

# Health and the SEND Tribunal: Extended Appeals

## Information Resource for DMOs/DCOs

This document provides an overview of the role of health in the SEND Tribunal: Extended Appeals. This information resource is aimed at Designated Medical Officers (DMOs), Designated Clinical Officers (DCOs), and other health colleagues who have an interest in, or are involved with, the SEND Tribunal: Extended Appeals.

### The Basics

#### What is the SEND Tribunal: Extended Appeals?

Following the end of the National Trial on 31 August 2021, the SEND Tribunal has been given extended powers to make non-binding recommendations on the health and social care aspects of Education Health and Care (EHC) plans. This gives parents and young people a 'single route' to raise their concerns about an EHC plan in one place. Parents and young people are able to appeal to the SEND Tribunal about decisions concerning all three aspects of Education, Health and Social Care – but only if there is an educational element to the appeal.

In cases where a parent or young person seeks amendments to the EHC plan with respect to health and social care, parents, local authorities, and health and social care commissioners will be required to provide evidence and arguments for the health and social care issues. In these instances, health and social care commissioners will need to let parents and the local authority know what steps they have decided to take or their reasons for any decision not to follow the recommendations.

#### What can the SEND Tribunal rule on?

[Regulations](#) set out the extended powers which explain that the Tribunal can make non-binding recommendations on:

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

You can find out more about the scope, benefits, and limitations at [Extended Powers SEND Tribunal: Online Toolkit - Mott MacDonald \(sendpathfinder.co.uk\)](#).

#### What can the SEND Tribunal do in regard to health and social care issues?

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

Where there is no EHC plan in place or where health and social care needs and/or provision **are not** included in the plan, the Tribunal has the power to recommend they are specified in the plan.

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

### What is the role of the DMO/DCO in the SEND Tribunal process?

The DMO/DCO role supports health commissioning bodies to fulfil their statutory responsibilities for children and young people with SEN and disabilities. The SEND Code of Practice under Section 3.45 to 3.48 provides more detail about the role, as well as the [DMO/DCO handbook](#) produced by the Council for Disabled Children.

[The DfE guidance on SEND tribunal extended powers](#) outlines the duties of health commissioning bodies in relation to the extended appeals process. Expectations of health commissioning bodies include:

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

### **Additional expectations**

Taking into consideration the above requirements, LA social care teams and health commissioners should update their local systems, policies and procedures to comply. This will include but not be limited to:

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

Before an appeal is registered, the parent or young person may choose to use SEND mediation. Mediation is an informal, structured process, facilitated by an independent and impartial person, that aims to reach resolutions to disagreement. It is not compulsory for a parent or young person to attend mediation prior to registering an appeal. However, if they want to register an appeal then

they must have a mediation certificate issued by a mediation adviser (unless their appeal is only about the name of the school in an EHC plan). If a parent or young person chooses to use mediation, and the dispute includes health-related issues, the health commissioning body must attend. You can find further details about mediation at [SEND Disagreement Resolution - Factsheet 3 - Mediation](#).

## Journey of an appeal

This document provides a summary of the key points in the journey of an appeal where a DMO/DCO may be involved in the SEND Tribunal appeals process. For further information about the complete SEND Tribunal process and the statutory duties of all parties you should refer to the DfE's guidance: [SEND Tribunal: Extended appeals guidance](#).

As part of the extend appeals process, health commissioners **must**:

- Respond to any request for information and evidence within the timeframe set by the Tribunal before the hearing takes place
- Send a witness from the health body to attend the hearing to give evidence (if required)
- Once the Tribunal has communicated its decision and recommendations following the hearing, respond to the parent/young person and the local authority within 5 weeks of a recommendation being made, setting out the steps they have decided to take or giving reasons why they are not going to follow the recommendation(s).

### 1. Appeal registered with the SEND Tribunal

The SEND Tribunal appeals process begins when a parent registers an appeal with Tribunal. When the appeal is registered, the local authority will be notified and sent copies of the papers filed, along with a deadline by which they must respond to the Tribunal and provide details of witnesses. It is the local authority's responsibility to notify health commissioners that an appeal has been registered. The local authority will produce the evidence bundle for the Tribunal hearing.

