

11 Resolving disagreements

What this chapter covers

This chapter is primarily about resolving disagreements between parents or young people and early years providers, schools, colleges, local authorities or health commissioners. It:

- supports early resolution of disagreements at the local level
- explains the independent disagreement resolution arrangements which local authorities **must** make available for disagreements across special educational provision, and health and care provision in relation to Education, Health and Care (EHC) plans
- also explains the independent mediation arrangements which parents and young people can use before deciding whether to appeal to the First-tier Tribunal (Special Educational Needs (SEN) and Disability) ('the Tribunal') and for health and social care complaints in relation to EHC plans
- goes on to describe the conditions for appealing to the Tribunal or making disability discrimination claims. It finishes by describing other complaints procedures and health and social services complaints procedures

Relevant legislation

Primary

The Children and Families Act 2014 Sections 51 – 57 and 60

The Children Act 1989, section 26

The Education Act 1996, Section 496 and 497

The Tribunals, Courts and Enforcement Act 2007

The Equality Act 2010

The Legal Aid, Sentencing and Punishment of Offenders Act 2012

Regulations

The Special Educational Needs Regulations 2014

The Children Act 1989 Representations Procedure Regulations 2006

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

The Local Authority Social Services and National Health Service Complaints Regulations 2009

The Education (Independent School Standards) Regulations 2010

Principles for resolving disagreements

11.1 The guidance in this chapter on resolving disagreements is based on the following principles:

- 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
- local authorities **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 (such as those listed in paragraph iv. in the Introduction) should have complaints procedures which, along with details about appealing to the Tribunal, should be made known to parents and young people through the local authority's information, advice and support service (see Chapter 2, Impartial information, advice and support)

11.2 The following table gives a summary of the people and bodies which can consider complaints about decisions and provision in relation to children and young people with education, health and care needs. Text in the rest of this chapter gives more detail about who can deal with complaints. Parents and young people should use the complaints procedures of local providers (schools, colleges etc) before raising their complaints with others.

Local authority	✓ (LA maintained schools)		✓	✓	✓	✓ (about nonprovision of education & social care)			✓
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	Early years/ school/ college provision	Provision for individual CYP incl those with SEN but no plan	Decision not to assess	Undergoing EHC assessment	Decision not to issue EHC plan	EHC plan	Disability discrimination	Health complaints	Social care complaints
Local Government Ombudsman			✓ (maladministration, delay etc)	✓ (maladministration)	✓ (maladministration)	✓ (about non provision of education & social care)			✓
Disagreement resolution services	✓ (how providers carry out duties)	✓	✓	✓	✓	✓ (about sections E, H and C in the plan)			
Mediation			✓		✓	✓ (about sections E, H and C in the plan)			
First-tier Tribunal (SEND)			✓		✓	✓ (about education in the plan)	✓ (in schools)		
County Court							✓		

							(in early years, post-16, LAs)		
NHS complaints						✓ (about health provision in plan)		✓	
Parliamentary and Health Service Ombudsman						✓ (with the LGO)		✓	

Early resolution of disagreements

- 11.3 Decisions about provision for children and young people with SEN should be made as soon as possible. In most cases this will be achieved by early years providers, schools, colleges, local authorities and clinical commissioning groups (CCGs) working closely together and agreeing what should be provided with parents and young people.
- 11.4 However, where agreement cannot be reached, early resolution of disagreements benefits parents and young people and can avoid unnecessary stress and expense. The local information, advice and support service, described in Chapter 2, can provide access to support for parents and young people in arranging and attending meetings.

Disagreement resolution arrangements and mediation

- 11.5 While 'disagreement resolution' and 'mediation' are often used interchangeably, under the Children and Families Act 2014 they refer to different processes. Disagreement resolution arrangements apply more widely and are distinct from the mediation arrangements set out in paragraphs 11.13 to 11.38 below which apply specifically to parents and young people who are considering appealing to the Tribunal about EHC needs assessments and the special educational element of an EHC plan or who want mediation on the health and social care elements of an EHC plan. However, local authorities may contract disagreement resolution services and mediation from the same providers. Whereas parents and young people **must** contact a mediation adviser before registering an appeal about EHC needs assessments or the SEN element of an EHC plan they do not have to engage with the disagreement resolution services at any time, including before registering an appeal.

Disagreement resolution services

- 11.6 Local authorities **must** make disagreement resolution services available to parents and young people. Use of the disagreement resolution services is voluntary and has to be with the agreement of all parties. The service, while commissioned by it, **must** be independent of the local authority – no-one who is directly employed by a local authority can provide disagreement resolution services. Parents and young people can also access informal support in resolving disagreements through the local impartial information, advice and support service and, between 2014 and 2016, with the help of independent supporters.
- 11.7 Disagreement resolution arrangements cover all children and young people with SEN, not just those who are being assessed for or have an EHC plan, and a range of disagreements, as set out in paragraph 11.8. They are available to

parents and young people to resolve disagreements about any aspect of SEN provision, and health and social care disagreements during the processes related to EHC needs assessments and EHC plans set out in Chapter 9. They can provide a quick and non-adversarial way of resolving disagreements. Used early in the process of EHC needs assessment and EHC plan development they can prevent the need for mediation, once decisions have been taken in that process, and appeals to the Tribunal.

