



Section I (School/Placement) Appeals only

This guidance is for Parents that have completed a SEND35 form and have received correspondence from the Tribunal that their appeal has been registered (please see our separate guidance that explains this)

Under Section 38 (3) of The Children and Families Act 2014, a parent or young person has a right to request any of the following types of school or college:

- (a) a maintained school;
- (b) a maintained nursery school;
- (c) an Academy;
- (d) an institution within the further education sector in England;
- (e) a non-maintained special school;
- (f) A section 41 school (these are independent schools which have 'opted in' to be able to be requested by parents)

If you are not sure what type of school you're asking for, check on the government website 'Get Information About Schools' <https://get-information-schools.service.gov.uk/>

In this type of appeal, the burden of proof is on the Local Authority (LA) to dislodge the parental preference. They need to do so by evidencing one of the following as contained in Section 39(4) Children and Families Act:

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

The LA has to prove that at least one of these conditions applies in order to dislodge the parent or young person's preference.

Whilst the burden of proof is on The LA, you must still submit evidence towards your appeal. The type of evidence you need, depends on what the dispute is about.

If yours and The LA's choice of schools are both saying that they can meet 'need' your appeal would be about the costs of each school ('the efficient use of resources') by demonstrating that there is a minimal difference in cost to the taxpayer/public purse.

You can find out how the Schools can meet your child's needs this information in a number of ways -

- Looking at the Schools Ofsted report,
- SEN Information on their website and their prospectus
- Talking to the SENCo.
- Visiting each School (Your 1st choice, second choice and the LA's choice - this demonstrates that you have done thorough research and that you are clear about what each one can provide)



The schools would also be called as witnesses to your appeal so they can be questioned and demonstrate this. If the LA have not called the School of your choice as a witness, you are able to do so.

Suitability

Age

This may seem obvious, but there are occasions where a child may be permitted to attend a School, even if their chronological age says otherwise - particularly if they are a 'Summer-born' child. That is, they were born between 1st April and 31st August of the year they are due to start, or did start School.

For example, a child born in July, who is due to leave Primary School in 2023, may have their entry to Year 7 deferred for a year, if it is in their best interests and the School agree, giving them an extra year in Primary School.

Ability, Aptitude or SEN - How will I know?

The decision makers in the LA would have used the contents - Sections B & F - of your child's EHC Plan to determine which School would be suitable for your child. Therefore, this is what you need to do for yourself - for the LA's choice of School, as well as your own.

If the LA says that the school you have asked for is not **suitable** (the LA does not have to provide your child with the best education, but a suitable one) for your child you will need to:

- Gather evidence about the type of children who are admitted by the school you want. Look at the OFSTED report and prospectus of the school.
- Look at the evidence that you have about your child's needs (in Sections B & F of the EHC Plan).
- If you are seeking a place for your child in a mainstream School with a Resourced Provision base, which of the 4 broad areas of need below do they specialise in? Is this your child's Primary area of need?

⇒ **Communication & Interaction** (ASD; Social/Communication difficulties)

⇒ **Cognition & Learning** - Moderate Learning Difficulties (MLD - where a child is working below or significantly below average across all learning areas) or Specific Learning Difficulties (SpLD - such as Dyslexia, Dyscalculia or Dyspraxia/DCD)

⇒ **Social, Emotional & Mental Health (SEMH)** - many children with ADHD come under this category, as well as behavioural or mental health difficulties that is a barrier to them learning.

⇒ **Sensory & Physical** - a physical or sensory impairment

Incompatibility

If the LA says that the attendance of your child at the school you want will be incompatible with the provision of efficient education for the other children in your child's class, you can ask for evidence of this. Their rationale could have come from the School's written feedback response, which you can request a copy of if you have not already received it.

Incompatibility has to be something that disrupts the education and learning of other children. It is not something trivial or avoidable. For instance -

- A behavioural problem that can't be dealt with effectively without disrupting the education of other children
- A behavioural problem which is constantly interfering with others' learning.

If your child has a behavioural problem, consider whether it would still be a problem if he or she gets the right support, as described in Section F of their EHC Plan.



The 'incompatibility' argument is often used where the school is 'full'.

- Find out if the school is over-subscribed, if so by how many children?
- Has the school exceeded the stated number of children in the past?
- Is there any flexibility in terms of which class your child would go into?
- Exactly how many adults and children will be in that class?

There is no definition in law of what it means for a school to be 'full'. LA's are able to name schools which say they are 'full' in EHC plans and must do so unless they are able to prove that by adding one more child with their specific needs would have a detrimental effect on the education of the other children and that there are no **reasonable steps** that could be taken to remove the incompatibility.

