCP) because:

I disagree with the specification of special educational provision (Section F of the EHCP) because:

The LA have not considered

I disagree with the LA's choice of school/college/institution (Section I of the EHCP) because:

I prefer my choice of school/college/institution (Section I of the EHCP) because:

(please continue on a separate page if necessary)

Grounds of appeal – DRAFT

Feel free to use this draft of examples as a template for your reasons of appeal and include all the points that apply to you. The reasons you could use are *not* limited to the examples given here. This can be edited and built upon to suit your situation. Remember that you don't have to have a formal diagnosis.

1. My son/daughter, **[name]** is diagnosed as having **[diagnosis]**. I attach his/her diagnosis. In addition, he/she has:
(insert from list below adding appropriate details e.g. diagnosis, date of, therapy given, progress, existing needs.)
 - a. Speech and language difficulties (see report attached)
 - b. Sensory difficulties (see report attached from occupational therapist)
 - c. Cognitive difficulties
 - d. Physical difficulties
 - e. Sleep difficulties
 - f. Eating difficulties
 - g. Anxiety issues
 - h. Behavioural issues
 - i. Lack of self-help skills
2. My son/daughter attends **[name of current/latest school]**. I attach his/her latest pre-school/school report. That placement agrees with me that **[name]** needs special educational provision to be secured through an Education and Health Care Plan.
3. On the **[date of letter received]** I received confirmation from the LA that it was not going to issue an EHC plan for my son/daughter. Its failure to do so is a breach of Section 37(1) of the Children and Families Act 2014.
4. The available evidence and reports from the EHC needs assessment shows that my son/daughter is not making appropriate progress.
(List the reasons/examples – developmental milestones, academic attainment etc.)
5. In addition, the ordinarily available provision is clearly insufficient to meet my son's/daughter's needs. **[name]** needs much greater support in order to fully access his/her education, especially if they were to continue in a mainstream setting.
(Insert any provision you say is needed above that which is ordinarily available)
6. The available evidence and reports from the EHC needs assessment shows that my son/daughter will not be appropriately placed in any LA maintained mainstream school because:
(List the reasons)

I therefore ask the Tribunal to:

- A. Find that my son/daughter has special educational needs.
- B. Find that my son/daughter requires special educational provision to be secured through an Education, Health and Care Plan.
- C. Find that the LA are in breach of their statutory duty to issue an EHC plan for my son/daughter as indicated in Section 37(1) of the Children and Families Act 2014.
- D. To find that the current school my son/daughter attends cannot meet their needs without provision being made through an EHC Plan.
- E. Order the LA to issue a draft EHC plan and proceed to a final EHC plan, in keeping with statutory processes, for my son/daughter, **[name]**.

Evidence

You will need to provide evidence to support your argument that you/your child requires special educational provision to be provided through an EHC plan. As much as possible, you should try to get together any supporting evidence to submit with your appeal form. In your reasons for appeal, you should refer to this evidence to support your arguments (for example, if you are saying that you/your child has not made progress despite receiving SEN support, refer to school reports and/or other records which show this). Don't worry if you don't have everything ready to send straight away; you can submit more evidence after you've registered your appeal. You must send in enough information for the LA to be able to respond.

What advice/information must the LA seek out during the EHCNA?

- The needs of the child or young person
- What provision may be required to meet such needs
- About the outcomes that are intended to be achieved by the child or young person receiving that provision

Who from?

- The child's parent or young person
- Education provider
- Health care professionals
- Educational psychologist
- Social care
- Anyone else the LA thinks is appropriate
- If within or beyond year 9 – advice in relation to provision for preparation to adulthood
- Any person reasonably requested by the parent or young person

Section 5: Making the appeal

LA decision

Which local authority made the decision that you are appealing against?

What is the date on the decision letter from the local authority?

Late appeal or no mediation certificate

You must send your appeal to the Tribunal no later than 2 months from the date of the Local Authority's decision letter or within one month of the date of the mediation certificate, if later.