11.8 The disagreement resolution service is to help resolve four types of disagreement or to prevent them from escalating further:

- The first is between parents or young people and local authorities, the governing bodies of maintained schools and maintained nursery schools, early years providers, further education institutions or the proprietors of academies (including free schools), about how these authorities, bodies or proprietors are carrying out their education, health and care duties for children and young people with SEN, whether they have EHC plans or not. These include duties on the local authority to keep their education and care provision under review, the duties to assess needs and draw up EHC plans and the duty on governing bodies and proprietors to use their best endeavours to meet children and young people's SEN
- The second is disagreements between parents or young people and early years providers, schools or post-16 institutions about the special educational provision made for a child or young person, whether they have EHC plans or not
- The third is disagreements between parents or young people and CCGs or local authorities about health or social care provision during EHC needs assessments, while EHC plans are being drawn up, reviewed or when children or young people are being reassessed. Disagreement resolution services can also be used to resolve disagreements over special educational provision throughout assessments, the drawing up of EHC plans, while waiting for Tribunal appeals and at review or during reassessments
- the fourth is disagreements between local authorities and health commissioning bodies during EHC needs assessments or reassessments, the drawing up of EHC plans or reviews of those plans for children and young people with SEN. In relation to EHC plans, this includes the description of the child or young person's education, health and care needs and any education, health and care provision set out in the plan. These disagreements do not involve parents and young people.

- 11.9 Local authorities **must** make the availability of disagreement resolution services known to parents, young people, headteachers, governing bodies, proprietors and principals of schools and post-16 institutions in their areas and should make them known to others they think appropriate. Details of the disagreement resolution arrangements **must** be set out in the Local Offer.
- 11.10 A decision by parents and young people not to use disagreement resolution services has no effect on their right to appeal to the Tribunal and no inference will be drawn by the Tribunal if the parties to a disagreement have not used the disagreement resolution services. Disagreement resolution meetings are confidential and without prejudice to the Tribunal process and the Tribunal will disregard any offers or comments made during them. Partial agreement achieved by use of disagreement resolution services can help to focus on the remaining areas of disagreement in any subsequent appeals to the Tribunal.

Contracting disagreement resolution services

- 11.11 In contracting an effective disagreement resolution service, local authorities should:
- take responsibility for the overall standard of the service
 - have clear funding and budgeting plans for the service – parents and young people should not be charged for the use of the service and schools, colleges and early years providers should be clear about how the service can be accessed and how it will be funded
 - ensure that the service is impartial
 - ensure that the service has a development plan which sets out clear targets and is regularly reviewed
 - ensure that the independent persons appointed as facilitators:
 - have the appropriate skills, knowledge and expertise in disagreement resolution
 - have an understanding of SEN processes, procedures and legislation
 - have no role in the decisions taken about a particular case, nor any vested interest in the terms of the settlement
 - maintain confidentiality
 - carry out the process quickly and to the timetable decided by the parties

- establish protocols and mechanisms for referring parents and young people to disagreement resolution and, where necessary, provide advocacy support to help them take part
- establish a service level agreement for delivering the service which sets out the appropriate standards expected of, and the responsibilities delegated to, the provider. There should be appropriate arrangements for overseeing, regularly monitoring and reviewing the performance of the service, taking account of local and national best practice, and
- seek feedback from the service to inform and influence local authority and provider decisions on SEN policies, procedures and practices

11.12 Parents and young people can also use the complaints procedures set out in paragraphs 11.67 to 11.111 in addition to these disagreement resolution arrangements. There is no requirement to have used the disagreement resolution services before using those other complaints procedures, and disagreement resolution services can be used before, at the same time or after those procedures.

Mediation

11.13 As paragraph 11.5 points out, the Children and Families Act 2014 makes a distinction between disagreement resolution arrangements and mediation. If parents or young people want it to, mediation can take place following decisions by a local authority not to carry out an EHC needs assessment, not to draw up an EHC plan, after they receive a final EHC plan or amended plan, following a decision not to amend an EHC plan or a decision to cease to maintain an EHC plan. These mediation arrangements complement the disagreement resolution arrangements set out in paragraphs 11.5 to 11.10. The disagreement resolution arrangements are designed to resolve disagreements about the performance of duties, SEN provision, disagreements over health and social care provision and disagreements between health commissioners and local authorities and are voluntary for both parties (see paragraph 11.8). The mediation arrangements are specifically linked to decisions about EHC needs assessments and plans. Disagreement resolution services can be used at any time, if both parties agree, including while an EHC needs assessment is being conducted, while the plan is being drawn up, after the plan is finalised or while an appeal is going through the Tribunal process.

Contracting services for mediation and mediation information

11.14 Local authorities must make arrangements for parents and young people to receive information about mediation so that they can take part in mediation if they so choose before a possible appeal to the Tribunal.

11.15 Local authorities and relevant health commissioners are free to choose how they make arrangements to provide mediation information and mediation, whether that is

by contracting a mediation provider or providers or otherwise. Any mediation provision – by a mediation adviser (providing information) or mediator (conducting mediation) – **must** be independent of local authorities in England and/or relevant health commissioners. No one who is directly employed by a local authority in England can be a mediation adviser and no one who is directly employed by a local authority in England or a relevant health commissioner can act as a mediator. People who are contracted to act as mediators should have received accredited mediation training. The guidance on arranging effective disagreement resolution services (paragraph 11.11) provides a good guide for the arrangements which should be made for mediation services.

- 11.16 Local authorities must set out the arrangements they have made for securing mediation information services and mediation itself in the Local Offer.

Routes to mediation

- 11.17 The Children and Families Act 2014 sets out two pathways for going to mediation depending on whether the parent or young person wants to go to mediation about the matters which can be appealed to the Tribunal (see paragraph 11.45) or whether they want to go to mediation about the health and social care elements of EHC plans.

Mediation on matters which can be appealed to the Tribunal

- 11.18 Parents and young people who wish to make an appeal to the Tribunal (see paragraphs 11.39 to 11.52) may do so only after they have contacted an independent mediation adviser and discussed whether mediation might be a suitable way of resolving the disagreement.
- 11.19 When the local authority sends the parent or young person notice of a decision which can be appealed to the Tribunal it **must** tell the parent or young person of their right to go to mediation and that they **must** contact a mediation adviser before registering an appeal with the Tribunal. The notice **must** give the contact details of a mediation adviser, contain the timescales for requesting mediation and the contact details of any person acting on behalf of the local authority who the parent or young person should contact if they wish to pursue mediation. The notice should also make clear that parents' and young people's right to appeal is not affected by entering into mediation.
- 11.20 If the parent or young person is considering registering an appeal and has contacted the mediation adviser, the adviser will provide information on mediation and answer any questions which the parent or young person may have. The information will normally be provided on the telephone, although information can be provided in written form, through face-to-face meetings or through other means if the parent or young person prefers.