You can find further information about the SEND Tribunal timeframes at: [Preparing a SEND Tribunal case: local authorities - GOV.UK \(www.gov.uk\)](#)

Further information about being a witness at a SEND Tribunal and preparing evidence can be found here: [SEND Tribunal: if you're asked to be a witness - GOV.UK \(www.gov.uk\)](#).

Section 3 of the SEND Tribunal: extended appeals guidance also contains information about preparing and presenting evidence: [SEND Tribunal: Extended appeals guidance](#).

#### **Frequently asked questions:**

##### **Who is responsible for securing a health witness?**

Whilst the local authority is responsible for appointing witnesses and submitting evidence, there is an expectation that the health commissioner would support these activities through identifying and appointing a relevant witness for the health-related aspects of the appeal and supporting this witness with providing evidence.

### 2. Attending the SEND Tribunal Hearing

As part of the SEND Tribunal hearing, the DMO/DCO will act as the point of contact when coordinating with the local authority and/or the SEND tribunal. If required, the DMO/DCO will be

responsible for sending a witness to give oral evidence at the hearing and ensuring that this witness is provided with the necessary information and supported throughout the process. If required, the DMO/DCO may also attend the SEND Tribunal hearing as a witness.

Both the local authority and the parent or young person can request that the SEND Tribunal require a witness to attend the hearing. Witnesses will usually receive a letter to ask them to be an expert witness and to explain why they have been summoned. Once summoned, a witness should attend the SEND Tribunal hearing. Further information can be found under the 'If you get a witness summons' section here: [SEND Tribunal: if you're asked to be a witness - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/send-tribunal-if-youre-asked-to-be-a-witness).

Appeals to the SEND Tribunal are heard by a judge and two specialist lay members who have knowledge and experience of children and young people with SEND. For appeals relating to health matters, the panel members will have a background in health and/or social care and be trained in SEND law – additional specialist health and social care members have been recruited by the Tribunal for this purpose.

HM Courts & Tribunal Service (HMCTS) have produced a series of videos for parents and young people to provide an overview of what to expect on the day of the tribunal. These videos include an outline of who is who at the Tribunal and their role, as well as an overview of what takes place during the hearing. These videos can be accessed through the HMCTS YouTube page here: [Special Educational Needs and Disability Tribunal - YouTube](https://www.youtube.com/watch?v=Ugk1v1v1v1v)

#### **Frequently asked questions:**

##### **Does the DMO/DCO need to attend the hearing?**

No, the DMO/DCO is not usually expected to attend the hearing unless the DMO/DCO has been summoned to attend the hearing as a witness.

### **3. Responding to SEND Tribunal recommendations:**

The Tribunal will not usually make a decision or any recommendations on the day of the hearing but will be confirmed by the judge through a formal written decision (normally within 10 working days).

The Tribunal must send its decision or any recommendations to both the local authority and the parent or young person who registered the appeal. If the Tribunal decides to make a recommendation on the health issues included in the appeal then the Tribunal must also send a copy of these recommendations to the relevant health commissioning body. The Tribunal may also decide to send a copy of the full decision along with these recommendations.

Recommendations made by the Tribunal in relation to health elements of an EHC plan are non-binding. There is no requirement on the relevant health commissioning body to follow the recommendations; however, there is a general expectation that recommendations are followed.

Once the Tribunal has made its recommendations, the relevant health commissioning body must respond to the parent or young person and the local authority SEND team within five weeks of the date of the recommendation. The Tribunal may specify a different time limit that health commissioning bodies need to respond within depending upon the issues and complexity of the case.

The response from the health commissioning body must be provided in writing and state the steps it has decided to take with regards to the recommendations. Any recommendations made by the Tribunal should be carefully considered and if a decision is taken not to follow the recommendations, this decision should be sufficiently detailed in the written response by the health commissioning body.

A toolkit has been created to provide resources to local authorities and health commissioners in relation to the SEND Tribunal. This toolkit includes sample letter templates that can be used to draft responses to recommendation letters and can be accessed here: [SEND Tribunal extended powers: Online Toolkit](#).

