Tribunal Appeals:
Refusal to carry out an EHC needs assessment

Learning Aims

The learning aims of this briefing are to enable you to:

1 Become familiar with the applicable law when an appeal is made to the Special Educational Needs and Disability Tribunal ("**SEND**" or "**the Tribunal**") against a decision by a local authority to refuse to carry out an assessment under the Children and Families Act 2014 ("**the C & F Act 2014**");

2 Apply the law to develop the reasons for appeal and argue the case in SEND.

Level: Advanced

1. Introduction

Most children and young people with special educational needs ("**SEN**") and disabilities do not have Education, Health and Care Plans ("**EHC plans**"). They are being supported in their schools, nurseries and colleges by the teaching staff on what is called SEN Support. However, for some children and young people this support is not going to be sufficient to meet their SEN. At some stage they are going to need something more – provision which is set out in an EHC plan.

Sometimes it is immediately apparent that a child is going to need an EHC plan; if a child has profound and multiple learning difficulties support is likely to be put in place by the local authority ("**LA**") without any disagreements or issues taking place. However this is not always the case. Asking for an assessment under the C & F Act 2014 is often the first step in what is going to be a long and drawn out dispute between parents or young people and their local authorities.

In this briefing, we look at what happens when either a parent, young person or a school/other setting has requested statutory assessment – i.e. an assessment of their education, health and care needs under the C & F Act 2014, known as an **EHC needs assessment** - and has been turned down and decided to appeal to SEND. For more detail on the practice and procedure of running a Tribunal case, see our briefing "Practice and Procedure" and see also our useful model letters.

References in this briefing to sections are to sections of the C & F Act 2014 unless otherwise stated.

2. Law

Statute:

Section 36 (8) contains the legal test;
Section 36 (10) contains the additional considerations for a young person over 18;
Section 51 (2) (a) contains the right of appeal.

Regulation:

The Special Educational Needs and Disability Regulations 2014 as amended ("**the SEND Regs**") contain detailed provisions about the powers of the Tribunal[a].

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 set out the procedure in the Tribunal and the powers of the Tribunal ("**the HESC Rules**")[b].

3. Guidance

Statutory Guidance:

The Special Educational Needs and Disability Code of Practice: 0 – 25 Years (dated January 2015 and effective as of 1st April 2015) ("**the SEND Code**") contains guidance about Tribunal cases in Chapter 11.

[a] The SEND Regs have been amended twice since they were first passed, by The Special Educational Needs (Miscellaneous Amendments) Regulations 2014 which made minor amendments and The Special Educational Needs and Disability (Amendment) Regulations 2015 which made amendments about the powers of the Tribunal and the time limits following the conclusion of Tribunal Appeals. There has as yet been no consolidation of the SEN Regs – do make sure when you refer to the SEND Regs that you are taking account of the recent amendments.

[b] The HESC Rules have been amended several times. You will find in the resources a consolidation of the HESC Rules with all of the amendments up to August 2014.

4. Requests for statutory assessment

Before starting to deal with any appeal it is important to understand how the parent/young person got to the point of appealing. This is both to understand the procedural history and to start to realise what the case is about.

An EHC needs assessment is defined in section 36 (2) as an assessment of the educational, health care and social care needs of a child or young person. It is a required step towards the obtaining of an EHC plan **but it is not necessary to establish that the child/young person definitely needs an EHC plan in order to obtain the assessment**. The point of the assessment is to determine whether or not the EHC plan is necessary. It is fundamental to understanding this type of case to realise this – often the LA says no precisely because they believe an EHC plan is not necessary and that is not the right test.

In terms of process, the LA will have been required to make a decision about whether or not to assess in two circumstances:

- Where the LA has become responsible for the child/young person under section 24;
- Where a request has been made of the LA under section 36 (1).

In practice, in most cases, it is likely that the LA's decision will have been made following a request having been made.