Mediation advice before mediation

11.21 The mediation information which is given to parents and young people:

- should be factual and unbiased, and
- should not seek to pressure them into going to mediation. Where there is more than one available, the mediation adviser should not try to persuade the parents or young people to use any particular mediator

11.22 The mediation adviser should be ready to answer any questions from the parent or young person and explain:

- that mediation is an informal, non-legalistic, accessible and simple disagreement settlement process run by a trained third party and designed to bring two parties together to clarify the issues, and reach a resolution
- that the parent or young person's use of mediation is voluntary
- the timescales which must be met and the certificate, and
- that the local authority will pay reasonable travel expenses and other expenses to the parent or young person and witnesses taking part in mediation

11.23 Once the information has been provided it is for the parent or young person to decide whether they want to go to mediation before any appeal they might make to the Tribunal. Parents and young people have the right to appeal to the Tribunal but are not able to register an appeal without a certificate and the local authority must tell them this in the notice referred to in paragraph 11.19. Where the parent or young person decides not to go to mediation during or following contact with the mediation adviser the adviser will issue a certificate, within three working days of the parent or young person telling them that they do not want to go to mediation, confirming that information has been provided. The certificate will enable the parent or young person to lodge their appeal, either within two months of the original decision being sent by the local authority or within one month of receiving the certificate whichever is the later.

Exceptions to the requirement to contact a mediation adviser

11.24 Parents and young people do not have to contact the mediation adviser prior to registering their appeal with the Tribunal if their appeal is solely about the name of the school, college or other institution named on the plan, the type of school, college or other institution specified in the plan or the fact that no school or other institution is named. Parents and young people will already have had the opportunity to request a school, college or other institution and to discuss this in detail with the local authority. The disagreement resolution arrangements, as set out in paragraphs 11.5 to 11.10, would be available if parents or young people and local authorities

wanted to attempt to resolve the dispute about the placement by making use of these arrangements.

11.25 The mediation advice arrangements do not apply to disability discrimination claims.

Going to mediation about matters which can be appealed to the Tribunal

- 11.26 If the parent or young person decides to proceed with mediation then the local authority **must** ensure that a mediation session takes place within 30 days of the mediation adviser informing the local authority that the parent or young person wants to go to mediation, although it may delegate the arrangement of the session to the mediator. Parents or young people do not have to pay for the mediation session(s). The local authority **must** attend the mediation.
- 11.27 If the parent or young person wants to go to mediation then the local authority **must** also take part. If the local authority is unable to arrange mediation in a case which involves a disagreement on a matter which can be appealed to the Tribunal within 30 days it **must** tell the mediator. The mediation adviser **must** then issue a certificate within three days. On receipt of the certificate the parent or young person could decide whether to appeal immediately or to wait for mediation to take place. If the parent or young person initially indicates that they want to go to mediation about a matter which can be appealed to the Tribunal but changes their mind, they can contact the mediation adviser who can then issue a certificate with which an appeal can be registered.
- 11.28 A mediation session or sessions which arise out of these arrangements **must** be conducted by independent mediators. Once mediation is completed about a matter which can be appealed to the Tribunal the mediation adviser **must** issue a certificate to the parent or young person within three working days confirming that
- it has concluded. Mediation will not always lead to complete agreement between the parties and if the parent or young person still wants to appeal to the Tribunal following mediation they **must** send the certificate to the Tribunal when they register their appeal.
- 11.29 Parents and young people have one month from receiving the certificate to register an appeal with the Tribunal or two months from the original decision by the local authority whichever is the later. The certificate will not set out any details about what happened in the mediation – it will simply state the mediation was completed at a given date. When cases are registered with the Tribunal following mediation the Tribunal will deal with the appeal on the facts of the case. The Tribunal may cover similar ground to that explored in the mediation but will reach its own independent findings and conclusions. Mediation meetings are confidential and without prejudice to the Tribunal process and the Tribunal will disregard any offers or comments made

during them. Partial agreement achieved through mediation can help to focus any subsequent appeals to the Tribunal on the remaining areas of disagreement.

11.30 The Special Educational Needs and Disability Regulations 2014 set out time limits for local authorities to implement agreements made at mediation. If the local authority does not implement the agreements within the set time limits, or ones which have been agreed with the parents or young people instead, the parents or young person can appeal to the Tribunal if it is a matter which can be appealed (see paragraphs 11.45 and 11.46).

Mediation on the health and social care elements of an EHC plan

11.31 Parents and young people can also go to mediation about the health and social care elements of an EHC plan. However, unlike matters which can be appealed to the Tribunal, parents and young people do not have to receive mediation advice before going to mediation. (Health and social care provision which educates or trains a child or young person is treated as special educational provision, rather than health and social care provision, and can be appealed to the Tribunal and the parent or young person would have to contact a mediation adviser before appealing about that provision.)

11.32 The notice which is sent to the parent or young person by the local authority with the final EHC plan or the final amended plan **must** tell the parent or young person that they can go to mediation about the health and care aspects of the plan and give contact details of someone acting on behalf of the local authority who the parent or young person should contact if they want to go to mediation. When contacting the local authority the parent or young person **must** tell the local authority about the matters they wish to go to mediation about. In particular, they **must** inform the local authority if they want to go to mediation about the fact that no health care provision or no health care provision of a particular kind, is specified in the plan and they **must** also inform the local authority of the health care provision which he or she wishes to be specified in the plan.

11.33 If the parent or young person wants to go to mediation about the health care matters set out in paragraph 11.32 then the local authority **must** inform each relevant commissioning body within three days about those matters.