For instance, the LA has to show that because of the high numbers of pupils in the school your child's needs won't be met, or that other children's needs would not be met; or that there would be an inefficient use of resources (for example, as a result of them having to appoint another teacher or build another classroom).

The right to a mainstream education

If you want your child to be educated in a mainstream school or college, there is another part of the law you can rely on as well.

Section 33 of The Children and Families Act 2014 (CAFA 2014) states that a child or young person with an EHC plan must be educated in a mainstream setting unless:

1. it is against the wishes of the child's parent or the young person; or
2. it is incompatible with the provision of efficient education for others and the LA can demonstrate that there are no reasonable steps that it could take to prevent the incompatibility.

Even if the LA successfully argued that a mainstream school was unsuitable for the ability, aptitude or SEN of the child (one of the lawful reasons for refusing a school) if they wanted to name a special school against the parents' or young person's wishes they would also have to show that it was incompatible with the provision of efficient education for others.

Please note - this is a right to mainstream education but not necessarily a right to a *particular* mainstream school.

Requesting an independent school or college

Parents and young people do not have a right to request an independent school in the same way that they can request the settings listed above, set out in section 38(3) CAFA 2014. However, this does not mean that they cannot ask for a place at an independent setting which is not on the above list.

Where parents are asking for an independent setting to be named in their child's EHC Plan, the LA must have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, as long as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

When a parent requests a section 38(3) school or college, the LA must comply with the request unless the limited exceptions outlined above apply.

If the LA refuses to name the parents' choice, the onus is on the LA to prove why it is not possible. However, when a parent appeals for an independent setting to be named in an EHC plan, the onus is on them to prove that none of the schools the LA is offering can meet the child's needs, or that the cost of the placement will not cause unreasonable public expenditure.

Public expenditure includes all the costs to the public purse of the placement not just those incurred by the LA education budget. This can include social care costs, health costs and any other costs incurred by any public body. If the parent or young person cannot show this, the Tribunal will not order an independent school to be named.



Building a case

We advise that you make full use of the information in the prospectus, SEN Information Report and any Ofsted reports for both schools. All these will need to be sent as evidence to your Appeal. You are required to submit the latest Ofsted report for your chosen school and The LA will submit the Ofsted report for theirs.

Make use of any reports which demonstrate the extent of your child's difficulties and/or the extent of provision required to support your child.

Below is a table of the type of evidence we would advise that you submit to the Tribunal and the LA. Once your appeal is registered, any further documents and emails you send to Tribunal send@justice.gov.uk **must also** be sent to the LA sendtribunal@wirral.gov.uk using the subject format below:

For example; 'HD 11/11/2023 | EH344/23/00000 | Child's full name | New Evidence'.

This is broken down in to the following format:

Current hearing date, for example "HD 11/11/2023"
 Appeal number which will start EH344/23/
 Child's/young persons full name
 Subject, for example EVIDENCE or SEND 7.

Type of evidence	What the evidence could provide
Special school prospectus and Ofsted report	<ul style="list-style-type: none"> • Outlining the facilities and provision in place which would meet the needs of the child. • Highlight difference between one school and another • Understanding the needs of current students - are they similar to your child?
Report or witness statement from current school	If applicable, outlining how a mainstream setting cannot meet need
Transport costs	If applicable, outlining difference in cost
Fees if independent special school	If applicable, outlining difference in cost
If independent school – a letter showing that there is a place available	Tribunal service will request this if not submitted – the form would be called Provision of Placement (POP)
Annual Review recommendations (if applicable)	What is the outcome of the Annual Review? Has the EHCP been reviewed adequately? Exhausted all options? Sought appropriate support of outside agencies?

Late evidence

Late evidence is anything after the Final Evidence Deadline. No further evidence will be accepted after the deadline without the express permission of the Tribunal.

For the evidence to be admitted as late evidence, the application must prove that the evidence was not available at the time of the final evidence deadline and that it is relevant to the issues in the appeal. Requests asking for late evidence to be accepted after the final evidence deadline will only be considered at the final hearing and so may delay the start of the hearing or result in its being adjourned, as the Tribunal will require time to read the late evidence.

Consider Sections B & F

The decision to place your child in the School of the LA's choice is made, not by one person, who knows your child well, but is based upon the information contained in Sections B & F. Check these sections and consider -

- Am I satisfied that *all* of my child's needs are accurately described in Section B?
- Is all of the information up-to-date?
- Am I satisfied that my child's needs will be met by the provision stated in Section F?
- Has anything that is in the advice from the Professional that has been missed?

If the answer is 'No' to any of the above questions, you may want to consider submitting a SEND7 - Request for Changes form. You can access this here - <https://www.gov.uk/government/publications/form-send7-request-for-change>