If the appeal is submitted to the Tribunal more than 2 months after the date of the Local Authority's letter or one month after the date of the mediation certificate, you must set out in writing the reasons for the delay and why you think the appeal would succeed if time for making the appeal is extended. If you do not do so, the papers will be returned to you without being registered or seen by a Tribunal Judge.

If you do not have mediation certificate you must set out in writing why you have not been able to get one. If you do not give an explanation, the papers will be returned to you without being registered or seen by a Tribunal Judge.

My appeal is being made late
 I do not have a mediation certificate

Section 5: Local Authority & Mediation

Enter the name of your LA and the date of the decision you're appealing against or the date of the final EHC plan.

If it is a late submission of appeal, (after your deadline) then you must set out your reasons why it is late here.

Section 6: You

Enter your name and contact details here.

Add details of anyone else who has parental responsibility, if possible; if you have a reason for not wishing to include this information, this must be stated.

Section 6: Who is making the appeal?

I am making this application to appeal.

Please tick only one of these options – see page 1 for explanations:

Parent or other – on behalf of a child under 16 years old
 Young Person – aged 16 and under 25 years old
 Alternative Person – making an appeal in the 'best interests' of a young person who does not have the Mental Capacity to bring an appeal themselves

A. Details of first person making the appeal

Mr Mrs Miss Ms
 Other _____

Surname _____
First name(s) _____
Home address _____
Postcode _____
Daytime phone number _____
Mobile phone number _____
Email address _____

If you are not the Young Person, what is your relationship to the child or Young Person e.g. parent, foster parent

Add any special requirements to make the process accessible to you: say here if, for instance, you need documents translated, wheelchair access, a reader or a signer, or cannot manage negotiations over the phone.

Things you should do:

- Keep it short and to the point.
- Separate your points into paragraphs.
- Number your paragraphs or organise them under headings.
- Refer to any evidence that supports your points with relevant quotes or if you need to refer to a whole report, state the report author, job title/service and date as well as page numbers if possible. (You can send more evidence later and you should say if you know there is evidence that you do not have yet but intend to send later.)
- Refer to the legal issues.

Things you should *not* do:

- 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.
- Submit any non-relevant evidence. Although you may have many years of reports and emails, to avoid overwhelming the Tribunal and to ensure that they have time to read what is important to your case, only submit the evidence that supports your reasons for appeal.

Please note we have only spoken about key sections of the form here. There are other sections you will also need to read and fill in.

Where do I start?

Begin by looking at the evidence the LA used to make its decision. In their decision letter, they must set out detailed reasons for why they are not issuing an EHCP.

- 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.

How should the evidence inform an EHCP?

It is worth noting that a final EHCP must describe the needs and support your child must receive in enough detail so that the reader can clearly tell what must be delivered, how often, how long for, and by whom. This detail is referred to as specificity. Therefore, all evidence informing it must be clear, accessible and specific. In light of this, here are some points to consider when reviewing the evidence/professional reports from the assessment:

- Does it appropriately address outcomes?
- Is it sufficiently detailed about all of your child's needs?
- Is it quantifiable and specific about provision required to meet all of those needs?
- Watch out for & query woolly phrases in the recommendations such as: "access to", "opportunities for", "input from", "may benefit from" etc.

How can I get specificity put in to the evidence reports?

If you feel that some of the evidence reports submitted by professionals are not specific and quantifiable enough, then you can take action to try and get this amended.

In the first instance, parents only have to accept reports that they believe are accurate. Paragraph 9.47 of the SEND Code of Practice and the SEN Regulations 6(4) state that; the LA, parent/young person, and the person providing advice, must all be satisfied that the advice is sufficient for the purposes of the assessment process. All professional bodies have guidelines for writing an EHC NA report.

When making an appeal to the SEND Tribunal, you can get a court order from the judge to get specificity put into the reports before the hearing date, using a "request for changes" form. You would need to inform the other parties that you intend to make this request. Your argument would be that an informed decision whether to issue an EHCP can't be made without this quantifiable/specific information.