11.34 If the parent has told the local authority that they disagree with either the education and social care element of the plan or the health and one or both of the education and social care elements then the local authority **must** arrange the mediation, after the parent or young person has contacted the mediation adviser in a case involving the education element of the plan. If the parent or young person only wants to appeal about the health care aspect of the plan then the responsible health commissioning body or bodies **must** arrange for mediation between them and the parent or young person, ensure that the mediation is conducted by an independent person who is not employed by a clinical commissioning group or the National

Health Service Commissioning Board, and take part in the mediation. The health commissioning body or bodies **must** also take part in the mediation arranged by the local authority if the mediation is about the health care element of the plan and either or both of the education or social care parts of the plan. They **must** pay the reasonable expenses of the parent or young person where they arrange the mediation.

- 11.35 If the responsible health commissioning body or bodies are responsible for arranging a mediation which is solely about the health care elements of the plan then they **must** do so within 30 days of being informed by the local authority.
- 11.36 Mediation offers a relatively quick way of resolving disagreements about the health and social care elements of an EHC plan. It may not resolve those disagreements or may not resolve all of them. If there is no resolution of the parent's or young person's disagreement with the health and/or social care elements of the plan then they cannot appeal to the Tribunal. Parents and young people could at this point request that the responsible commissioning body in the case of the health care element of the plan or the local authority in the case of the social care element goes to disagreement resolution, although the health commissioning body and the local authority would be under no duty to do so and given that the disagreements have not been resolved at mediation the health commissioning body and the local authority are unlikely to agree. The mediation arrangements for the health and social care elements of an EHC plan lie alongside the health and social care arrangements set out in paragraphs 11.101 to 11.111. Going to mediation about the health and social care elements of an EHC plan does not prevent a parent or young person also complaining via the routes set out in paragraphs 11.101 to 11.111 and vice versa nor does going to mediation prevent a parent or young person subsequently complaining via those routes.
- 11.37 Despite there being two routes to mediation the right to go to mediation about the education, health and social care elements of an EHC plan provides an opportunity for disagreements about a plan to be dealt with at one venue and dealt with holistically. Where parents or young people have disagreements about more than one element of the plan, including the educational element, the local authority should not arrange the mediation until the parent or young person has contacted the mediation adviser and decided whether they want to go to mediation about the educational element of the plan, so that one mediation can be arranged covering all areas of disagreement.

Effective mediation

11.38 For mediation to work well:

- the mediation session should be arranged, in discussion with the parents or young people, at a place and a time which is convenient for the parties to the disagreement. The body (or bodies) arranging the mediation **must**

inform the parent or young person of the date and place of the mediation at least 5 working days before the mediation unless the parent or young person consents to this period of time being reduced

- the mediator should play a key role in clarifying the nature of the disagreement and ensuring that both sides are ready for the mediation session. The mediator should agree with the parties on who needs to be there
- mediators **must** have sufficient knowledge of the legislation relating to SEN, health and social care to be able to conduct the mediation
- the local authority and health commissioner representative(s) should be sufficiently senior and have the authority to be able to make decisions during the mediation session
- the parents or young person may be accompanied by a friend, adviser or advocate and, in the case of parents, the child, where the parent requests this and the local authority has no reasonable objection. In cases where parents are the party to the mediation and it is not appropriate for the child to attend in person the mediator should take reasonable steps (within terms of time, difficulty, expense etc) to obtain the views of the child. Young people with learning difficulties, in particular, may need advocacy support when taking part in mediation
- both parties should be open about all the aspects of the disagreement and not hold anything back for a possible appeal to the Tribunal on the SEN aspects of EHC plans
- where a solicitor has acted as the mediator, under the Solicitors' Code of Conduct (rule 3 Conflict of interests), he or she should not also represent either party at the Tribunal
- generally, legal representation should not be necessary at the mediation, but this will be a matter for the parties and the mediator to agree. If either party does have legal representation they will have to pay for it themselves

Children and young people in youth custody

Please see Chapter 10, paragraphs 10.76 to 10.78.

Registering an appeal with the Tribunal

11.39 Parents and young people have two months to register an SEN appeal with the Tribunal, from the date of the local authority sent the notice containing a decision which can be appealed or one month from the date of a certificate which has been

issued following mediation or the parent or young person being given mediation information, 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.

- 11.40 The Tribunal will not take account of the fact that mediation has taken place, or has not been taken up, nor will it take into account the outcome of any mediation. Parents and young people will not be disadvantaged at the Tribunal because they have chosen not to go to mediation.

Parents' and young people's right to appeal to the Tribunal about EHC needs assessments and EHC plans

The First-tier Tribunal (SEN and Disability)

- 11.41 The Tribunal forms part of the First-tier Tribunal (Health, Education and Social Care Chamber). Tribunals are overseen by Her Majesty's Courts and Tribunals Service.

The role and function of the Tribunal

- 11.42 The Tribunal hears appeals against decisions made by the local authorities in England in relation to children's and young people's EHC needs assessments and EHC plans. It also hears disability discrimination claims against schools and against local authorities when the local authority is the responsible body for a school.
- 11.43 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 or young person 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.

Who can appeal to the Tribunal about EHC needs assessments and plans

- 11.44 Parents (in relation to children from 0 to the end of compulsory schooling) and young people (over compulsory school age until they reach age 25) can appeal to the Tribunal about EHC needs assessments and EHC plans, following contact with a mediation adviser in most cases (see paragraph 11.18). Young people can register an appeal in their name but can also have their parents' help and support if needed. Chapter 8, paragraphs 8.15 to 8.18, gives further guidance on the rights of young people under the Children and Families Act 2014 and the involvement and support of parents.