So the first question to ask is what was the trigger for the LA to make its decision. Was a request made and if so by whom. A request can only be made under section 36 (1) by

- A child's parent;
- A young person (which, if the young person lacks mental capacity, will be made by the parent or other representative of the young person on their behalf); or
- A person acting on behalf of a school or post-16 institution.

If the request was made by the parent/young person, it is important to find out whether or not it was supported by the school/other setting. As will become clearer as you work through this briefing, cases where the parent/young person is supported by the school/setting can develop quite differently from cases where they are not.

The LA has a duty to consult the child's parent or the young person *before* making its decision. What happened as part of this consultation is also useful preliminary information.

Having established the basis on which the parent/young person or school/other setting made their request and looked at any consultation which took place it is time to look at the legal test and see if the LA applied it properly.

5. The Legal Test

Throughout your preparation of the case you will find yourself coming back to the legal test. It is essential not to get distracted by any irrelevant considerations.

> Section 36 (8):
>
> The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—
>
> (a) the child or young person has or may have special educational needs, and
>
> (b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

This test has two parts both of which need to be established if the child/young person is going to be entitled to an assessment. It is usually the second part about which there is a dispute but let's look at them both:

Part 1: The child or young person has or may have SEN

The first question is whether the child/young person has SEN but it is not a requirement that they definitely do have SEN – only that they ***may do.*** In other words is it possible. To unpick this we need to go back briefly to basics and look at the definition of SEN. This is contained in section 20 (1):

> ***Section 20 (1):***
>
> *A child or young person has special educational needs if he or she has a learning difficulty or a disability which calls for special educational provision to be made for him or her.*

So the question being asked (looked at in the context of section 36 (8)) is whether it is possible that the child or young person:

- has either a **learning difficulty or a disability;** AND
- that this learning difficulty or disability requires **special educational provision** to be made for him or her.

This is not a particularly high bar. To have a learning difficulty or a disability is about having a ***significantly greater difficulty in learning*** than the child/young person's peers or there being barriers in place which prevent or hinder the child or young person from accessing their education[a]. It is not about being severely disabled or being a particular number of months behind. The child or young person may be intellectually very bright but not be able to access education because of physical disabilities or mental health issues.

Part 2: It may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan

This is often the more difficult aspect of the test but before going on to the question of how this may be established, remember that under the C & F Act 2014 special educational provision ("**SEP**") is not just about education, but **education or training** – which is additional to or different from what is available in mainstream schools in England[b]. What the LA should have considered here is whether it is possible that it is going to be necessary for the special educational provision the child or young person requires to be made in accordance with an EHC plan. The Act does not say why ***it may be***

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[a] ***Section 20 (2):***

A child of compulsory school age or a young person has a learning difficulty or disability if he or she—

(a) has a significantly greater difficulty in learning than the majority of others of the same age, or

(b) *has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.*

[b] ***Section 21 (1):***

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

(a) mainstream schools in England,

(b) maintained nursery schools in England,

(c) mainstream post-16 institutions in England, or

(d) places in England at which relevant early years education is provided.

"Special educational provision", for a child aged under two, means educational provision of any kind.

necessary but what the parent/child is likely to have to establish is why the school, nursery or college is not likely to be able to provide the SEP required from their own resources.

6. Additional legal considerations – under and over compulsory school age

There are additional legal considerations to be borne in mind where the child is under compulsory school age or where the appeal concerns a young person.

Under compulsory school age:

Where a child is under compulsory school age the definition of learning difficulty or disability – relevant as this is a component of the definition of SEN as you will see from the above – is different:

Section 20 (3):

A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age

So when considering whether or not a child under compulsory school age has a learning difficulty or a difficulty it is necessary to apply the test looking forward to how the child is likely to be where they are of compulsory school age. In other words, is it likely based on what is known now about the child and the likely progression of their condition, that when they reach compulsory school age they will have a significant difficulty in learning or have barriers in place which will prevent or hinder them from accessing their education.

