



Department  
for Education

# **SEND Tribunal: single route of redress national trial**

**Guidance for local authorities, health  
commissioners, parents and young  
people**

**November 2019**

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# 1 Introduction

This guide is for all local authorities (LAs), health commissioning bodies and parents and young people in England, who from the 3 April 2018 will be taking part in a national trial to extend the powers of the First-tier Tribunal Special Educational Needs and Disability (SEND) ('the Tribunal') to make non-binding recommendations about health and social care aspects of Education, Health and Care (EHC) plans. It explains the new powers conferred on the Tribunal by the [Special Educational Needs and Disability \(First-tier Tribunal Recommendations Power\) Regulations 2017](#) ('the Regulations') and the associated duties on LAs and health commissioning bodies. The guidance can also be used to inform advice that Information, Advice and Support services and others provide to parents and young people.

## Aims of the national trial

Parents and young people are able to appeal to the SEND Tribunal about decisions concerning Education, Health and Care (EHC) needs assessments and plans. To date, they have only been able to appeal about the special educational needs and provision sections and the placement section of EHC plans.

The trial gives parents and young people new rights to request recommendations about the health and social care needs and provision specified in EHC plans, in addition to the educational aspects, when making a SEND appeal. This applies for all SEND appeals apart from those that are only about carrying out an EHC needs assessment. The trial gives the Tribunal new powers to make non-binding recommendations on the health and social care aspects of EHC plans. It gives parents and young people the opportunity to raise all their concerns about an EHC plan in one place.

The policy aims of the national trial are to:

- create a more holistic, person-centred view of the child or young person's needs at the Tribunal
- bring appeal rights in line with the wider remit of EHC plans
- encourage joint working between education, health and social care commissioners
  - bring about positive benefits to children, young people and parents

## Timing

The trial will start from 3 April 2018 and run until August 2020. This means that recommendations about health and social care needs and/or provision can be made only on LA decisions and EHC plans issued or amended from 3 April 2018.

An evaluation will run alongside the trial and the evaluators (IFF Research and Belmana) will be in contact with LAs, health commissioning bodies, parents and young people in

England to ask them about their experiences of the trial. All personal information will be kept confidential, and the evaluation findings will be used to inform a decision on whether the new Tribunal recommendation powers should be continued after the trial. More information about the evaluation is provided in Section 6.

## The SEND reforms

On 1 September 2014, Part 3 of the Children and Families Act 2014 ('the Act') introduced important changes to the system of support for children and young people who have special educational needs or a disability (SEND), including:

- the replacement of statements of SEN and Learning Difficulty Assessments (LDAs) with person-centred EHC needs assessments and plans that should be prepared with the full involvement of an LA's social care service, local health care providers, children, young people and parents
- the continuation of a system of mediation for disagreements between parents or young people and the LA or health commissioning body about EHC needs assessments or plans
- the requirement for parents and young people to consult a mediation adviser to see if mediation might be a suitable way to resolve a disagreement about an EHC needs assessment or plan (in some circumstances) before registering an appeal with the Tribunal
- the continued requirement for LAs to make disagreement resolution services available to parents and young people to resolve disagreements about any aspect of SEN provision. Disagreements about health and social care aspects of EHC plans can also be resolved through disagreement resolution services.

The reforms implement an approach which seeks to join up help across education, health and care from birth to age 25 and ensure that children and young people's needs are identified early, with children and young people with SEND and their parents or carers fully involved in decisions about their support and what they want to achieve, and with a strong focus on outcomes. Further detail on the reforms can be found in the [0-25 SEND Code of Practice](#).

## The recommendations pilot

During the development of the Act, Government considered whether the Tribunal should be given the power to make decisions on the health and social care sections of EHC plans, to take a more holistic view of the needs of the child/young person and reduce burdens on parents who may need to access three separate routes of redress.

The Government commissioned the Centre for Educational Development, Appraisal and Research (CEDAR) at the University of Warwick to carry out a review, as stipulated under Section 79 of the Children and Families Act 2014, of how effectively disagreements

about the exercise of functions under Part 3 of the Act are being resolved. As part of this review, the Government piloted what effect it would have if the Tribunal were given the power to consider the health and social care needs and provisions of the plan and to make non-binding recommendations where appropriate. The review and government response, published in March 2017, can be found [here](#).

The pilot was undertaken on a voluntary basis by 17 LAs over 15 months, from June 2015 to August 2016. There were 30 pilot appeals, 9 of which went on to a hearing. The evaluation showed that:

- health and social care disagreements were resolved and the extended powers acted as a 'lever' to promote resolution prior to the hearing
- the extended powers stimulated more joint working across education, health and social care and increased stakeholders' knowledge and understanding of the system
- most stakeholders, including parents and LAs, supported the principle of a single route of redress

However, with only 30 appeals taking place during the pilot, there was not enough evidence to make a robust assessment of its impact with regard to health and social care responsiveness to recommendations or wider implications for the sectors. It is on this basis that the national trial has been put in place to gather sufficient evidence on a larger scale.

## Principles for resolving disagreements

Chapter 11 of the [SEND Code of Practice](#) sets out the following general principles for resolving disagreements, which also have relevance here:

- Decisions about provision for children and young people with SEN or disabilities should be made jointly by providers, parents, and children and young people themselves, taking a person-centred approach, with the views of children, young people and parents taken into account when those decisions are made
- Relations between education, health and social care services and parents and young people should be marked by open communication so that parents and young people know where they are in the decision-making process, their knowledge and experience can be used to support good decision-making and they know the reasons why decisions have been made
- Parents and young people should be given information and, where necessary, support so that they can take part in decision-making and complaints processes. Support can be provided by statutory or voluntary organisations
- LAs must make known to parents and young people the possibility of resolving disagreements across education, health and social care through disagreement

resolution and mediation procedures and education, health and social care providers should have complaints procedures which, along with details about appealing to the Tribunal, should be made known to parents and young people through an LA-funded statutory SEND Information, Advice and Support Service.

