



# The SEND Mediation Legal Framework

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20 May 2021



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# SEND EHCP Legal Framework

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- Education, Health and Care Plans (Children and Families Act 2014) replaced Statements of Special Educational Needs.
- Stage 1 – Request for a Education, Health and Care Plan needs assessment  
Test: The Local Authority (LA) must secure a needs assessment... if...:
  - (a) the child or young person has or may have special educational needs, and
  - (b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan. [Section 36(8) of the Children and Families Act 2014].
- Stage 2 – Decision to assess
- Stage 3 – Decision to issue a Education, Health and Care Plan

# SEND EHCP Legal Framework

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Definition of special educational needs –

(1) A child or young person has SEN if they have a learning difficulty or disability which calls for special educational provision to be made for him or her.

(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

Children and Families Act 2014, s 20.



# Education and Health Care Plans

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Education and Health Care (EHC) Plans must contain the following sections:

**Section A:** the **views, interests and aspirations** of the child and his parents or the young person;

**Section B:** the child or young person's **special educational needs ("SEN")**;

**Section C:** **health care needs** which relate to their SEN;

**Section D:** **social care needs** which relate to their SEN or to a disability ;

**Section E:** the **outcomes sought** for the child or young person;

**Section F:** the **special educational provision** required to meet their SEN;

**Section G:** any **health care provision** reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN;

**Section H:** any **social care provision**;

**Section I:** the **name of the school or other institution** to be attended by the child or young person, and the type of that institution (or just the type if no specific institution is named);

**Section J:** details of any **direct payment** which will be made;

**Section K:** copies of all of the advice and information obtained as part of the EHC needs assessment.



# Disagreements between parents, young people and the Local Authority

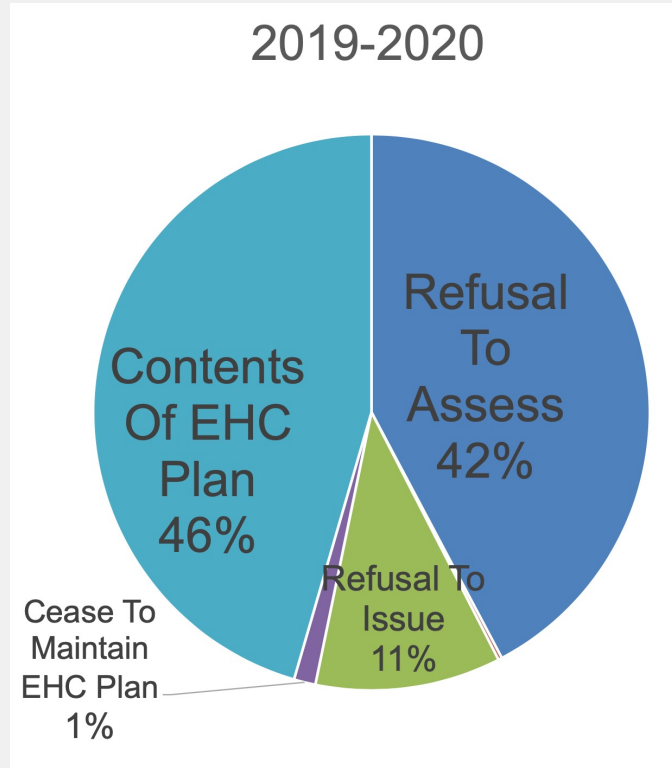
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- The appealable decisions are:
  - Decisions not to secure an EHC needs assessment (section 51(2)(a));
  - Decisions not to issue an EHC plan (section 51(2)(b));
  - Decisions relating to the contents of the EHC plan (the child's special educational needs (section B)/the provision (section F)/placement (section I) (section 51(2)(c)); including decisions not to re-assess under section 44 (section 51(2)(d)) or amend an EHC plan following a review or re-assessment (section 51(2)(e)); and
  - Decisions to cease to maintain an EHC plan (section 51(2)(f)).

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NB Duty to consider mediation does not apply to section I.

# Use of Mediation in SEND Disagreements



Source: KIDS SEND Mediation Service.



# Who can Appeal?

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Appeals can be made either:

- In the case of children under compulsory school age, by their parents;
- In the case of young people (over compulsory school age but under 25), by the young person.

In the case of a young person who lacks the mental capacity to make decisions in relation to such an appeal, appeals can be brought in the young person's name by their representative (usually appointed under the Mental Capacity Act 2005) or, if they don't have one, by their parent.





## Requirement to consider mediation – compulsion (s 55)

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A parent or young person may only register an appeal at the SEND Tribunal if a mediation advisor has issued a certificate to them (section 55(3)).

A mediation certificate is issued when:

- (1) A mediation advisor has provided the parent or young person with information and advice about mediation and then the parent or young person has said they **do not** wish to pursue mediation; or
- (2) A mediation advisor has provided the parent or young person with information and advice about mediation and then the parent or young person has said they **do** wish to participate in mediation and they then have participated in mediation.

A mediation certificate is issued following a **SEND mediation information and advice session (MIAS)**, or, at the conclusion of the mediation. The parents or young person then have 30 days to register their appeal.



# Health and social care

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- The requirement to consider **mediation** is only related to the education sections of the EHC plan.
- A parent or young person can choose to go to statutory mediation regarding the health and social care sections of a plan alongside an education element.
- But, they will not be able to appeal to the SEND Tribunal about the health and social care sections alone.
- There is currently a national trial of powers to enable the SEND Tribunal to look at the health and social care sections when dealing with an appeal which also concerns educational matters (the trial period of the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017. The trial is being independently evaluated and all relevant SEND Tribunal decisions are being published).