So in principle the test is the same (and this test applies from 0 to compulsory school age) but it is looking at the position as it is expected to be rather than how it is now.

In addition for those under two, special educational provision means educational provision of any kind. So to give an example, say a child has a hearing impairment which is not likely to improve. It is likely that when they get to school age they will have a significantly greater difficulty in learning or that their hearing impairment may prevent them from accessing education. So they would meet the test of learning difficulty or disability. If that learning difficulty or disability calls for any educational provision now then that is special educational provision.

Young people

For young people there is an additional consideration in section 36 (10):

Section 36 (10)

In making a determination or forming an opinion for the purposes of this

section in relation to a young person aged over 18, a local authority must consider whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or training.

This is a critical additional test which recognises that young people over 18 with SEN may require longer in education and training than their typically developing peers.

7. Is this a refusal to assess appeal

Do make sure that this is a refusal to assess appeal. Often parents will start by saying that this is a refusal to assess case but during discussions it will become apparent that they have received a note in lieu or that an assessment has already taken place and it is a refusal to issue an EHC plan.

Sometimes looking at the letter from the LA with the right of appeal does not help – these letters are no longer in a standard form and confusion can arise.

If this is a transition situation (from a statement to an EHC plan) the LA cannot refuse to assess – an essential feature of transition is that an assessment must take place. Even if assessment has not been carried out properly (or at all) this is in effect a refusal to issue an EHC plan (on which see our separate briefing).

Also make sure that the appeal is made about the LA in which the child is ordinarily resident, i.e. that it is the LA which is responsible for the child.

8. Making the case – possible approaches

You will need to explain in your reasons for appeal[a] why the child or young person fits within the legal tests, i.e.

- What are the special educational needs of the child or young person, i.e. what is the learning difficulty or a disability which calls for special educational provision to be made;
- Why may it may be necessary for the special educational provision to be set out in an EHC plan.

For a young person over 18, also explain whether he or she requires additional time, in comparison to the majority of others of the same age who

[a] Reasons for appeal in this type of case do not need to be lengthy or complicated but you do need to explain the elements of the appeal and why the child meets the tests. If the notice of appeal does not contain sufficient grounds, there is a risk that the case will be struck out.

do not have special educational needs, to complete his or her education or training.

For a child under compulsory school age, explain why the child will meet the tests when they meet that age.

NB: always keep in mind that these tests are about special educational needs and special educational provision. Although the result of an assessment may be the issuing of an EHC plan including, possibly, health care provision and/or social care provision, the duty to assess – the "gateway" to an EHC plan is about children and young people with SEN. No matter how severe or complex a child/young person's social care needs or health care needs these are not relevant considerations at this stage. The emphasis must be on special educational needs and the special educational provision which may be required to meet those needs.

Generally there are three ways of establishing this. It can be argued that:

1 a full assessment is the only way to find out what the difficulties are and what help is needed;

2 the school/institution may not be able to supply all the educational help needed unless it receives extra help from the LA;

3 the school/institution has provided all the help that could be expected but the child or young person has not made enough progress.

There are at least two different approaches to take:

A Where point 1 (above) applies, the case will need to be made that advice from a number of different professionals is needed to fully understand the special educational needs of the child or the young person. In other words, professionals do not yet understand enough about the difficulties and only a full investigation can help everyone understand the nature and severity of the difficulties and decide what help is needed. Often this is not enough on its own to persuade the Tribunal. You may also have to show that they may need an EHC plan if their needs are to be met (see B).

B For points 2 and 3, the case will need to be made that the SEN may not be met without an EHC plan. The test is not that an EHC plan is necessary, only that it *may be* necessary.

9. The position of the school/setting being attended

An appeal against a refusal to assess decision is easier to run if the early years provider, school or post-16 institution is in agreement with the parent or young person although it is not essential – but without that support the case becomes more difficult to establish.