## 2 Requirements and expectations for local authorities and health commissioners

The Regulations outlining the Tribunal's additional powers when determining appeals and the associated duties on LAs and health commissioners can be found at: [Special Educational Needs and Disability \(First-tier Tribunal Recommendations Power\) Regulations 2017](#) (the 'Recommendations Regulations'). These sit alongside the [Tribunal Procedure \(First-tier Tribunal\) \(Health, Education and Social Care Chamber\) Rules 2008](#) (the 'Tribunal Procedure Rules').

### Powers of the Tribunal to make recommendations

The Regulations explain that the Tribunal can make non-binding recommendations on:

- the health and social care needs specified in EHC plans
- the health and social care provision specified in EHC plans related to the learning difficulties or disabilities that result in the child or young person having SEN
- the social care provision specified in EHC plans that is made under Section 2 of the Chronically Sick and Disabled Persons Act 1970

The Regulations enable the Tribunal to make a recommendation about health and social care needs or provision as part of an appeal by a parent or young person relating to:

- a decision by the LA not to issue an EHC plan
- a decision by the LA not to carry out a re-assessment for a child/young person who has an EHC plan
- a decision by the LA not to amend an EHC plan following a review or reassessment
- a decision by the LA to cease to maintain an EHC plan
- the description of the child/young person's special educational needs in an EHC plan
- the special educational provision specified in an EHC plan
- the school or other educational institution named in an EHC plan

For an appeal against a refusal to issue an EHC plan, if the Tribunal orders a plan to be made, it has the power to recommend that health and social care needs and provision be specified when the plan is drawn up.

Where health and social care needs and/or provision are not included in the plan, the Tribunal has the power to recommend they be specified in the plan.

Where health and social care needs and/or provision are included in the plan, the Tribunal has the power to recommend that the need or provision be amended.



It should be noted that the Tribunal will only make a recommendation about health and social care needs or provision related to a child or young person's learning difficulties or disabilities which result in them having special educational needs, with the exception of any social care provision made under Section 2 of the Chronically Sick and Disabled Persons Act 1970. The Tribunal will not make decisions relating to conflicting clinical diagnosis from medical professionals concerning health needs or health provision.

## Requirements for local authority SEND teams

The following outlines the requirements LA SEND teams must follow to support the trial:

- LAs **must** notify parents and young people of the Tribunal's power to make nonbinding recommendations on the health and social care needs or provision specified in EHC plans (see Regulation 8 of the Recommendations Regulations), when they:
  - notify a parent/young person of a decision not to issue an EHC plan
  - send a final version of an EHC plan to a parent/young person
  - send an amended version of an EHC plan to a parent/young person
  - notify a parent/young person of a decision not to carry out a re-assessment where an EHC plan already exists
  - notify a parent/young person of a decision not to amend an EHC plan following a review or re-assessment
  - notify a parent/young person of a decision to cease to maintain an EHC plan
- LAs **must** include information on the extended right to appeal in their Local Offers (see Schedule 2 of the Special Educational Needs and Disability Regulations 2014).
- If requested by the Tribunal, LAs **must** provide evidence from the health and social care bodies in response to the issues raised, within the timeframe specified, and as necessary can seek permission to bring additional witnesses to the hearing (see the Tribunal Procedure Rules).
- LAs **must** send the health and social care commissioners' responses to the recommendation to the evaluator at [SENDletters@IFFResearch.com](mailto:SENDletters@IFFResearch.com) within one week of receiving it (see Regulations 6 and 7 of the Recommendations Regulations).

## Additional expectations

Taking into consideration the above requirements, LAs will need to update their local systems, policies and procedures to comply. This will include but not be limited to:

- updating decision letters to include the relevant information on the trial and the rights parents and young people have, including the availability of [information, advice and support services](#).
- updating their Local Offers to include co-produced information on the trial.
- ensuring Information, Advice and Support Services (IASS) can provide parents and young people with information and guidance about the new rights
- training staff and disseminating key information and guidance to those involved in the process, including high level training to ensure that those responsible for decisions are fully aware of the legal duties when making decisions
- ensuring local Clinical Commissioning Groups (CCGs) and children and adult social care leaders are aware of the trial and the implications
- identifying lead contacts for mediation and appeals for:
  - CCGs (each CCG, where an LA is covered by more than one)
  - children social care services, and ○ adult social care services

Template wording, forms and information on the support available to help LAs prepare for the trial can be found in the [toolkit](#) and Section 4 of this guide.

## Requirements for health and local authority social care commissioners

The following outlines the requirements health and LA social care commissioners must follow to support the trial:

- Health and LA social care commissioners **must** respond to any request for information and evidence from the Tribunal within the timeframe specified (see the Tribunal Procedure Rules).
- If required, health and LA social care commissioners **must** send a witness from the health and/or social care bodies to attend the hearing to give oral evidence (see the Tribunal Procedure Rules).
- Following the health and social care recommendations, the responsible health commissioning body and LA social care team **must** respond in writing, within 5 weeks from the date of the recommendation (or the date specified by the Tribunal, if different), to the parent or young person, and for health commissioners to the LA, to state what steps they have decided to take or to give reasons for any decision not to follow the recommendation(s).

## Additional expectations

Taking into consideration the above requirements, LA social care teams and health commissioners will need to update their local systems, policies and procedures to comply.

This will include but not be limited to:

- for health commissioners, ensuring CCGs are working together with specialist commissioning colleagues – the trial includes all health commissioning bodies
- for social care commissioners, ensuring both adult and children’s social care services are fully informed and prepared
- training staff and disseminating key information and guidance to those involved in the process
- considering local processes to ensure that there is a clear communication system and understanding of any previous learning points around complaints, Tribunal appeals and mediation.
- setting up arrangements to consider recommendations in detail, to draft clear and full evidence and to implement any recommendations agreed in a timely manner. • drafting responses to recommendation letters

### **3 The Tribunal appeals process**

As set out in Section 2 of this guide, parents and young people can ask the Tribunal to make non-binding recommendations concerning health and social care aspects of an EHC plan only as part of an appeal relating to:

- a decision by the LA not to issue an EHC plan
- a decision by the LA not to carry out a re-assessment for a child/young person who has an EHC plan
- a decision by the LA not to amend an EHC plan following a review or reassessment
- a decision by the LA to cease to maintain an EHC plan
- the description of the child/young person’s special educational needs in an EHC plan
- the special educational provision specified in an EHC plan
- the school or other educational institution named in an EHC plan

When a parent or young person is bringing an appeal on any of these grounds against an LA and also wants the Tribunal to make non-binding recommendations about the health and/or social care aspects of an EHC plan, they should follow the normal process for bringing an appeal to the Tribunal. Advice on making SEND appeals to the Tribunal is available from the [GOV.UK website](https://www.gov.uk).

