

SEND Tribunal - update September 2021



Delivered by:

Tayntons
SOLICITORS

Statutory Test

Children and Families Act 2014 s36(8)

LA must carry out an EHC needs assessment if,

- (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.

Decision to issue an EHCP

Children and Families Act 2014 s37(1)

LA must issue an EHC plan when it is “necessary” for Special Educational Provision to be made for the child or young person in accordance with an EHC Plan

Special Educational Provision

Children and Families Act 2014 s21

(1) For a child aged two or more or a young person, means education or training provision that is additional to, or different from, that made generally for others of the same age in –

- (a) mainstream schools in England,
- (b) mainstream nursery schools in England,
- (c) mainstream post-16 institutions in England,
- (d) places in England at which relevant early years education is provided.

Special Educational Provision

Children and Families Act 2014 s21

(2) “Special educational provision”, for a child aged under two, means educational provision of any kind.

Guidance – content of EHCP

SEND Code of Practice January 2015 – paragraph 9.61

“EHC plans should be clear, concise, understandable and accessible to parents, young people, providers and practitioners. They should be written so they can be understood by professionals in any local authority.”

Placement – Section 1

Children and Families Act 2014 s38 and s39

Where a parent or YP requests a placement under Section 38 at:-

- a. a maintained school – mainstream or special;
- b. a maintained nursery school;
- c. an Academy – mainstream or special;
- d. an institution in the FE sector in England;
- e. a non-maintained special school;
- f. an institution approved by the Secretary of State under Section 41 (independent special schools and special post-16 institutions, approved).

Placement – Section I

Children and Families Act 2014 s38 and s39

The parent or YP's requested placement must be named unless one of the exceptions in Section 39 apply, namely:-

- a. the school or institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or YP, or
- b. the attendance of the child or YP at the requested school or other institution would be incompatible with –
 - (i) the provision of efficient education for others, or
 - (ii) the efficient use of resources.

The National Trial

Extended the powers of the Special Educational Needs and Disability Tribunal under The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017.

Previously the Tribunal could only order amendments to Sections B, F and I of a child or young person's EHCP. From April 2018, where a parent or young person opted to have their appeal registered under The National Trial, this enabled the Tribunal to also make non-binding recommendations about health and social care issues related to the child or young person's SEN in relation to Sections C, D, G and H of an EHCP.

The National Trial came to an end on 31 August 2021.

2021 – Consultation Process

On 20th July 2021, following a consultation process with stakeholders and having evaluated the impact of the National Trial, the Department for Education confirmed that the extended powers given to the Special Educational Needs and Disability Tribunal to make non-binding recommendations about health and social care aspects.

It is important to note that an appeal to the SEND Tribunal cannot be brought solely in relation to either the social care or health issues in a case. All appeals before the SEND Tribunal must include a challenge to the educational aspects.

SEND Tribunal Recommendations

Recommendations in relation to social care and health issues are non – binding but should not be dismissed without due consideration.

Where a social care team or health commissioning body decides not to follow the SEND Tribunal's recommendations, they should provide reasons within 5 weeks of the Tribunal's decision being issued.

NOTE: A Tribunal decision in relation to the Educational aspects of an appeal is binding and can only be challenged by way of an appeal on a point of law to the Upper Tier Tribunal, if permission to appeal is granted.

When recommendations are not followed -

If parents or the young person are unhappy with the refusal to comply with SEND Tribunal's recommendations they may:-

- have grounds for Judicial Review, or
- consider pursuing a complaint concerning social care to the LA initially and

then to the Local Government Ombudsman or if the matter concerns health issues the complaint would be made to the service provider and then to the Parliamentary and Health Service Ombudsman.