This does not mean that such cases should not be pursued but it will be important in a case where the school/setting is not supporting the

parent/young person to manage the expectations of the parent/young person and to ensure that it is appreciated that it is going to be necessary to collect the evidence to support their case at an early stage from other sources.

There are various possible reasons why a school/other setting may not support the appeal:

- Sometimes children or young people present very differently at school or other settings than they do at home; this is a feature the expert Tribunal should be aware of but it means that the parent or young person will need to establish what is happening with other evidence.
- There may be issues at a particular school such as staffing problems which are not related only to this child or young person and it will be important for this to be put into evidence.
- Sometimes the early years provider, school or post-16 institution will say that it has done all it can but the LA disagrees. This leaves the parent or young person in a difficult position as they are in effect caught in between the two. In this situation it will be important to find out what the LA normally expects local schools to provide for children/young people with SEN in its area and what is being provided at this particular school. This may be readily available in the Local Offer or in the SEN Information Report (see below under evidence) but if not further investigation may be required.

If the school/setting does support the parent/young person's case then written evidence from the school/setting will be useful as well as someone attending the hearing as a witness (see below under witnesses).

10. Funding and Law vs Policy

You may find that the LA makes one of the issues in the case school funding. Local authorities receive money from central government to pay for the services they provide in their area. In the case of education funding they then delegate money for special educational provision to the schools. For mainstream schools there are three elements of this funding[a]:

(1) The **AWPU** – the age weighted pupil unit – this is the basic per pupil funding which schools receive for every child whether or not they have SEN;

(2) **Additional support funding** – this is an identified figure within the delegated budget which each school receives annually. It is

[a] Funding is less likely to be a significant feature of this type of case than say refusal to issue an EHC plan or a Section I appeal but for more information about SEN funding, see our briefing "Understanding SEN Funding".

provided by LAs for mainstream schools and the Education Funding Agency for Academies and Free Schools. This element of funding is used to fund the special educational provision for children on SEN Support and a proportion of funding for children with statements of SEN or EHC plans;

(3) **"Top up"** (or "high needs") funding for individual pupils. This funding comes from the commissioning home LA, as and when required, and on the basis of the child's assessed needs. It is usually, although not exclusively, used to fund support for children with a statement of SEN or an EHC plan.

For a refusal to assess case, funding should not become the main focus of the dispute. The LA may say that before they will assess a certain amount must first be spent by the school from their delegated funding on the particular child. This is a matter of local authority policy, not law. Local Authorities cannot delegate the legal duties they owe to children and young people with special educational needs. The LA, as a matter of policy, will expect the school to spend £6,000 per annum on a child with SEN from element 2 of their funding before the school can come back to the LA and ask for top up funding. This **does not** equate to an argument that just because the provision for a particular child is going to cost less than the additional £6,000 a year that the LA should refuse to assess.

The LA may say that the child/young person does not fit its criteria for making an EHC needs assessment. The Tribunal is not bound by the authority's criteria, however, and, while it will take into account the way the authority or a school/college organises its SEN support, it will want to be sure that the school/college fully understands the special educational needs in this individual case and can make all the provision needed.

Some authorities may say they never issue statements for children and young people in mainstream schools or for children and young people with a particular disability, or for anyone who does not fall into the bottom 2 per cent of abilities. These are blanket policies and are unlawful and the Tribunal will know this. The SEND Code also makes this clear at paragraph 9.16:

> "Local authorities **must not** apply a 'blanket' policy to particular groups of children or certain types of need, as this would prevent the consideration of a child's or young person's needs individually and on their merits."

11. Evidence

The Tribunal is an evidence based process. The burden of proof for this type of appeal will be on the parent/young person – i.e. these cases are not about the LA having to prove why they made their decision and why it was correct, but for the parent/young person to show why it was wrong. The Tribunal is an

inquisitorial body but particularly for parents who are represented the tribunal expects the parents to provide the necessary evidence to support their case.