What parents and young people can appeal about

11.45 Parents and young people can appeal to the Tribunal about:

- a decision by a local authority not to carry out an EHC needs assessment or re-assessment
- a decision by a local authority that it is not necessary to issue an EHC plan following an assessment
- the description of a child or young person's SEN specified in an EHC plan, the special educational provision specified, the school or other institution or type of school or other institution (such as a mainstream school/college) specified in the plan or that no school or other institution is specified
- an amendment to these elements of the EHC plan
- a decision by a local authority not to amend an EHC plan following a review or re-assessment
- a decision by a local authority to cease to maintain an EHC plan

The Tribunal does not hear appeals about Personal Budgets, but will hear appeals about the special educational provision to which a Personal Budget may apply (see paragraph 9.108).

11.46 Parents and young people who are unhappy with decisions about the health and social care elements of an EHC plan can go to mediation (see paragraphs 11.31 to 11.35). They can also complain through the health and social care complaints procedures, set out in paragraphs 11.101 to 11.104 and 11.105 to 11.111.

Conditions related to appeals

11.47 The following conditions apply to appeals:

- the parent or young person can appeal to the Tribunal when the EHC plan is initially finalised, following an amendment or a replacement of the plan
- appeals **must** be registered with the Tribunal within two months of the local authority sending a notice to the parent or young person of the decision about one of the matters that can be appealed to the Tribunal or within one month of a certificate being issued following mediation or the parent or young person being given mediation information

- the right to appeal a refusal of an EHC needs assessment will be triggered only where the local authority has not carried out an assessment in the previous six months
- when the parent or young person is appealing about a decision to cease to maintain the EHC plan the local authority has to maintain the plan until the Tribunal's decision is made

Decisions the Tribunal can make

11.48 The Tribunal has prescribed powers under the Children and Families Act 2014 to make certain decisions in relation to appeals. The Tribunal can dismiss the appeal, order the local authority to carry out an assessment, or to make and maintain an EHC plan, or to maintain a plan with amendments. The Tribunal can also order the local authority to reconsider or correct a weakness in the plan, for example, where necessary information is missing. Local authorities have time

limits within which to comply with decisions of the Tribunal (see the Special Educational Needs Regulations 2014).

11.49 In making decisions about whether the special educational provision specified in the EHC plan is appropriate, the Tribunal should take into account the education and training outcomes specified in Section E of the EHC plan and whether the special educational provision will enable the child or young person to make progress towards their education and training outcomes. The Tribunal can consider whether the education and training outcomes specified are sufficiently ambitious for the child or young person. When the Tribunal orders the local authority to reconsider the special educational provision in an EHC plan, the local authority should also review whether the outcomes remain appropriate.

How parents and young people can appeal

11.50 When appealing to the Tribunal parents and young people **must** supply a copy of the decision that they are appealing against and the date when the local authority's decision was made, or the date of the mediation certificate. The parent or young person who is appealing (the appellant) 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 the appellant disagrees with the decision. Parents and young people have to send all relevant documents, such as copies of assessments, to the Tribunal.

11.51 Once the appeal is registered the local authority 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. 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 appellant lives as possible. 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 SEN or disabilities. The local authority will provide a bundle of papers for each of the panel members and the parent, including any document requested by the parent. Advice on making SEN appeals to the Tribunal is available from the Ministry of Justice website – a link is given in the References section under General.

11.52 A video is available from the Ministry of Justice website which gives appellants some guidance on what happens at a hearing – a link to it is given in the References section under Chapter 11. A DVD of this video can be requested from the Tribunal by writing to:

First-tier Tribunal (Special Educational Needs and Disability)
Mowden Hall
Staindrop Road
Darlington DL3
9BG

Disability discrimination claims

11.53 The parents of disabled children and disabled young people in school have the right to make disability discrimination claims to the Tribunal if they believe that their children or the young people themselves have been discriminated against by schools or local authorities when they are the responsible body for a school. Claims **must** be made within six months of the alleged instance of discrimination. The parents of disabled children, on behalf of their children, and disabled young people in school can make a claim against any school about alleged discrimination in the matters of exclusions, the provision of education and associated services and the making of reasonable adjustments, including the provision of auxiliary aids and services. They can also make claims to the Tribunal about admissions to independent and non-maintained special schools. Claims about admissions to state-funded schools are made to local admissions panels.

11.54 Disability discrimination claims by young people against post-16 institutions, and by parents about early years provision and about their treatment as a parent in being provided with an education service for their child, are made to the county courts. Claims by parents and young people against local authorities about the policies the authorities have adopted also go to the county courts.

11.55 Guidance on how to make a disability discrimination claim to the Tribunal is available from the Ministry of Justice website, via the link to information about the Tribunal given in the References section under General.

