

# Appealing a Refusal to Assess decision

You have received notice from the Local Authority (LA) that they have refused your request to assess your/your child's needs by means of an EHC needs assessment. 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 assess your/your child's needs and you wish to lodge an appeal, then you will need to follow the correct legal process.

## When can I request an EHC needs assessment?

It is important to remember the legal test the LA must apply is Section (S.) 36(8) of the **Children & Families Act 2014 (CAFA 2014)**:

“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 under subsection (7), the authority is of the opinion that—

- 1) the child or young person has or may have special educational needs, and
- 2) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.”

The test is simply whether the child or young person **may** have SEN and that it **may** be necessary for special educational provision to be made for the child or young person in accordance with an EHC Plan. You will see that this is a very low threshold. If an EHC needs assessment has already been carried out in the last 6 months and you want to request a re-assessment, the LA do not have to consider it. Otherwise, you can apply again whenever you like.

## Why can the LA refuse my request?

The LA can **only** refuse your request if the submission does not meet the legal test; if the views you have stated, and the evidence submitted do not indicate any *potential* SEN and/or the *potential* need for extra provision.

## 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 LA's decision letter, 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 SEND35a appeal form

With your reasons for making the appeal

(form can be found on the gov.co.uk website or google SEND35a:)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/776050/send35a-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776050/send35a-eng.pdf)



#### 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 assess decision.**

## Where to submit your appeal



### Email

(currently the Tribunal's preferred option):

[send@hmcts.gsi.gov.uk](mailto: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 SEND35a 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: Reasons for appeal

It is important to tell the Tribunal why you disagree with the LA decision not to secure an EHC assessment and refer to any written evidence you have to support your case.

#### Legal Test the Tribunal will apply

The legal test for deciding whether to secure an EHC needs assessment is contained in the Children and Families Act 2014 s. 36(8).

The Tribunal will decide two questions in the appeal:

#### Question one: 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 two: 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:

### Section 2: Why

You will need to explain why you think the LA must assess your child, or you as a young person. 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. There are two questions to answer, asking you to describe the **SEN they have**, describe the **SEN they might have**, and **why they may need an EHCP**.

## What are Special Educational Needs (SEN)?

A learning difficulty and/or disability which requires Special Educational Provision (SEP):

- **Significantly greater difficulty learning** than majority of others the same age, or
- Impairment has a **substantial long-term adverse effect** on carrying out day-to-day activities, including the making use of generally provided facilities in mainstream institutions.

This means that you **do not** have to have a formal diagnosis to request an EHC needs assessment. Deciding whether an assessment would be necessary is based on the presenting needs and difficulties. Any diagnosis by a professional is excellent evidence but you do not have to have this. (SEN is defined under Section 20 CAFA 2014.)

### Section 3: 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

Please explain why this has happened:

### Section 5: 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.

You will have chance to add details of 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.

### Section 3: Local Authority & Mediation

Enter the name of your LA and the date on the decision letter you're appealing against.

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

### Section 5: 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

### 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.

## 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.

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

- Describe any special educational needs that the child or young person has:
  1. My son/daughter, **[name]** is diagnosed as having **[diagnosis]**. I attach his/her diagnosis report. In addition, he/she has:  
***(insert from list below adding appropriate details e.g. diagnosis, date of, therapy given, progress, existing needs/difficulties.)***
    - 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
  
- Describe any special educational needs which you consider the child or young person may have which have not yet been fully identified:
  1. My son/daughter, **[name]** is awaiting assessment for diagnosis of **[condition(s)]**. I attach **[evidence of condition/upcoming appointment]**. In addition, he/she has:  
***(insert from list below adding appropriate details e.g. notification date, upcoming assessment/reports, any interventions given, progress, existing needs/difficulties.)***
    - 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

## Question two: 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
  1. 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/may need special educational provision to be secured through an Education and Health Care Plan.
  2. On the **[date of letter received]** I received confirmation from the LA that it was not going to carry out an EHC needs assessment for my son/daughter. Its failure to do so is a breach of Section 36(8) of the Children and Families Act 2014.
  3. The available evidence shows that my son/daughter is not making appropriate progress.  
***(List the reasons/examples – developmental milestones, academic attainment etc.)***
  4. 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.  
***(Insert any provision you say is needed above that which is ordinarily available)***