## Mediation

When LAs issue a decision letter or send a final EHC plan or a final amended plan, they must tell the parent or young person that they can go to mediation about the education, health and social care aspects of the plan and give contact details of the mediation adviser, whom the parent or young person should contact if they want to go to mediation, alongside the contact details of someone acting on behalf of the LA.

Before parents and young people can register an appeal with the Tribunal, they must contact a mediation adviser within two months of the LA decision they wish to appeal and consider whether mediation might be a way to resolve their disagreement with the LA. If parents and young people want to appeal only about the school or other education institution named in the EHC plan or about the fact that a school or other institution has not been named, they do not have to contact a mediation adviser.

If parents and young people wish to pursue mediation they must inform the mediation adviser and LA of this fact alongside what the mediation issues are and whether they include disagreements about health provision. Parents and young people's right to appeal is not affected by entering into mediation. Mediation will take place within 30 days from when parents and young people inform the mediation adviser that they wish to pursue mediation. Once mediation is complete, or if parents and young people decide not to take up mediation, the mediator will issue a certificate within 3 days that will allow them to register an appeal with the Tribunal within 30 days.

Mediation is carried out by an independent and impartial mediator who has had no prior involvement in the case and who has no personal interest in its eventual outcome. The mediator will have knowledge of EHC plan procedures and will be trained in resolving disagreements and working with people to help them take part in mediation. Mediation can be used to resolve education, health and social care issues.

Mediation is generally successful – of the 1,886 mediation cases held during the 2016 calendar year, 75% of these were resolved without the need to appeal to the Tribunal that year<sup>1</sup>. CEDAR's review of disagreement resolution<sup>2</sup> also found that mediation generates overall cost savings, when LA, Tribunal and parental costs are taken into consideration. The Department for Education is providing support to the sector to introduce SEND mediation standards and an accreditation system to increase confidence in, and quality of, mediation.

### Mediation for health and social care issues

Parents and young people can go to mediation about the health and social care elements of an EHC plan, but this is not compulsory. Parents and young people can request

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<sup>1</sup> [Statements of SEN and EHC plans: England, 2017](#)

<sup>2</sup> [Review of arrangements for disagreement resolution \(SEND\), 2017, Centre for Educational Development, Appraisal and Research \(CEDAR\), University of Warwick](#)

recommendations about health and social care issues without having to receive mediation advice or attend mediation about those issues, provided there is also an education issue about which they are appealing.

If mediation resolves the appealable educational issues, the parent or young person will not be able to ask the Tribunal to make recommendations on any health and/or social care aspects of the EHC plan. However, mediation provides an opportunity for people to resolve disagreements and it can be completed more quickly than an appeal. It does not affect the right of parents and young people to make an appeal about educational aspects of EHC plans, and some aspects of the disagreement can go to appeal even when other aspects are resolved. Commissioners and parents and young people are encouraged to pursue this route first for health, social care and education disagreements to see if an agreement can be reached with all parties involved.

If the parent wishes to mediate about education or social care, the LA must arrange the mediation through the mediation provider (even if the parent also wants to mediate about health). The health commissioning body or bodies must take part in the mediation arranged by the LA if the mediation is about the health element of the plan as well as either the education or social care parts of the plan.

The responsible health commissioning body must organise the mediation if the mediation is solely about health and must take part in it. In this situation, the health commissioning body (rather than the LA) must pay the reasonable expenses of the parent or young person.

## **Tribunal orders and recommendations**

The Tribunal has powers under the Children and Families Act 2014 to make certain decisions in relation to appeals. The Tribunal can dismiss the appeal or order the LA to carry out an assessment, make and maintain an EHC plan or maintain a plan with amendments. The Tribunal can also order the LA to reconsider or correct a weakness in the plan, for example, where necessary information is missing. When the Tribunal orders the LA to reconsider the special educational provision in an EHC plan, the Tribunal can also consider whether the education and training outcomes specified are sufficiently ambitious for the child or young person. LAs have time limits within which to comply with decisions of the Tribunal (see the [Special Educational Needs Regulations 2014](#)).

Under the national trial, the Tribunal will also be able to make non-binding recommendations concerning:

- the health and social care needs to be specified in EHC plans
- the health and social care provision which is related to the learning difficulties or disabilities that result in the child or young person having SEN
- the social care provision that is made under Section 2 of the Chronically Sick and Disabled Persons Act 1970

If the Tribunal orders a plan to be made it has the power to recommend that, when drawing up the plan, health and/or social care needs and provision are specified. Where health and/or social care needs or provision is not included in the plan the Tribunal has the power to recommend it be specified in the plan. Where health and/or social care needs or provision is included in the plan the Tribunal has the power to recommend that the need and provision be amended.

Although any recommendations made by the Tribunal on health and social care elements of an EHC plan are non-binding and there is no requirement to follow them, they should not be ignored or rejected without careful consideration. Any reasons for not following them must be explained and set out in writing to the parent or young person.

It is important to be aware that, should an LA or responsible health commissioning body decide not to follow the recommendations of the Tribunal, parents and young people can complain to the Ombudsmen or seek to have the decision judicially reviewed. Further information on these and other options for further redress is set out in Section 5 of this guide.

## **Registering an appeal with the Tribunal**

Parents and young people have either one month to register a SEN appeal with the Tribunal from the date of a certificate which has been issued following mediation or the parent or young person being given mediation information, or two months from the date when the LA sent the notice containing an appealable decision, whichever is the later. In some cases parents and young people will not register the appeal within the two-month limit. Where it is fair and just to do so the Tribunal has the power to use its discretion to accept appeals outside the two-month time limit.