The most important evidence is primary evidence about the child or young person and their SEN and the provision to meet those needs. However it can also be useful to look at what is happening in the local area and in the school generally as well as to provide secondary evidence about the particular disability.

When looking at evidence remember again that the legal tests are around the child or young person's special educational needs and the special educational provision to meet those needs. So whilst information about health needs may be helpful to file as well, the key evidence will be about what is happening at school and from those looking at the child from an educational perspective, such as a teacher or an educational psychologist.

Begin by looking at the evidence the LA used to make its decision. This is likely to include documentation from the early years provider, school or post-16 institution, such as school/college reports; the records of any assessments done by the early years provider, school or post-16 institution, what they then did and what effect that had; any advice from the LA's educational psychologist or other professionals who may have been involved. If the decision seems at odds with the evidence you may need to look no further than the documentation and reports of the LA's own professionals.

If the evidence supports the LA's decision the parent/young person will have to look elsewhere for evidence to back up the case.

Evidence about the child/young person and their difficulties

The SEND Code says that LAs should look for evidence of a child's progress when deciding whether to make an EHC needs assessment. Evidence which demonstrates that a child's progress is slow or uneven, or that they have complex needs involving more than one difficulty, is going to be important.

The SEND Code also says a child's attainment is a factor, but this must be considered in the context of their peers' attainment, their progress over time and what is expected of the child's performance. If it can be shown, for example, that their performance in some areas is much lower than other areas or below what their general intelligence indicates is possible, then this should be a factor in deciding whether to assess.

A good place to start would the child's school records to which the parent is entitled (see Model letter 2 for a form of the request for school records where these are not readily available).

Other examples of evidence:

- A written report from a teacher or a learning support assistant where they support the appeal;

- A letter from the child/young person's GP[a];
- Expert reports if available;
- Others involved with the child or young person e.g. social workers, youth workers, careers advisers;
- Home–school diaries;
- Evidence from the child or the young person, written via a third party when necessary;
- School/college work if this demonstrates a point such as the limited progress, or a particular difficulty which is in dispute.

Evidence about what cannot be provided without an EHC plan

In some cases it will be enough to provide evidence of problems in learning or to show educators' or trainers' difficulty in understanding the problems and the help they need.

However, in most appeals against a refusal to assess, you will need the early years provider, school or post-16 institution to provide evidence of what help they have provided and be able to show why this may not be enough in the future. The SEND Code mentions three potential triggers for assessment where resources are critical:

- Lack of progress: the SEND Code at paragraph 9.16 says: "In considering whether an EHC needs assessment is necessary, the local authority should consider whether there is evidence that despite the early years provider, school or post-16 institution having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child or young person, the child or young person has not made expected progress."
- Progress but only with unsustainable support: if the school or other setting has provided a lot of support which has ensured progress, but will not be able to continue doing so without an EHC plan, the SEND Code rightly says this is also a trigger for assessment (paragraph 9.14).
- Transfer to a college or other post-16 provider which may not have the SEN resources a school has.

As well as the help provided by the school/institution, you will need to know what outside help the early years provider, school or post-16 institution can call in, for example the LA's educational psychologist, their behaviour support team, health service speech therapists, and specialist teachers.

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[a] Although beware relying too heavily on medical evidence; the Tribunal is considering the educational needs and provision, not health care needs/provision on this type of appeal

The Local Offer and the School SEN Information report

Two useful sources of information may be the local offer and the school's SEN Information Report.

All LAs must publish a local offer and it is required to set out the special educational provision it expects to be available for the children and young people for whom it is responsible. This would be a good place to start but if the local offer is not helpful then asking the LA to explain what it expects to be available and what its criteria are for an EHC needs assessment may produce some useful information (see model letter one).

Schools are required to publish an SEN Information report which will be available on the school's website although this duty does not apply to independent schools.

