

Appealing about a refusal to issue an EHC Plan

1. Introduction

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 issue an Education, Health and Care (“**EHC**”) plan for your child or, if you are a young person, you.

This pack relates to the law in England under the Children and Families Act 2014 (“the **Act**”).

Refusal to assess, or refusal to issue?

It is important to be clear about what stage you are at in the EHC needs assessment and plan process.

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 their decision within 6 weeks. If they decide not to conduct an assessment, you will have a right of appeal. This is known as a **Refusal to Assess** appeal. For more information on how to appeal against a refusal to assess decision, see our [Refusal to Assess Pack](#).

This pack concerns the situation where the LA has [conducted an EHC needs assessment](#), but then decides not to issue an EHC plan. Again, you will have a right of appeal. This is known as a **Refusal to Issue** appeal.

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

Following an EHC needs assessment, the LA must decide whether it will issue an EHC plan for the child or young person based on the evidence it has gathered.

If the LA decides not to issue an EHC plan, it must notify the parent or young person (referred to below as “you”) as soon as practicable and at the latest within **16 weeks** of the date the request for assessment was made. 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 information, advice and support and disagreement resolution services.

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

Please see our pages on [appealing to the SEND Tribunal](#) and in particular our [general advice for all appeals](#) for detailed information about the process of bringing an appeal, including:

- [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 for the hearing](#)
- [the hearing and beyond](#)

3. When must the LA issue an EHC Plan?

The legal test is found in section 37(1) of the Act, and it turns on whether an EHC plan is “necessary”:

(1) 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.

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 (“**SEN**”), to complete their education or training (section 36(10) of the Act).

Therefore the LA must decide, on the basis of the evidence from the EHC needs assessment, whether it is necessary for the child or young person to have an EHC plan.

The term “*necessary*” is not defined by the Act and allows for flexibility. The focus is on the simple and practical question of whether an EHC plan is required in order that the child or young person gets the special educational provision (“**SEP**”) they require. This will depend on the circumstances of the particular case, and may well involve a considerable degree of judgment.

It is sometimes easier to reframe the question in the negative:

Will the child or young person receive the SEP they require without an EHC plan?

If **no**, then an EHC plan **is** necessary.

If **yes**, then an EHC plan **is not** necessary.

4. How do I prove that an EHC Plan is necessary?

The burden of proof is on you to show why it is necessary for the SEP required by the child or young person to be set out in an EHC plan. What the required SEP is, and whether the school or other setting can or will provide it, is usually at the heart of the dispute.

The [SEND Code of Practice](#) sets out different aspects the LA must consider in making its decision:

- Whether the child or young person's SEN were previously fully understood by the school, and whether the SEP already being made was "*well matched*" to those needs (para 9.54). An EHC plan may not be required where the school will now, in the light of the information from the EHC needs assessment, be able to support the child or young person more effectively in future.
- Where the child or young person is not progressing sufficiently, despite well-targeted provision, the LA must consider what further SEP is needed (para 9.55). If the SEP required cannot reasonably be provided from the school's own resources, this suggests that an EHC plan would be necessary.
- If there is no previous information or SEP to consider, e.g. because the child's SEN have only recently been identified, or have changed significantly, or they have only been in their current setting a short time, the LA must consider what new SEP is needed (para 9.56). If the required SEP cannot reasonably be provided from the school's own resources, an EHC plan would be necessary.

However, these examples are not exhaustive, and it is the legal test that prevails.

Under that test, there is a rough and ready resource line to be crossed before an EHC plan is considered to be necessary, which is based on the kinds of provision a mainstream school, nursery or college could make from its own resources and notional SEN budget. If the school or other setting cannot make the SEP that the child or young person requires from within its own resources, then an EHC plan will be necessary.

There are therefore two key areas to focus on when making your case:

a. identifying the SEP required by the child or young person

The starting point should be the information and advice gathered by the LA during the [assessment process](#). This must cover all of the child or young person's SEN and the SEP they require, and the outcomes intended to be achieved.