If a parent or young person wishes to appeal against an LA decision and wishes to ask the Tribunal to make non-binding recommendations on health and/or social care aspects of an EHC plan, they should follow the normal process for bringing an appeal to the Tribunal, including considering mediation and using the appeal form found on the [GOV.UK website](https://www.gov.uk). When registering an appeal, they should also tick the box on the appeal form relating to a health and/or social care appeal.

When appealing to the Tribunal parents and young people must supply a copy of the decision that they are appealing against, the mediation certificate and the date when the LA's decision was made, or the date of the mediation certificate. The parent or young person who is appealing will be required to give the reasons why they are appealing. The reasons do not have to be lengthy or written in legal language but should explain why they disagree with the decision and should include information about any health or social care issues. Parents and young people have to send all relevant documents, such as copies of assessments, to the Tribunal.

Once the appeal is registered the LA will be sent a copy of the papers filed and will be given a date by which they must respond and asked to provide details of witnesses – this will apply to all parties. The parties will also be told of the approximate hearing date.

## The appeal timetable

The Tribunal has wide discretion to give case management directions (this often involves an informal telephone meeting) and set a timetable for appeals. The standard timetable that the Tribunal will usually follow is the same as that for non-trial appeals and is:

- Week 1 – the appeal is registered and the notice of appeal is sent. There will be a case management review of the appeal to:
  - identify the issues, including the educational issues and any health and social care issues
  - identify the evidence required
  - clarify the recommendations being sought
- Week 6 – the LA must send in their response, including the response from health and social care commissioners
- Week 7 – final evidence deadline
- Week 8 – telephone case management of appeal (if required)
- Week 10 – evidence bundle produced by the LA and sent out to the Tribunal and all parties
- Week 12 – the hearing takes place (if not resolved by case management)
- Week 14 – the decision and recommendation (if applicable) is issued

## The Tribunal hearing

For a trial appeal, the LA will be required to provide evidence from the health and/or social care commissioners. The Tribunal's Procedure Rules give the Tribunal discretion to give case management directions in each case, including on the number of witnesses. The Tribunal has limited the number of witnesses who can attend the hearing to three for each party, and careful thought should be given to the identification of the witnesses who are required at the hearing. As necessary, LAs will be able to request an additional witness from the health commissioning body or from social care to give evidence at any hearing (i.e. four, rather than the three witnesses usually allowed by the Tribunal), as will the parent or young person who has requested the recommendation. Where a fourth witness is required because of health or social care issues, then the party seeking to bring an additional witness will need to make an application to the Tribunal for permission to bring them explaining why their attendance is required.

The length of the hearing will depend on the number and complexity of issues to be decided and the number of witnesses who give oral evidence (if any). Hearings are heard



throughout the country at Her Majesty's Courts and Tribunals Service buildings. The Tribunal will try to hold hearings as close to where the parent or young person lives as possible, with at most two hours' travelling distance.

Appeals are heard by a judge and a panel of Tribunal members who have been appointed because of their knowledge and experience of children and young people with SEND. Panel members for the trial will have a health and/or social care background and be trained in SEND law. The Tribunal has recruited and trained additional specialist health and social care members for this trial.

The LA will provide a bundle of papers for each of the panel members and the parent or young person, including any documents requested by the parent or young person.

The Tribunal seeks to ensure that the process of appealing is as user friendly as possible, and to avoid hearings that are overly legalistic or technical. It is the Tribunal's aim to ensure that a parent, young person, LA or health commissioner should not need to engage legal representation when appealing a decision. Parents and young people may find it helpful to have support from a voluntary organisation or friend at a hearing (see Section 4 on the support available).

## **Presenting evidence**

The Tribunal is revising professional witness guidance on how to present evidence effectively and guidance on producing bundles. Evidence from all professionals should clearly specify a child or young person's special educational, health or social care needs and the provision required to meet each of those needs. It should also identify the outcomes expected if that provision is put into place over a period of time. Specification means being clear what needs a child or young person has and quantifying and qualifying what provision they require, including who will deliver that provision, when, how often, for how long and the arrangements that should be in place to monitor its effectiveness.

Once an appeal is registered at the Tribunal, the LA will be required to respond to the issues raised and to present its evidence concerning the child or young person's special educational needs. The LA will also have to obtain and submit evidence relating to the social care and health issues about which the parent or young person has requested recommendations. LAs have a duty to obtain evidence during the assessment process and this can be used for this purpose.

Parties seeking to rely on professional witness evidence should obtain written reports or witness statements from them to submit to the other party and to the Tribunal explaining their evidence. It may then be possible for the evidence to be agreed and for the attendance of that witness at the hearing to be avoided. Where evidence is in dispute, it is likely that it will be necessary for the witness to attend the hearing to answer questions arising from their evidence by the other party and the Tribunal panel.



The Tribunal has extensive powers to direct the production of evidence by the parties and by third parties where they consider it necessary, and powers to direct that existing evidence be supplemented or its adequacy improved. It is therefore important to ensure that reports prepared during the assessment process are sufficiently detailed and specific. The Tribunal can also issue witness summonses to require the attendance of witnesses who have indicated to the parties that they will not attend the hearing otherwise.

In some circumstances, special arrangements can be made for the presentation of evidence by telephone, Skype, video conference or recorded video clips where the attendance of the witness is problematic unless these special arrangements are made.

## **Communicating the Tribunal recommendations**

The Tribunal must send its decision, including any recommendations relating to health and social care, to the LA and parent or young person who made the appeal. The Tribunal must also send a copy of any recommendations it makes to the relevant health commissioning body if it includes any recommendations on health issues, and may also send a copy of the full decision.

## **Responding to recommendations**

Although any recommendations made by the Tribunal on health and social care elements of an EHC plan are non-binding and there is no requirement to follow them, the LA and/or responsible health commissioning body are generally expected to follow them. They are recommendations made by a specialist Tribunal and should not be ignored or rejected without careful consideration. Any reasons for not taking them forward must be explained and set out in writing as explained below.