These however are not the only sources of information – see our separate briefing on "Information Rights" which explains how parents can use the Data Protection Act 1988 and the Freedom of Information Act 2000 to obtain information from various authorities/public bodies.

11. Witnesses

The parent/young person will need to consider who they want to have with them at the hearing. Often in refusal to assess cases there are no additional witnesses and it will just be the parent attending to explain to the Tribunal why they believe their child has or may have SEN and why it may be necessary for SEN to be set out in an EHC plan.

The absence of other witnesses therefore is not necessarily problematic in itself but if there is someone who knows about the child/young person's SEN and the special educational provision likely to be required then it would be helpful to them to attend – especially someone from the school or other setting.

Sometimes a learning support assistant or teacher from a school will want to be helpful but have reservations about attending. In those circumstances a witness summons may be helpful as they will then have no choice but to attend.

Some parents will want to bring a medical witness such as a doctor and that can be helpful but in that case it will be important to explain that the issues under consideration are not about health care issues but about special educational needs and provision as defined.

12. Case law

Most cases before the tribunal involve unrepresented appellants and the Tribunal does not expect, particularly in a refusal to assess case, sophisticated legal arguments or references to case law. Nonetheless there have been some useful cases on refusal to assess under the Education Act 1996 which set out useful principles.

NM v London Borough of Lambeth (SEN) [2011] UKUT 499 (AAC)

The judge in this case pointed out that the SEN Code of Practice (this was about the 2001 version of the Code under the Education Act 1996) had raised the threshold for assessment above that required by the law:

> "16. In paragraph 7.34 of the Code of Practice, it is stated that the critical question is whether there is convincing evidence that, despite the school having, with the help of external specialists, taking relevant and purposeful action to meet the child's learning difficulties, these difficulties remain or have not been remedied sufficiently and may require the LEA to determine the child's special educational provision. I am unclear how the requirement of convincing evidence can be reconciled with the "probably" provision of s.323[(1) and] (2). It seems to me that what should be required is evidence sufficient to satisfy the statutory requirement and not evidence that goes beyond that.

In addition, where the child had made progress only because the school has been able to give them more resources than usual under School Action Plus, a statement and therefore assessment may be necessary to protect the child's provision from fluctuations in resources or teaching staff, or if the child moved school.

This case shows why it can be helpful to find out what is generally available in mainstream schools in the area as part of the evidence to support the appeal.

Buckinghamshire County Council v HW (SEN) [2013] UKUT 0470 (AAC)

Judge Jacobs agreed with the reasoning in *NM v London Borough of Lambeth [2011] UKUT 499 (AAC)* that the reference in paragraph 7.34 of the Code of Practice to the need for convincing evidence was going beyond the statutory test and that it is the statutory test which must be applied, i.e. the test of **necessity** (still the language used under the C & F Act 2014) and explained it thus:

Necessary sets a standard that is somewhere between indispensable and useful or reasonable. I am not going to define it more precisely. It is a word in general usage and it is that usage that the tribunal must apply

The UT also considered whether or not the First-tier Tribunal had been right to look to the future in this case as the child was about to transfer from primary to secondary. The UT decided that *Wilkin v Goldthorpe and Coventry City Council [1998] ELR 345* was correct, albeit that the Wilkin case related to a

statemented child, because an analysis of the language alone showed that the same approach was appropriate.

"The statutory test inevitably directs attention to something that will happen after the assessment has been made. The assessment is made for a purpose. That purpose involves identifying provision necessary to meet a child's needs. The assessment cannot realistically limit itself to the immediate present. When there will be a change of circumstances in the near future, it is impossible to ignore that future".

The LA asked for guidance on the issue of whether or not the LA has to proceed with an assessment where there is an appeal under foot and the UT made it clear that the decision is binding once it has been made by the first-tier tribunal. If the LA does not want to proceed with the assessment they will need to apply for a suspension of the first-tier tribunal decision.