The Code of Practice says (at paragraph 9.51) that the evidence and advice must be "*clear, accessible and specific and provide advice about outcomes relevant for the child or young person's age and phase of education and strategies for their achievement.*"

A useful technique is to go through the assessment evidence with two different coloured highlighter pens. Highlight all the identified SEN in one colour, and the SEP in another. Is each identified SEN matched with appropriate SEP? Is that SEP clear and specific? Is it outcomes-focused? Did the LA in fact conduct the assessment properly and obtain all of the legally required advice and information? If not, the LA should be asked to go back to the relevant professional(s) and ask them to provide the missing information. If they won't, you can ask the Tribunal to order them to do so, using the [Request for Change](#) form on the Tribunal's website.

You may also want to submit evidence of your own, in order to show that the assessment evidence is wrong or incomplete. For example, does it fail to address some of your child's SEN? Does it downplay the severity or effects of their SEN? Does it under-estimate the SEP that will be required? Does the proposed SEP reflect what is available locally, rather than what the child/young person actually needs?

This evidence could include independent reports from professionals such as educational psychologists or speech therapists, evidence from teachers or other people who know your

child well, school reports, home-school diaries, or examples of your child's work over time. See our [evidence for contents appeals](#) page for more detailed information on potential sources of evidence. Section 3 of the [Refusal to Assess Pack](#) will also be helpful.

Independent reports can be helpful, but are not essential. They can be very expensive, so do check whether you are eligible for [legal aid or help from other organisations](#).

LAs are legally required to consider all information and reports submitted by parents as part of the assessment process, and cannot simply disregard them (as sometimes happens). The Tribunal will take into account *all* the evidence from both sides when determining the appeal.

b. identifying whether the SEP can be provided by the school or other setting without an EHC plan

Once you have identified the SEP that your child or young person needs, you must establish whether the school or other setting can (or will) in fact provide this SEP without an EHC plan.

Our [Model Letter 19](#) can be used to ask the school for detailed information about its SEN budget and provision and the number of children/young people it covers. You should also look on the school's website for their SEN Information Report, which must set out the type and extent of SEP that they can provide.

You will also need evidence of the support provided for the child or young person up to this point. The SEND Code of Practice says that [SEN Support](#) should be provided in schools and other settings through a four-part "cycle of action": assess, plan, do and review. See our [FAQs](#) for details of what this should look like in early years settings, schools and post-16 settings.

In order to show whether the school or other setting has done this properly up to now, you will need evidence in the form of records of the assessments carried out in school and the SEP that has been put in place. Individual education plans, provision maps or similar documents should be available, showing that the school has accurately identified the child or young person's SEN, put appropriate SEP in place, and reviewed it regularly. This information should be part of the child or young person's school records, which you are entitled to access (see [Model Letter 18](#)).

If you can show that the school or other setting has used its best endeavours to deliver appropriate SEP, and the child or young person is still not making expected progress, this will be strong evidence that an EHC plan is necessary.

LAs are required to publish a [Local Offer](#) setting out (amongst other things) what help it expects schools and other settings to provide for children with SEN - although there is no guarantee that this will actually be available. You can also ask the LA to provide further details of the help that they expect schools to provide (using [Model Letter 17](#)). It can help your case if there is a discrepancy between what the LA says it expects and what the school or other setting says it can actually do.

Once you have gathered this evidence, you will be able to consider which of the following scenarios is relevant in meeting this second part of the test:

- i. School willing to provide SEP, but does not have resources

It will help considerably if the school agrees with you that an EHC plan is necessary and is willing to provide details of the extent to which they can or cannot meet your child's needs. As well as providing written information, they may be willing to allow someone with knowledge of how their SEP is organised and resourced to attend the hearing as a witness (e.g. the SENCO or head teacher).

- ii. School able to provide SEP, but not willing to do so

Cases like this can be challenging, but the Tribunal will look at the reality of the situation. You would need to produce evidence to show that even though a school could in theory make the required provision, this is unlikely to happen in practice unless an EHC plan is issued.

- iii. School is meeting needs, but only by going above and beyond what could normally be expected

An EHC plan may be required if your child's needs are being met, but only because the current school is putting in a lot of extra support which is not sustainable in the long term, and/or which other mainstream schools might not be able or willing to replicate.

The provision required by the child or young person should be compared to that which is available in mainstream schools in England generally – not just in the LA's area or in the individual school concerned.

5. Some common issues

What if the school hasn't spent £6,000 on the child or young person?

LAs sometimes argue that an EHC plan is not necessary because the school can spend more on the child or young person. Mainstream maintained schools and academies receive delegated funding to support pupils with SEN (often referred to as "additional support funding" or the "notional SEN budget"), and must usually demonstrate that they have spent £6,000 on a particular pupil before they can ask the LA for more funds. Further education colleges are funded in the same manner.