When the Tribunal makes recommendations about health or social care needs or provision, the responsible health commissioning body or LA social care team must respond in writing to the parent or young person within five weeks of the date of the recommendation, unless the Tribunal imposes a different time limit (see Regulations 6 and 7). If a health commissioning body is responding to a recommendation about health provision in an EHC plan, it must also send a copy of its response to the LA SEND team. Depending on the complexity of the case and the issues being addressed, the Tribunal has discretion to shorten or lengthen the five-week response time.

Responses must be in writing and state what steps the health commissioning body or LA social care commissioner has decided to take following consideration of the Tribunal's recommendations. If a decision has been taken not to follow all or part of the recommendations, the health commissioning body or LA social care commissioner must give sufficiently detailed reasons for that decision.

For the purposes of evaluating the trial, the LA SEND team must send a copy of the response to recommendation letter(s) to the evaluator at

[SENDletters@IFFResearch.com](mailto:SENDletters@IFFResearch.com). This will help the DfE to collate data about how the trial has worked in practice and will feed into any future decisions around its continuation and the nature of recommendations. The response to recommendation letters will be obtained by Ofsted and the Care Quality Commission for the purpose of their local area SEND inspections. Template letters are included as part of the [toolkit](#).

## **Mental Capacity**

Young people over compulsory school age have the right to appeal to the Tribunal, although there is nothing to stop them asking their parents, or others, to help them. However, some young people, and possibly some parents, will not have the mental capacity to bring an appeal to the Tribunal.

The Special Educational Needs and Disability Regulations 2014 specify that when the parent or young person is appealing to the Tribunal, a representative or parent has to act on behalf of a young person who lacks capacity or a representative if the child or young person's parent lacks capacity. In these cases, the LA and Tribunal must consider the views of the representative instead of the parent or young person.

Under the Children and Families Act 2014, lacking mental capacity has the same meaning as in the Mental Capacity Act (MCA) 2005. A Code of Practice provides guidance on how the MCA works on a day-to-day basis. Professionals and anyone who is paid for the work they do with someone who lacks capacity has a duty to 'have regard' to that Code. The Code is available from the [GOV.UK website](#).

## 4 Support and further information

### Support for families

#### Information, Advice and Support Services (IASS)

If parents or young people require further information, support or advice, they should contact their local Information, Advice and Support Service (IASS), which can provide impartial advice about resolving disagreements, appealing to the Tribunal, the law on SEN, local SEN arrangements and support for their child's needs. The service can also help parents and young people prepare for meetings with the school, LA or other agencies including the Tribunal. Parents and young people can find the contact details for their local service through this [weblink](#).

There is also a separate [website](#) for children and young people who have SEND, to help them understand what rights they have for accessing information, advice and support across education, health and social care. The website also contains full contact details for Information, Advice and Support Services across England.

IASS will specifically be able to support parents and young people during the trial by:

- providing information on the trial and the rights of parents and young people
- providing support with managing appeals, which can include preparing cases and attendance at hearings
- sign-posting to mediation and further support

#### Tribunal service

Advice on making SEND appeals to the Tribunal is available from the [GOV.UK website](#).

Further guidance from the Tribunal can be found in the [toolkit](#).

#### Local Offer

All LAs in England are required to publish details in their Local Offers notifying parents and young people of their right to appeal a decision of the LA to the Tribunal and this includes their extended rights as part of the single route of redress national trial. Your LA's Local Offer will contain further information, including links to other organisations that can support parents and young people, and can be found [here](#).

#### Further support

There are a range of other voluntary sector organisations that can help parents and young people with preparing for and attending the Tribunal, including IPSEA, SOS!SEN

and the National Autistic Society. Parents and young people should contact their local IASS to find out more.

## **Online resources**

Key information and resources will be shared as the trial progresses and will be made available as part of the [toolkit](#).

## **Support for LA SEND teams, health and LA social care commissioners**

Mott MacDonald are the trial facilitators and will be on hand to support SEND, health and social care commissioners throughout the trial.

The support options available are as follows:

### **Helpdesk**

A helpdesk is available to assist with queries in relation to the trial. The helpdesk can be reached via email or telephone. Details are as follows:

Telephone: 0207 651 0308

Email: [SENDDeliverySupport@mottmac.com](mailto:SENDDeliverySupport@mottmac.com).

### **Newsletter**

A regular newsletter will be issued to interested parties who sign up. It will include developments across the trial and any key learning from other areas and will have input from key partners. To sign up to this newsletter, please contact [SENDDeliverySupport@mottmac.com](mailto:SENDDeliverySupport@mottmac.com).

### **Advisers**

The SEND advisers will provide on-going contact with LAs over specific trial queries. They will also act as a conduit for information exchange and problem-solving between DfE and LAs.

Each link SEND adviser will be available as a second opinion on the necessary LA documentation – letters, Local Offers, information leaflets.

### **NHS England**

Local SEND Leads, with support from the National SEND Lead, will be the main contact for health queries and act as a conduit for information exchange to the Department of

Health. Please contact [ENGLAND.CCNSENDBoard@nhs.net](mailto:ENGLAND.CCNSENDBoard@nhs.net) to find out who your NHS England SEND Local lead is and for further information.

## Toolkit and online resources

Key information and resources will be shared prior to the start of the trial and as the trial progresses and will be made available as part of the [toolkit](#).

This will include further guidance, the relevant Regulations, Local Offer and decision letter templates, forms, a regularly updated FAQ document and expenses guidance.

## Regional training events for local areas

There were 12 regional events in January/February 2018 for senior managers from LA SEND and social care teams and health. A regional NNPCF representative, Ofsted representative and voluntary and community sector organisation representatives also attended. This was an opportunity for a question and answer session as well as presentations from the judiciary, SEND advisers and NHS regional leads, giving an overview and context for the trial and setting out the new duties and expectations on local areas and the support available. We expect attendees to disseminate the information to their teams and networks. The slides for the events are available in the [toolkit](#) alongside a recorded webinar.