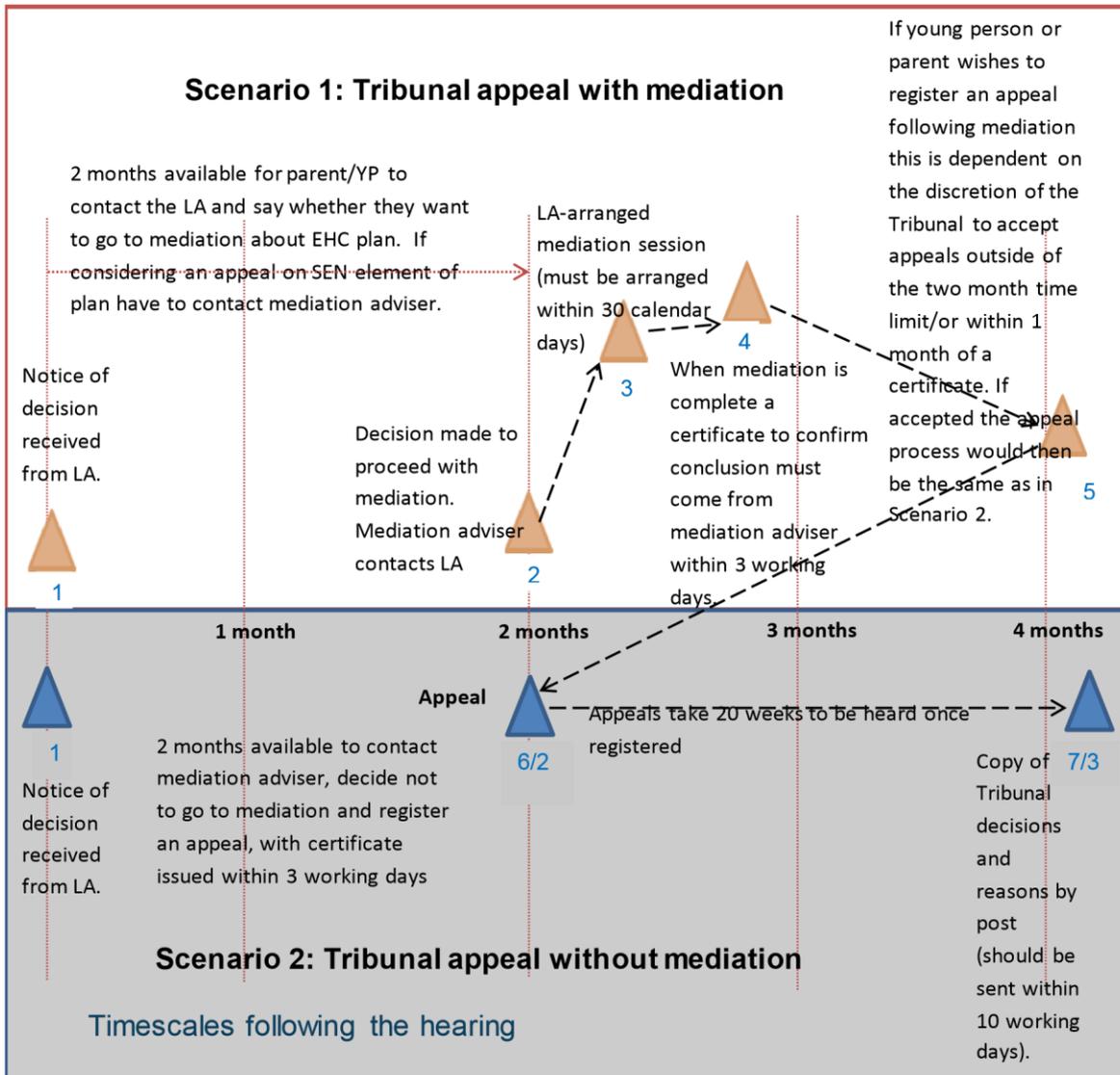
Exclusion

11.56 The Government issues statutory guidance on school exclusion, which can be found on the GOV.UK website – a link is given in the References section under Chapter 11.

11.57 The guidance sets out details of the permanent exclusion review panel process, including parents' right to ask for an SEN expert to attend. In addition, claims for disability discrimination in relation to permanent and fixed-period exclusions may be made to the Tribunal.

11.58 Local authorities have a duty to arrange suitable, full-time education for pupils of compulsory school age who would not otherwise receive such education, including from the sixth day of a permanent exclusion. Schools have a duty to arrange suitable, full-time education from the sixth day of a fixed period exclusion (see Chapter 10, paragraphs 10.47 to 10.52 on alternative provision). Suitable education means efficient education suitable to a child's age, ability and aptitude and to any SEN the child may have.

Please note that the following figure shows the maximum time it would take to register an appeal at the Tribunal both with and without mediation and have the appeal heard. Most registrations of an appeal, even where the case goes to mediation will take a far shorter time than this. The top half the diagram is for appeals after receipt of a finalised EHC plan.



11.59 The young person or parent making the appeal and the local authority should both receive a copy of the Tribunal's decision and reasons by post within 10 working days of the hearing. Along with the decision notice the Tribunal will send a leaflet which will explain the application process for permission to appeal the Tribunal decision to the Upper Tribunal, if the appellant considers that the decision made was wrong in law. Local authorities can also appeal to the Upper Tribunal on the same grounds.

11.60 Step-by-step guidance on the process of appealing to the Tribunal and what it involves can be found at the Ministry of Justice website – a link is given in the References section under General.

Legal aid

- 11.61 If a parent or young person has decided to appeal, legal aid may be available to assist with that appeal. Legal aid can fund legal advice and assistance in preparing an appeal to the Tribunal, but not representation at the Tribunal.
- 11.62 Before someone can be granted legal aid they **must** pass a financial means assessment. The case **must** also satisfy a merits test of whether it has a reasonable chance of succeeding.
- 11.63 If the parent or young person's appeal to the Tribunal is unsuccessful, and they wish to mount a further appeal to the Upper Tribunal (or beyond to the Court of Appeal or Supreme Court), then legal aid can provide advice, assistance and representation, subject to the means and merits tests being met.
- 11.64 Legal aid for disability discrimination cases may also be available on the same basis set out above.
- 11.65 A parent or young person seeking access to legal aid for an SEN case or disability discrimination case should go to the legal aid checker on the GOV.UK website to find out if they are eligible or contact the Civil Legal Advice (CLA) service on 0845 345 4 345. A link to the checker is given in the References section under Chapter 11. If a person is eligible, the CLA will provide legal advice, normally by phone, online or by post unless the specialist advice provider assesses them as unsuitable to receive advice in this way. Decisions are taken by the Director of Legal Aid Casework on a case-by-case basis. As a civil servant, the Director acts independently of the Lord Chancellor.
- 11.66 The following groups do not have to apply via CLA – they can seek advice directly from a face- to-face provider:
- young people under 18, and
 - those assessed by the CLA in the previous 12 months as requiring face-to-face advice, who have a further linked problem, and are seeking further help from the same face-to-face provider

Complaints procedures

Early education providers' and schools' complaints procedures

- 11.67 The Early Years Foundation Stage (EYFS) Statutory Framework requires all registered childcare providers to have a complaints procedure.
- 11.68 For childcare provision registered with Ofsted concerns should be raised directly with the manager or provider in the first instance. For complaints in writing the nursery

provider **must** respond within 28 days. Where the childcare provision is run by a school, the school's complaints procedure should be used.