However, the £6,000 figure is not a fixed threshold that must be passed before an EHC plan can be issued, and it does not form part of the legal test in s.37(1) of the Act. Detailed arguments about local school funding arrangements should not be necessary as part of a refusal to issue appeal. The question remains whether you can show that unless the required SEP is provided via an EHC plan, it is not in fact going to be made.

Furthermore, SEP is not always about cost. For example, it might be that an EHC plan is necessary because a child needs a different environment or a type of specialist input that a mainstream setting cannot simply purchase.

What if the LA says that the school can access external specialists?

Schools and other settings can normally access a certain amount of external advice and support for SEN pupils without an EHC plan. This could include the LA's educational psychologists, behaviour support team, autism advice service, NHS speech and occupational therapists, and specialist teachers. However, if the child needs a high level of ongoing support from these services, or if the school has to go through some kind of application process which may or may not be successful, then it can be argued that this is SEP that is not ordinarily available from within the school's own resources, or that it's unlikely to be delivered unless an EHC plan is issued.

What if my child is about to transfer to a new phase of education (e.g. nursery to primary school, primary to secondary, or secondary to further education)?

In such cases the LA should be looking ahead to what will happen after the transfer, and cannot focus only on the current situation. It may be that the child's needs are being met in the current setting, but that an EHC plan will be necessary in the next phase of their education.

What if my LA says that their policy is only to issue EHC plans for children who meet certain criteria?

Local policy does not trump the law, and the Tribunal will only apply the legal test in s.37. Any stricter criteria are unlawful.

What if a child or young person is incapable of achieving qualifications, progressing to employment or making significant progress?

The courts have been clear that these are not essential elements of education, and a child or young person of any age (up to 25) may need an EHC plan even in circumstances where they are functioning at a very low level and their future achievements are likely to be small.

What if the LA issues a non-statutory document which looks like an EHC plan, but isn't?

Sometimes the LA concludes an EHC needs assessment by refusing to issue an EHC plan and issuing a "[non-statutory EHC plan](#)" instead. This might be called something like a "My Plan", "Resource Plan". "[Name of LA] Plan" or "Person Centred Plan". These documents purport to set out the child or young person's SEN and the SEP they require, but have no legal force. This is still a case of refusal to issue an EHC plan, and you will have the same right to appeal. The document can sometimes be useful in the appeal as it sets out the base line of SEP which the LA admits is required.

What if my child needs health and/or social care provision as well?

For a trial period (currently running until August 2021), the Tribunal is able to make non-binding recommendations in respect of health and social care, so long as there is also an educational issue at stake. This is referred to as [the National Trial](#).

In refusal to issue appeals, the Tribunal would be able to *order* the LA to issue an EHC plan and to *recommend* that it should include health and/or social care provision, whether generally or of a particular kind. This may be useful if you have struggled to get the NHS

or social services to give any meaningful input to the EHC needs assessment process so far, and they would need to give a very good reason for disregarding the Tribunal's recommendation. It is likely to be particularly useful for those seeking a residential placement, and for young people who may start to require greater social care support as they move towards the end of full-time education.

6. Outcomes of an appeal against a refusal to issue an EHC Plan

If you win your appeal, the Tribunal will order the LA to issue an EHC plan. However, it cannot (at this stage) tell the LA what the EHC plan should say, or which school should be named in it.

The LA must produce a draft EHC plan within 5 weeks and consult with you as to what it says. It must then issue the final EHC plan within 11 weeks. More information on what to do when you receive the draft EHC plan may be found [here](#).

If you are unhappy with the EHC plan once it is issued, you will need to bring a further [appeal against its contents](#).

If you lose your appeal, the LA will not have to issue an EHC plan, but hopefully the school or other setting will be able to use the additional information and advice obtained during the assessment and appeal process to support your child more effectively in the future.

You should keep careful records in the coming months of the support that your child receives, whether the school or other setting is following the advice that was obtained in the assessment, whether your child is making expected progress, and whether they are experiencing difficulties.

If you feel that your child's SEN are still not being met properly, you may wish to start the process again and make a fresh [request for assessment](#), using your records as supporting evidence. You will need to wait six months from the previous assessment before making a new request.