The Department is planning further training events and webinars during the trial and information on these will be provided in due course.

## Funding

LAs and CCGs will be reimbursed for reasonable costs incurred in taking part in the trial. A grant will be awarded for SEND Tribunal trial activity up to the total value of £4,000 per case for the period of the trial. It is expected this will cover costs incurred in relation to:

### LA SEND Team

- Informing the social care team and health commissioning body of the appeal and request for recommendations and collecting evidence from the social care team and health commissioning body to contribute to the bundle of evidence
- The additional costs related to attending an extended trial hearing
- Forwarding response to recommendation letters to the evaluators at [SENDletters@IFFResearch.com](mailto:SENDletters@IFFResearch.com)

## Social care and health commissioners

- Gathering evidence, creating an outline argument, sending evidence to the LA and any case management activity
- Sending a witness to a trial hearing
- Responding to parents (and the LA) about recommendations from the Tribunal

## How to claim

LAs can submit a monthly expenses form via email to Mott MacDonald ([SENDDeliverySupport@mottmac.com](mailto:SENDDeliverySupport@mottmac.com)) to receive this funding. They will need to sign the grant funding agreement and set out the costs incurred against the trial activity set out above, including costs incurred by the health commissioning body and social care team. The LA must provide available evidence to explain these costs and gather sufficient additional evidence from the health commissioning body and social care team.

The expenses form will be processed by Mott MacDonald and paid on a monthly basis by the DfE. It will be LAs' responsibility to transfer the funding to the health commissioners.

Expenses forms will be made available as part of the [toolkit](#) or by request from [SENDDeliverySupport@mottmac.com](mailto:SENDDeliverySupport@mottmac.com)

Further guidance will also be available as part of the [toolkit](#) including:

- how to complete an expenses claim form
- what is in and out of scope of the funding agreement
- the grant funding agreement
- new time limits to submit a claim

## 5 Implications of not following recommendations

Although any recommendations made by the Tribunal on health and social care elements of an EHC plan are non-binding and there is no requirement to follow them, the LA and/or responsible health commissioning body are generally expected to follow them. They are recommendations made by a specialist Tribunal and should not be ignored or rejected without careful consideration. Any reasons for not following them must be explained in sufficient detail and set out in writing in the response to recommendation letters.

It is important to be aware that, should an LA or responsible health commissioning body decide not to follow the recommendations of the Tribunal, parents and young people can use a range of alternative routes of complaint, including complaining to the Ombudsmen or seeking to have the decision judicially reviewed. Further information on each of these options is included below.

If there has been a significant change in circumstances relevant to the recommendations made by the Tribunal since the decision was made, parents and young people may request a review on that basis pursuant to Rule 48 of the Tribunal Procedure Rules 2008. Additionally, the Tribunal may be asked to review a decision and/or give permission to appeal to the Upper Tribunal if there is an error of law, and this will include errors relating to health and social care issues considered by the Tribunal.

## **Ofsted and the Care Quality Commission (CQC) local area inspections**

Ofsted and the CQC will be incorporating the national trial into their local area SEND inspections, which assess local areas to see how well they are fulfilling their responsibilities for children and young people with SEND. Further details on the inspections and the published reports are available on the [GOV.UK website](https://www.gov.uk).

Ofsted and the CQC will obtain the responses to recommendation letters from the local areas. Ofsted and CQC inspectors will review the health and social care commissioners' response in the recommendation letters as part of their pre-inspection analysis. On inspection, they will consider local area leaders' responses to the recommendations during meetings that focus on First-tier Tribunals and joint working more generally.

## **Other routes of complaint and redress**

The national trial lies alongside other health and social care complaint routes. Disagreements about SEND that are not directly related to those parts of an EHC plan that can be appealed to the Tribunal can be resolved via a number of local complaints procedures. Complaints about the way an LA or CCG has carried out its statutory duties can be made using the LA's or CCG's own statutory complaints procedure, and escalated to the Ombudsmen (either the Local Government and Social Care Ombudsman or the Parliamentary and Health Service Ombudsman, as appropriate) if necessary. There is also a range of other avenues for complaint in the NHS, depending on which part of the service the complaint refers to.

Going to the Tribunal about the health and social care elements of an EHC plan does not prevent a parent or young person also complaining about other aspects of the disagreement through other complaint procedures. Parents and young people should seek advice about the different routes available, including from Information, Advice and Support Services.

The interactions between the different complaint routes will be within the scope of the evaluation of the trial.

## **NHS Complaints**

The NHS complaints arrangements cover the health services which a child or young person receives under an EHC plan. A complaint may be made to a service provider (for example, the NHS Hospital Trust) where there are concerns about the service provided, or to the CCG where there is a concern about the way in which a service is commissioned or provided, and this might include concerns about the appropriateness of the services in an EHC plan.

Local Healthwatch has a statutory role to provide patients with advice on how to take forward a complaint, or resolve an issue (local Healthwatch may also notify Healthwatch England of concerns which need to be considered at a national level). Contact details for local Healthwatch are available on the [Healthwatch for England website](#) and should also be made available in LAs' Local Offers. Each CCG will have available information about its complaints arrangements and will deal with complaints about any of its functions. Providers of NHS services will have patient advice and liaison services (PALS), and handle complaints about the services they provide. Support in making a complaint about health services can be provided by PALS and also the NHS Complaints Advocacy Services (each LA will have details of services in their own local areas).

If a complainant is dissatisfied with the way in which the NHS has dealt with their complaint, they can contact the Parliamentary and Health Service Ombudsman (PHSO), though usually the NHS will need to have had a chance to resolve it locally.

## **Complaints about social services provision**

The Children Act 1989 promotes the welfare of children and young people and places a duty on children's social care services to safeguard and protect children. Someone who is unhappy with the way in which they or their family have been treated by these services, including during EHC needs assessments and the drawing up of plans, has the right to make a formal complaint under the 'Local Authority Complaints Procedure'. They can write to either the Director of Children's Services or the Designated Complaints Officer for the LA concerned. Complaints about social care may also be made outside this procedure.