I therefore ask the Tribunal to:

- A. Find that my son/daughter has/may have special educational needs
- B. Find that my son/daughter requires/may require special educational provision to be secured through an Education, Health and Care Plan
- C. To hold that my son/daughter requires an EHC needs assessment; to fund further investigation in order to fully identify his/her needs and therefore exactly what special educational provision he/she requires
- D. Find that the LA are in breach of their statutory duty to provide an EHC needs assessment of my son/daughter as indicated in Section 36(8) of the Children and Families Act 2014.
- E. Order the LA to carry out a statutory assessment of the SEN of my son/daughter, **[name]**.

## Evidence

You will need to provide evidence to support your argument that you/your child needs an EHC needs assessment. 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 the support they currently receive, 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.

### Legal Framework: The SEND Code of Practice 0-25 (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. 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 being taken by the early years provider, school or post-16 institution to meet the child or young person's SEN
- 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”

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.

## Where do I start?

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.

## Sources of evidence about “needs” and “provision”

The following can be useful sources of written evidence:

- Written statements from teachers: ask them to be precise and to quantify exactly what is needed for your child. Evidence this with copies of current and previous pupil passports/ IEPs etc.
- Information from the school/college record. Including results of both internal and national tests and assessments, communication with school (home-school diaries, emails, texts, letters), meeting minutes, current and previous pupil passports/ IEPs, pupil progress reports, incident reports, after school clubs, school trip risk assessments, educational psychologist report. If behaviour is a difficulty, the disciplinary record (exclusion letters, part time timetable risk assessments, attendance records) 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. **You have a legal right to a copy of this information.** Put your request in writing to the chair of the governing body at the school or the equivalent for a college (IPSEA have a template letter on p16 here):  
<https://www.ipsea.org.uk/Handlers/Download.ashx?IDMF=b006465c-2b25-4e28-839b-6417bfbb2da0>
- Written statements from others involved with you or your child e.g. social workers, youth workers, carers etc.
- 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.
- Information from voluntary groups relating to the learning difficulty/disability concerned.

- References to relevant research and findings and extracts from books, magazines etc. Beware of relying on this too much as the best evidence is going to be primary evidence about the child/ young person.
- 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 you/your child, written via a third party when necessary.
- Your/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. Examples of the child/ young person's work overtime. 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.

## Professional reports

Key evidence about the child or young person's SEN and the provisions required to meet that SEN will usually be found in reports from professionals. Useful sources of expert opinion include:

- **The Health Service** e.g. speech and language therapist, occupational therapist, clinical psychologist, CAMHS, paediatrician, GPs, medical professionals, physiotherapists, psychiatrists etc. may write a report. Get your GP to refer you.
- Privately obtained reports from **independent professionals**. Reports from educational psychologists can be extremely important to your case. 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.

**IPSEA** have issued a '**refusal to assess pack**' which provides further detailed information about making your appeal, filling in the form, providing evidence etc:

<https://www.ipsea.org.uk/Handlers/Download.ashx?IDMF=b006465c-2b25-4e28-839b-6417bfbb2da0>

## Appealing a Refusal to Assess decision: Summary

The LA must secure an EHC needs assessment if the child or young person **has or may have SEN** and that it *may* be necessary for special educational provision to be made in accordance with an EHC Plan.

**SEN** = A learning difficulty and/or disability which requires Special Educational Provision (SEP):

- **Significantly greater difficulty learning** than majority of others the same age, or
- Impairment has a **substantial long-term adverse effect** on carrying out day-to-day activities, including the making use of generally provided facilities in mainstream institutions.

- Make a note of your **appeal deadline** as soon as you receive it
  - **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 SEND35a 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 information
  - **Include evidence** from professional reports if you have them, and statements about **needs/difficulties** and provisions needed
  - **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:
- You do not need a formal diagnosis. It is based on the presenting needs. Allow the evidence you do have to speak for these.**

The LA 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 being taken** by the early years provider, school or post-16 institution to meet the child or young person's SEN
- 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

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## Refusal to Assess 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 SEND35a 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