11.69 All state-funded schools are required to have a procedure to deal with complaints and to publish details of their procedure. The governing bodies of maintained schools should make efforts to ensure that anyone who wishes to make a complaint, including a complaint in relation to children and young people with SEN, whether they have EHC plans or not, is treated fairly, given the chance to state their case, provided with a written response (including the rationale for any decisions) and informed of their appeal rights. If the complainant remains concerned after following the local complaints procedure, he or she could ask the Department for Education's School Complaints Unit to take up the matter.

11.70 Further details on making complaints to the Department about schools are available from the GOV.UK website – a link is given in the References section under Chapter 11.

11.71 The proprietors of academies, free schools and independent schools **must**, under the Education (Independent School Standards) Regulations 2010, ensure that a complaints procedure is drawn up which is in writing and is made available to parents. The procedure **must** allow for a complaint to be considered informally in the first instance and then, if the parent remains dissatisfied, there should be a formal procedure for the complaint to be made in writing. If the parent is still dissatisfied the complaint can then be heard in front of a panel of at least three people one of whom **must** be independent of the management and running of the school. Should the parent still not be satisfied they can complain, in the case of academies and free schools, to the Education Funding Agency (EFA) acting on

behalf of the Secretary of State, or, in the case of independent schools, to the Secretary of State directly. Both the EFA and the Secretary of State will look at whether the school handled the complaint properly, rather than the substance of the complaint. Further details on making a complaint to the EFA about academies and free schools are also available at the website address given in the previous paragraph.

11.72 Early years and schools complaints procedures are available for use in relation to children and young people who have SEN but without EHC plans.

Complaints to the Secretary of State

11.73 If disagreements have not been resolved at the local level, under sections 496 and 497 of the Education Act 1996 complaints can be made to the Secretary of State for Education that either the governing body of a maintained school or a local authority has acted unreasonably or has failed to carry out one of its duties under the Education Acts, including their SEN duties. The Secretary of State can also consider

complaints about disability discrimination in relation to a pupil at a school by virtue of Section 87 of the Equality Act 2010. Sections 496 and 497 of the Education Act 1996 apply only to maintained schools, not other state-funded schools or independent schools.

- 11.74 Unreasonableness has been defined by the Courts as acting in a way in which no reasonable governing body or local authority would have acted in the circumstances.
- 11.75 The Secretary of State can issue directions about the exercise of a power or the performance of a duty by the governing body of a maintained school or a local authority. Any directions the Secretary of State issues **must** be 'expedient' – that is, the direction can make a material difference in remedying the matter. The Secretary of State would not intervene in a case where there is another avenue of redress, such as the Tribunal.

Complaints to Ofsted

- 11.76 Ofsted can consider complaints from parents and others about early years providers and schools, but only where the complaint is about the early years provision or the school as a whole rather than in relation to individual children, and where the parent or other complainant has tried to resolve the complaint through the early years provider's or school's own complaints procedure.
- 11.77 Further information about complaints to Ofsted about early years or childcare provision can be found at Ofsted's website – a link is given in the References section under Chapter 11.
- 11.78 Further details about school complaints can be found at Ofsted's website – a link is given in the References section under Chapter 11.
- 11.79 Examples of circumstances where complaints might relate to the school as a whole include:
- the school not providing a good enough education
 - the pupils not achieving as much as they should, or their different needs not being met
 - the school not being well led and managed, or wasting money
 - the pupils' personal development and wellbeing being neglected
- 11.80 Ofsted can respond to a complaint that relates to the whole school by bringing forward an inspection, or it could decide to look at the matters raised when next inspecting the school.

11.81 Complainants can contact Ofsted on 08456 404045 or by email enquiries@ofsted.gov.uk

11.82 Complainants can make a formal complaint by writing to:

Enquiries
National Business Unit
Ofsted
Piccadilly Gate
Store Street
Manchester M1 2WD

Post-16 institution complaints

11.83 Complaints at general further education colleges can be made informally to the teacher or the Principal, or through the college's formal complaints procedure. If the complainant is dissatisfied after going through the college's own procedure they can take this up with the Skills Funding Agency. A copy of the Skills Funding Agency's procedure for handling complaints made against colleges is available on their website – a link is given in the References section under Chapter 11.

11.84 Complaints at sixth form colleges and some other Education Funding Agency (EFA)-funded providers can be made informally to the teacher or the Principal, or through the college's formal complaints process. If the complainant is dissatisfied after going through the provider's own procedure they can take this up with the EFA. A copy of the EFA's procedure for handling complaints is available on the GOV.UK website – a link is given in the References section under Chapter 11.

Local Authority complaints procedures

11.85 Some, but not all, local authorities offer a service that investigates the way in which a complaint was handled by a local authority maintained school. This may form part of a school's complaints procedure.

11.86 All local authorities have responsibility to consider complaints about decisions made in relation to the following:

- admission to schools (except in Voluntary Aided Schools)
- EHC needs assessments
- exclusion of pupils from schools
- child protection/allegations of child abuse
- complaints about the action of the Governing Body, and

- school transport

11.87 The Local Offer will make clear whether a particular local authority offers this service.

11.88 The Local Government Ombudsman provides 'top tips' for making a complaint to a local authority on its website – a link is provided in the References section under Chapter 11.

Local Government Ombudsman

11.89 The Local Government Ombudsman (LGO) can investigate complaints against local authorities where the complaint has not been resolved by the local authority's complaints procedure. The LGO investigates the process by which local authority decisions were made and whether there has been maladministration, rather than examining the merits of a decision which has been properly taken. The LGO will decide whether there has been an injustice to the complainant and/or there is evidence of maladministration. Maladministration can include delay, failure to take action and failure to follow procedures. The LGO does not investigate the merits of decisions which have been properly taken, but which the complainant thinks are wrong, but does look at the decision-making process and the delivery of provision set out in EHC plans.