If the complainant is unhappy with the LA's response, they can request a panel hearing by writing to the LA within 28 days of the response. If the complainant remains dissatisfied with the handling of their complaint under the local procedures and thinks that an LA has treated them unfairly as a result of bad or inefficient management ('maladministration'), and that this has caused them injustice (such as loss, injury or upset), they can refer their complaint to the Local Government and Social Care Ombudsman (LGSCO).



## The Ombudsmen

The Ombudsmen take a different approach than the Tribunal – they do not investigate matters which can be appealed to the Tribunal (the merits of a decision which has been properly taken), including for health and social care cases under the trial, but do look at the decision-making process, the delivery of provision set out in EHC plans and any maladministration, including delays or failure to provide a service which has been agreed to be provided. For example, a parent or young person may wish to go to the Tribunal regarding the special educational provision specified in the EHC plan and also to the Ombudsman for a delay in issuing the plan or in delivering the provision set out in the plan.

The Local Government and Social Care Ombudsman (LGSCO) can investigate complaints about LAs, all adult social care providers (including care homes and home care agencies) and some other organisations providing local public services. It is the final stage for complaints. Any person wanting to raise a complaint with the LGSCO must have complained to the organisation involved first to give them a chance to put things right and must have gone through all stages of their local complaints procedure (unless the complaint is about an LA's refusal to agree to carry out recommendations made by the Tribunal in relation to social care – see below). Further information can be found on the [LGSCO's website](#).

The Parliamentary and Health Service Ombudsman (PHSO) can make final decisions on complaints that have not been resolved by the NHS in England and UK government departments and other UK public organisations. They look into complaints where someone believes there has been injustice or hardship because an organisation has not acted properly or has given a poor service and not put things right. The PHSO can consider complaints about a CCG's failure to adequately assess or implement the health component of an EHC plan. It can also investigate complaints about the commissioning and provision of healthcare. The PHSO will generally expect the individual to have completed the organisation's own complaints procedure first. Further information can be found on their [website](#).

The LGSCO and PHSO have an agreed procedure that if either Ombudsman receives a complaint where a potential joint working element is identified, with the relevant consents the case will be considered by the joint working team and a decision made on whether a joint investigation should proceed or whether the matters complained of are separable and should be dealt with by either PHSO or LGSCO. This agreement means that the complainant is not passed from pillar to post and re-signposted to the other Ombudsman scheme if they have approached the incorrect one or have not themselves appreciated the complaint crosses LA and health functions. It is intended to be as seamless as possible. The agreement allows for matters to be considered by the joint working assessment team if, for example, the LGSCO has started an investigation into an LA and then identify a health element to the complaint further down the line.

## **Complaints to the LGSCO relating to the extended powers of the Tribunal**

Parents and young people will be able to complain to the LGSCO about an LA failure to agree to implement a Tribunal recommendation or, where a recommendation has been agreed, a failure to deliver on the recommendation in respect of the social care aspects of EHC plans. Parents and young people will also be able to complain to the LGSCO if the LA takes longer than 5 weeks to reach a decision about whether or not to agree to implement a recommendation.

If the LA fails to agree to implement a Tribunal recommendation a complaint could be made to the LGSCO, who could recommend the LA take the decision again. If the LA refuses, or remakes the decision and the LGSCO considers the decision remains flawed, then the LGSCO may take action, including issuing a public report. If the LA remakes the decision and accepts the Tribunal's recommendations, the LGSCO could look to remedy the loss of provision if they are satisfied the provision would have been in place sooner had the LA accepted the Tribunal's recommendations (e.g. by recommending the LA awards compensation).

If an LA agrees to implement the Tribunal recommendations but then fails to do so, the LGSCO would look into any maladministration and loss of provision in the usual way.

The LGSCO will consider each case on its individual merits. It will exercise discretion to accept complaints about refusals to accept a non-binding recommendation at the point the decision is made – the LGSCO would not expect a complainant to go through the LA's own complaint procedures first. If there is delay in making the decision, the LGSCO would also exercise discretion to accept complaints early, before the decision is made.

If there has been an agreement to accept the recommendations and there is then delay or a failure to provide, the LGSCO would in most cases expect a complainant to complain to the LA in the first instance. This is in accordance with the way the LGSCO deals with binding decisions and is based on the premise that the LA is best placed to put things right at the earliest opportunity if things have gone wrong. However, if the LA delays in dealing with the complaint the LGSCO would then consider exercising discretion to accept the complaint.

## **Complaints to the PHSO relating to the extended powers of the Tribunal**

Parents and young people will be able to complain to the PHSO about a failure to agree to implement a non-binding tribunal recommendation or, where a non-binding recommendation has been agreed, a failure to deliver on the agreement in respect of the health aspects of EHC plans. The PHSO will consider each case on its individual merits and could recommend a range of remedies if they uphold a complaint, including apologies, reconsideration of decisions and financial remedies (for either loss of provision or emotional distress).

The PHSO will exercise discretion to accept complaints about refusals to accept a nonbinding recommendation at the point the decision is made – the PHSO would not expect a complainant to go through the CCG’s own complaint procedures first.

If there has been an agreement to accept the recommendations and there is then delay or a failure to provide, the PHSO would in most cases expect a complainant to complain to the CCG in the first instance.

## **Judicial Review**

Judicial review is the process used for holding public bodies to account. Judicial review is not just about actions and decisions by public bodies but also omissions. Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body.

Parents and young people can seek to have the health or social care commissioner’s response to the Tribunal recommendation decision judicially reviewed, depending on the reasons given for refusing to implement the Tribunal recommendations.

Other options for remedy should be exhausted where possible before an application for judicial review is brought, although any application for judicial review is time limited – the applicant has three months from the date of the relevant decision.

Parents and young people should get legal advice if they are considering applying for judicial review and may be eligible for legal aid.

Further information can be found on the [GOV.UK website](https://www.gov.uk).

## **6 Role of the research and evaluation team**

IFF Research and Belmana will be carrying out an independent evaluation of the trial, to inform a decision on whether the new Tribunal recommendation powers should be continued after the trial. The evaluation will run alongside the trial, from January 2018 to March 2021.