If a health commissioning body decides not to follow the recommendations of the Tribunal, parents and young people can raise a complaint with the Local Government and Social Care Ombudsman (LGSCO). The LGSCO can consider cases where there is failure to agree to implement a non-binding Tribunal recommendation. Where the appeal includes health aspects the LGSCO will co-ordinate with the Parliamentary and Health Service Ombudsman (PHSO) to hear the complaint. If necessary, parents and young people can also seek to judicial review the decision. The Court will however generally refuse permission to apply for judicial review if it finds that the claimant has (or had) an adequate alternative remedy which it has not used.

#### **Frequently asked questions:**

##### **Can the Tribunal rule on health aspects that were not part of the original appeal?**

Yes – if the judge believes that there is something else that health commissioners should be doing but the parent or young person had not originally raised this as part of their appeal, then the Tribunal can make an additional recommendation.

### **Effective practice for managing appeals**

The following are approaches adopted by DMOs and DCOs that you may want to consider as part of your role.

- Coordinate with the local authority to set up a system where the DMO/DCO is notified at the point of mediation and involved from early-on in the SEND Tribunal Process. Early involvement in the SEND Tribunal process allows adequate time for collating sufficient information from health professionals.
- Connect with the local authority SEND Team to identify a reliable point of contact. Establish clear processes for joint working with key stakeholders involved in the SEND Tribunal, including, local authority SEND Teams, social care, and parents and young people.
- Prioritise effective communication with the parents or young person and continue to explore ways of resolving the areas of disagreement.
- Maintain strong and collaborative relationships with SEND Tribunal stakeholders by prioritising frequent communication with the local authority SEND Team throughout the SEND Tribunal process
- Advise health colleagues about their role and responsibilities for each stage of the SEND Tribunal process.
- Develop training and templates for health colleagues who may be less knowledgeable on the SEND Tribunal, in order to enable health colleagues to feel more confident on the contribution of health to the SEND Tribunal process.

- Check-in with and issue reminders about the statutory duties of health to colleagues who may be unfamiliar with the SEND Tribunal process.
- Provide access to legal support for health colleagues who require legal advice for complex SEND cases.
- Join the professional network of DCOs/DMOs to provide and benefit from peer support and share effective practice. The Council for Disabled Children have established an online DCO/DMO forum which you can join by emailing Marie Hunt at [MHunt@ncb.org.uk](mailto:MHunt@ncb.org.uk).
- Ensure key learnings from typical and more complex cases are shared with regional health colleagues and the wider cross-regional DMO/DCO network.

## Further information and useful links

### Statutory Guidance:

- [SEN and Disability Code of Practice 2014](#) – Section 11
- [SEND Tribunal: extended appeals guidance](#)
- [Children and Families Act 2014](#)
- [Health Education and Social Care Chamber tribunal procedure rules](#) – guidance from the Tribunal Procedure Committee
- [SEND \(First-tier Tribunal Recommendations Power\) Regulations 2017](#)

### Information and guidance from public bodies

- [First-tier Tribunal \(Special Educational Needs and Disability\)](#) – guidance and forms from HMCTS in relation to the SEND Tribunal
- [National Framework for NHS Continuing Healthcare](#)
- [National Institute for Health and Care Excellence \(NICE\)](#)
  - [Multi-agency working to support young people with special educational needs and disabilities preparing for adulthood](#)
- [Royal College of Speech and Language Therapists](#)
- [Royal College of Occupational Therapists](#)

### Other information and guidance

- [Extended powers SEND Tribunal: Online Toolkit](#)
- [National Trial: Summary of Decisions](#)
- [DMO/DCO Handbook – Council for Disabled Children](#)
- [Case law updates relating to EHC Plans](#)
- [Case law updates relating to health](#)
- [Focus on Health Advice e-learning](#) – various levels of free e-learning available depending on experience
- [IPSEA - Extended Powers FAQ document](#)
- Disabled Children: A Legal Handbook by Steve Broach and Luke Clements
- Disability Rights Handbook ed. 46 2021-2022 by multiple authors