Useful sources of Evidence

*Please note this is not an exhaustive list

- **The Health Service** e.g. speech and language therapist, occupational therapist, CAMHS, paediatrician, GPs, medical professionals, physiotherapists, psychiatrists etc.
- Evidence from the child or young person's **current school** or other institution e.g. attendance records, current and previous pupil passports/ IEPs, communication with school (emails, texts, letters), meeting minutes, education psychologist reports, pupil progress reports, exclusion letters, part time timetable risk assessments, incident reports, after school clubs, school trip risk assessments. Home/school diaries.
- Privately obtained reports from **independent professionals**. These can be very expensive so you may wish to consider:
 - If you qualify for legal aid: <https://www.gov.uk/check-legal-aid>
 - Voluntary organisations that specialise in a particular disability may be able to provide an assessment at a modest cost.
- During the EHC needs assessment, the LA should have sought information and advice from a range of professionals including an **educational psychologist**. The LA should have obtained an up-to-date report from a particular professional and if they failed to do so, you should ask them to do this. If they refuse, you can ask the Tribunal to order that they obtain the report needed – use the “Request For Change SEND7” form: <https://www.gov.uk/government/collections/special-educational-needs-and-disability-tribunal-forms>
- Written statements from those involved with the child or young person e.g. teachers, someone who knows the child or young person from outside school such as at a youth club or a carer, the child/young person (written by themselves if they are able to do so) or the parents (to ensure they get all their points across).
- Video/ audio evidence (this should be short and to the point. Video evidence more than 10 minutes is unlikely to be watched). Attach with it a statement of the facts the evidence seeks to establish.
- Published evidence or references to relevant research and findings. Beware of relying on this too much as the best evidence is going to be primary evidence about the child/ young person.
- Examples of the child/ young person's work and progress overtime.

Appealing a Refusal to Issue an EHCP: Summary

The LA must issue an EHC Plan if the evidence gathered during an EHC needs assessment establishes that it is necessary for special educational provision to be made in accordance with an EHC Plan.

- Make a note of your **appeal deadline** as soon as you receive it
- **Mediation** is an informal way to solve problems
Obtain mediation certificate by:
 - a) Taking part in mediation or
 - b) Contacting a mediator to say you do not want mediation
- Ensure you **fill in the SEND35 form** correctly
- Keep the appeal form answers clear, organised, concise, and to the point
- **Refer to the legal issues** and your own evidence documents for each of your points
- Do not overwhelm the SEND Tribunal with irrelevant evidence and history
- **Include evidence** from professional reports, statements about needs and provision, **highlighting the requirement for an EHCP**
- **Make copies** of your bundle and keep the originals for yourself
- **What you need to submit:** LA letter, Mediation certificate, Appeal form, evidence, list of documents

Remember that:

During appeal, it is your responsibility to prove that the school cannot meet the needs without an EHCP.

Evidence must pay particular attention to:

- The **needs** of the child or young person
- What **provision** is required to meet such needs
- About the **outcomes** that are intended to be achieved by the child or young person receiving that provision
- Action already taken by the education provider to try and meet the child's SEN / proof that intervention over and above ordinarily available provision is needed










Sources of evidence:

- The child's parent or young person
- Education provider
- Health care professionals
- Educational psychologist
- Social care
- Anyone else the LA thinks is appropriate
- If within or beyond year 9 – advice in relation to provision for preparation to adulthood
- Any person reasonably requested by the parent or young person

Specificity = An EHCP must describe the needs and support in enough detail so that the reader can clearly tell **what** must be delivered, **how often**, **how long for**, and **by whom**. (All evidence informing it must be clear, accessible and specific.)

Watch out for woolly phrases: "access to", "opportunities for", "input from", "may benefit from" etc.

Refusal to Issue EHCP Appeal Checklist (Tick as you complete them)

-  Make a note of your appeal deadline. Add to calendars, diaries, and set reminders
-  Received signed LA decision letter
-  Signed mediation certificate
-  Complete SEND35 appeal form with your reasons
-  Add the evidence documents that support your appeal
-  Add a chronological list of all the documents enclosed
-  Make scans/photocopies of your appeal bundle, keep the originals for your records
-  Register your appeal: submit a COPY of your bundle to the SEND Tribunal
-  Submit any further evidence that is relevant up until the evidence deadline