The evaluation aims to:

- assess whether the Tribunal’s extended powers were implemented as intended and whether they are deliverable and sustainable, including looking at economic data

- test the processes that were put in place for the extended powers, how satisfied commissioners, parents and young people are with these, and provide evidence that could underpin any decisions to change the process or policy
- provide indicative evidence of the impact of the extension of powers on children and young people with SEND and on commissioners and services
- assess any wider implications for the health and care sectors and the broader SEND system, and
- review whether there are lessons for improving the SEND system to prevent and resolve disagreements

IFF Research and Belmana will gather evidence from commissioners, parents and young people, and stakeholders working on SEND through:

- case studies of 12 local areas – evaluators will visit each area up to three times over the course of the trial to gather views and evidence on how the trial is working, whether it has led to any changes, what the costs are for commissioners, what the benefits are for commissioners, children and young people, and their families as well as wider views of the trial’s impacts (e.g. on joint working between commissioners).
- telephone interviews of appellants (parents and young people) or an online alternative – to gather their views and experiences of the Tribunal process, perceived outcomes for children and young people and the extent to which any recommendations were implemented as well as information on parental costs.
- an online annual survey of LAs and CCGs – this will be a short survey which seeks additional information on the costs (including the time spent preparing for Tribunal cases) and benefits of running the trial for SEND teams in LAs as well as health and social care commissioners.
- data from expense forms provided to DfE – this, in combination with the surveys and case studies, will allow an assessment of the costs incurred in the trial
- an analysis of responses to recommendation letters – to enable an analysis of why recommendations were/were not followed, and any patterns.
- an analysis of Tribunal and complaint data – to identify the main reasons for appeal and whether there is a reduction in use of alternative routes of redress.

It is important that the evaluation is based on robust evidence, and the evaluators are therefore strongly encouraging participation from parents and young people, and commissioners.

## **Participation from parents and young people**

It would be very helpful if parents and young people would agree to take part in an interview just after the appeal hearing (or when the appeal process has been completed, if earlier) and then a follow-up interview 6 months later. These interviews will help the evaluators to gather the views of parents and young people on the appeal process, as well as identify how recommendations have been implemented and what the (early) impact has been. The interviews will either be over the telephone or, if preferred, by filling in an online survey. This will be an important opportunity to help shape the future of this policy and to improve the process for other families.

To enable as much learning as possible about the effectiveness of these new rights, information from the Tribunal about the outcome of cases, as well as contact details of those who appeal, will be shared with the evaluators. This is so that the evaluators can keep track of the recommendations made and can get in touch with parents to find out about the effectiveness of the new rights and understand how satisfied parents and young people are with the process and outcome. Parents and young people that take part in the trial will receive a letter from the Tribunal explaining more about the evaluation and how their personal data will be stored confidentially and how it will be protected. The LA will also share the responses to recommendation letters with the evaluators, so that they can understand whether commissioners intend to follow the recommendations and any reasons for not doing so. This will inform a decision as to whether these new powers should be continued and on what basis.

## Participation from education, health and social care commissioners

It is important that education, health and social care commissioners participate in the evaluation in order to make the most accurate assessment of the costs and benefits of the trial, including understanding the impacts of the trial on joint working and any changes to provision.

Commissioners can participate in several strands of the evaluation:

- **Local areas agreeing to participate as case studies:** the evaluators will be visiting 12 local areas on up to three occasions during the trial, and speaking to SEND, health and social care commissioners, mediators, family support services representatives, and legal services representatives. The first visits will be in March-April 2018, with follow-up visits likely to be held in June 2019 and June 2020. Local areas will receive a short written summary of these case study visits. The evaluation report and good practice guide will draw on the findings from the case study visits (case study areas can remain anonymous if desired).
- **Responding to the annual online commissioners' survey (summer 2018 and summer 2019):** the survey will be sent to the SEND and social care commissioner for each LA and the health commissioner for each CCG. It will be a short, easy to

complete survey seeking information on additional costs linked to the trial and benefits of the trial. The evaluators will use the results of the survey, along with expenses data provided to DfE and through the case studies, to gain a picture of the costs associated with the trial.

- **Sense-checking costs data and assessments of the costs associated with different types of cases:** the evaluators will be developing cost case studies to identify the range of costs and benefits associated with different types of Tribunal case. They would welcome the opportunity to sense-check these with commissioners to make sure they are accurate.
- **Raising awareness of the evaluation among colleagues:** we are keen to ensure that the evaluation is based on wide-ranging and robust evidence, and welcome commissioner input at any stage during the evaluation.

## 7 Useful links and supporting resources

Links to key legislation and regulations:

[Special Educational Needs and Disability \(First-tier Tribunal Recommendations Power\) Regulations 2017](#)

[Tribunal Procedure \(First-tier Tribunal\) \(Health, Education and Social Care Chamber\) Rules 2008](#)

[0-25 Special Educational Needs and Disability Code of Practice](#)

[Children and Families Act 2014](#)

[Special Educational Needs and Disability Regulations 2014](#)

[Care Act 2014](#)

[Section 2 of the Chronically Sick and Disabled Persons Act 1970](#)

[Tribunals, Courts and Enforcement Act 2007](#)

Links to further information, advice and support:

[National trial toolkit](#)

[Information, Advice and Support Services](#)

Information on making an appeal on the [GOV.UK website](#)

## Contacts

The national trial is being facilitated on behalf of the Department by Mott MacDonald. If you have any questions relating to your participation in the trial, how the trial will operate

or the information in this guide, please get in touch with them using the contact details below.

Mott MacDonald: [SENDdeliverysupport@mottmac.com](mailto:SENDdeliverysupport@mottmac.com)

The evaluation of the trial is led by IFF Research working with Belmana. For any questions or to get involved please get in touch with them using the contact details below.

IFF Research: [SENDtrial@IFFResearch.com](mailto:SENDtrial@IFFResearch.com)

Telephone: 0800 035 6051.



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write to Information Policy Team, The National Archives, Kew, London, TW9 4DU

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