11.90 The LGO does not investigate matters which can be appealed to the Tribunal, such as a decision not to carry out an assessment (see paragraph 11.45). The LGO can investigate complaints that the special educational provision set out in EHC plans is not being delivered and, in doing so, can investigate what part the

school may have played in the provision not being delivered. (The LGO cannot, otherwise, investigate complaints about schools' SEN provision and has no powers to make recommendations to a school.) In association with the Parliamentary and Health Service Ombudsman (PHSO), the LGO can also investigate complaints about the delivery of health provision set out in plans. As set out in the previous paragraph, the LGO, in association with the PHSO with regard to health, does not investigate the merits of a decision which has been properly taken, but does look at the decision-making process and the delivery of provision set out in EHC plans.

11.91 Complaints can be made to the Local Government Ombudsman via its website – a link is given in the References section under Chapter 11. Help in making complaints is available on this number: **0300 061 0614**.

11.92 Alternatively complaints can be made in writing to the following address:

PO Box 4771
Coventry
CV4 0EH

- 11.93 If the LGO finds evidence of fault in the way a decision has been made, it will generally ask the local authority to reconsider the decision and consider if other remedies are available. Where there is evidence of systemic failings, LGO recommendations could include review of systems, policy and procedures. In addition, if during the course of an investigation the LGO identifies other children who are similarly affected they can widen the scope of their investigation to include them.
- 11.94 The LGO cannot make local authorities carry out its recommendations following investigation of a complaint but in practice authorities almost always do so.

The Parliamentary and Health Service Ombudsman

- 11.95 The role of the Parliamentary and Health Service Ombudsman (PHSO) is to investigate complaints that individuals have been treated unfairly or have received a poor service from government departments and other public organisations in the UK, and the NHS in England.
- 11.96 The PHSO can investigate complaints about the commissioning and provision of healthcare. As mentioned in paragraph 11.90, the PHSO can conduct joint investigations with the LGO where a complaint includes concerns about the delivery of the health provision in EHC plans. They will normally investigate a complaint only once the NHS organisation has had a chance to resolve the issue first.
- 11.97 The PHSO can also investigate a number of other organisations which have to have regard to this Code: Ofsted, the Education Funding Agency, the Skills Funding Agency, and the Department for Education (including its School Complaints Unit and the Secretary of State for Education). The PHSO will generally expect the individual to have completed the organisation's own complaints procedure first. Complaints about government departments and public organisations **must** be referred by an MP. If someone has any difficulties getting in touch with an MP, they can contact the PHSO for help.
- 11.98 The PHSO can investigate complaints that the Tribunal's administrative staff have got something wrong or acted in an unreasonable manner, although they cannot look into the actions of Tribunal members or the decisions made by the Tribunal. PHSO would generally expect the complaint to have been made to Her Majesty's Courts and Tribunals Service first. These complaints will also need to be referred by an MP.
- 11.99 More information on the role of the PHSO is available from their website – a link is given in the References section under Chapter 11.

Judicial review

11.100 Parents and young people can make an application to the Administrative Court for Judicial Review. The Administrative Court can consider decisions of local authorities in the exercise of their duties including decisions on special education for children and young people. For example, a judicial review in relation to EHC plans would be a review of the way in which decisions that are reflected in the plan were made rather than the content of these decisions. An application for judicial review will be considered only once all other options for remedy have been exhausted. Any application for judicial review is time bound. Guidance on making an application for Judicial Review is available from the Ministry of Justice website – a link is given in the References section under Chapter 11.

NHS Complaints

- 11.101 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.
- 11.102 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 available with the Local Offer – a link to the Healthwatch for England website is provided in the References section under Chapter 11.
- 11.103 Each CCG will have available information about its complaints arrangements and will deal with complaints about any of its function (providers of NHS services will have patient advice and liaison services, and handle complaints about the services they provide). Just as the arrangements for commissioning services for SEN integrate the contributions of education, health and care, so the local authority and CCG should consider integrating their arrangements for providing patient advice, liaison and complaints handling in this area. Support in making a complaint about health services can also be provided by NHS Complaints Advocacy Services (each local authority will have details of services in their own local areas).
- 11.104 If a complainant is dissatisfied with the way in which the NHS has dealt with their complaint, they can contact the PHSO though usually the NHS will need to have had a chance to resolve it locally. In line with the Ombudsman's Principles of

Good Administration, in considering a complaint in relation to health services in an EHC plan, the Ombudsman will take into account this Code of Practice, and relevant legislation.

Complaints about social services provision

11.105 The Children Act 1989 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 has 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 local authority concerned. The authority **must** then consider the complaint, appointing at least one person independent of the local authority to take part in dealing with the issues raised and provide the complainant with a written response within 28 days.

11.106 If the complainant is unhappy with the authority's response, they can request a panel hearing by writing to the authority within 28 days of the response. The panel should be chaired by an independent person. If the complainant remains dissatisfied with the handling of their complaint under the local procedures and they think a local authority 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 Ombudsman (LGO). See Local Government Ombudsman, paragraphs 11.89 to 11.94.

11.107 Young people aged 18 and over can complain under regulations which prescribe:

- a procedure before investigation, and
- an investigation and response process

11.108 The provider **must** acknowledge the complaint within three days and they **must** offer the complainant the opportunity to discuss the timing and procedure for resolving the complaint. Once that has been agreed, the complaint **must** be investigated and, as soon as possible after completing the investigation, a written report **must** be sent to the complainant explaining how the complaint has been considered, the conclusions of the report and any remedial action which has been taken or is proposed to be taken.

11.109 A complainant who is dissatisfied with the outcome of this process can also take their case to the Local Government Ombudsman.

- 11.110 Parents and young people who wish to complain about the way in which their concerns about the social care elements of EHC plans have been dealt with can use these complaint procedures whether they go to mediation about the social care elements of the plan or not.
- 11.111 From 2016 there will also be a new system for appealing local authority decisions made under part 1 of the Care Act. This will be detailed in future updates to Statutory Guidance on the Care Act 2014.