# Duties on the local authority

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- Local Authorities **must** provide information on mediation. Details, including contact details, of the mediation arrangements **must** be set out in the Local Offer.
- Local Authorities **must** inform families and young people of their right to mediation (s52(2)(a)).
- Local Authorities **must** arrange and pay for mediation.
- Local Authorities **must** send a representative with decision-making authority



## Duties on the mediator (s 56 and reg 40 SEND Regs 2014)

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- Mediators **must** be independent of the Local Authority.
- Mediators **must** have knowledge of SEND legislation (SEND Mediators can be accredited with College of Mediators (COM) and Civil Mediation Council (CMC)).
- *Usually provided by a specialist SEND Mediation Service*



## Who attends the mediation (Reg 38(1))

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- Parents and child / Young person and their alternative person
- Advocate / supporter
  - Friend
  - SENDIAS advisers, advocates
  - School – teacher, SENCO, headteacher
  - Therapist / Support Worker
  - Lawyer (*L Kumar v LB of Hillingdon* [2020] EWHC 3326 (Admin))
- Local authority
  - Case worker, Tribunal officer, Senior manager
- Health / Social Care (if health related CCG must attend)



# Mediation principles

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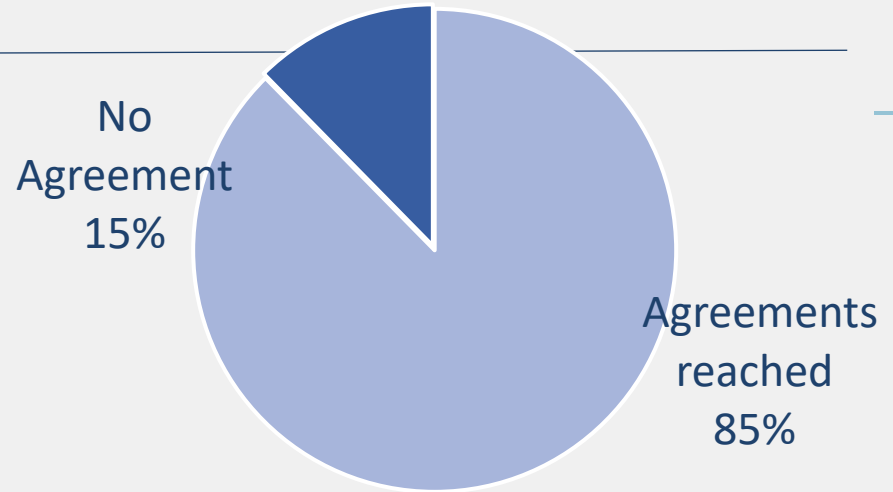
- Confidential, Informal, structured process
- Strong focus on the child / young person
- The mediator must be independent and impartial
- The discussion is confidential, outcome is not confidential
- Ensures everybody's voice is heard
- The mediator writes a mediation agreement setting out actions agreed
- Does not affect right to appeal
- Outcomes include definitive decisions (eg to issue an EHCP) as well as 'next steps', further information, meetings, communication issues.



# The benefits of mediation

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- Mediation is free (for young people and parents)
- High settlement rate
- Child / young person is the focus
- Quick – usually within 4-6 weeks
- Non-adversarial
- Solution-focused
- Provides an opportunity to build trust, leading to improved communication and relationships between LA and families.
- Supports LAs improve the way they work with families.



# Disagreement resolution services

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The SEND framework includes

- Local authorities **must** make disagreement resolution services available to parents and young people for disputes over children and young people with SEN and schools. Four categories –
  - Disagreements between parents/young person and local authority/schools about how they are carrying out their education, health and care duties
  - Disagreements about special educational provision
  - Disagreements about Health and Social Care provision
  - Disagreements relating to EHC plans
- Disagreement resolution is non-statutory mediation. The process is identical to mediation but there is no duty on local authority to attend and other legal duties don't apply.



# Judicial review

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- If the provision that is set out in the EHCP is not being made by the placement (early years setting, school, further education etc). Then there is no route of appeal to the SEND Tribunal - First Tier Tribunal (Special Educational Needs and Disability).
- Parents or young people may wish to judicially review the local authority.
- Consider mediation?
- Legal aid: Mediator's fee funded under expert rates as a disbursement, attendance of lawyer (if permission is granted or at risk).



# Disability Discrimination

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- Disputes over education provision may also arise in the context of disability discrimination.
- There is a route of appeal to the First Tier Tribunal (Special Educational Needs and Disability).
- Consider mediation?
- Legal aid



# SEND Legal Framework

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- Children and Families Act 2014:
  - **Section 51** of the Act sets out the rights of appeal;
  - **Sections 52 - 56** of the Act relate to mediation;
  - **Section 57** of the Act contains the obligation on the LA to make arrangements with a view to avoiding or resolving disagreements.
- The Special Educational Needs and Disability SEN Regulations 2014 (“**SEN Regulations**”) contain detailed provisions re:
  - Mediation : **SEN Regulations 32 - 42**
  - The SEND Tribunal’s powers: **SEN Regulation 43**;
  - Compliance with the SEND Tribunal’s orders: **SEN Regulation 44**; and
  - Unopposed appeals: **SEN Regulation 45**.
- SEND Code of Practice 2015, Chapter 11 deals with mediation and appeals.



# SEND Legal Framework

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## Also see

- The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) - set out the procedure in the SEND Tribunal and the powers of the SEND Tribunal.
- The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 - set out details of the trial period during which the SEND Tribunal will be able to make non-binding recommendations regarding health and social care needs and provision. Trial due to end in August 2020 but extended due to the Coronavirus pandemic until 31 August 2021.



## Further information

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Useful guides about mediation and dispute resolution -

<https://www.sendpathfinder.co.uk/send-disagreement-resolution>

National trial decisions –

<https://www.sendpathfinder.co.uk/summary-of-national-trial-decisions>



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