



Special Educational
Needs (SEN):

How to Make a Complaint or Challenge a Decision

Advice for Parents,
Carers and Young People

Produced by Birkett Long Solicitors
birkettlong.co.uk

Contents

Getting Your Child the Right Support	03	SEND Tribunal Appeals	10
Knowing Your Rights	04	Judicial Review	11
Making a Complaint: Nursery, School or College	05	Disability Discrimination	12
Escalating a Complaint	07	Making a Claim: Disability Discrimination	13
Further Action	08	How We Can Help You	14
SEND Tribunal Appeals	09		



Getting Your Child The Right Support

It can be a steep learning curve for parents and carers with a child with Special Educational Needs and Disability (SEND), even before they begin their education journey.

When your child starts nursery or school, the challenges faced can multiply as they discover life outside the home, learning in a different setting with new people, new rules and new expectations.

You want your child to get the best start and to have the best education possible – which includes support that recognises their individual needs. To enjoy learning, to thrive, and to achieve their full potential.

And when they move on to higher education, a young person might need as much care, support and attention as they did at nursery or school as they transition into adulthood.

So what can you do if you are the parent or carer of a child with SEN, or a young person whose needs are not being adequately supported?

How do you get your voice heard?

Making it simpler for you

Complaining or challenging a decision by a nursery, school, college or local authority can feel like a daunting prospect, an educational jungle fraught with red tape, legalities and disjointed advice.

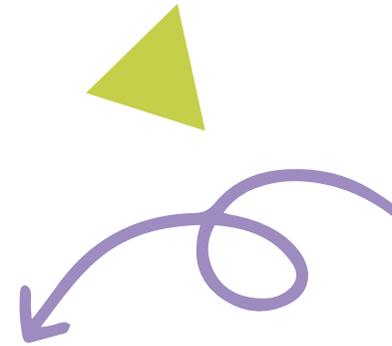
At Birkett Long, we know how much of a struggle it can be for you to get your child the support they need, and how difficult it can be to tackle this area of law when things go wrong.

We also recognise that you have enough on your plate without having to comb your way through stacks of complicated and confusing information, just to find out what you can do.

That is why we have produced this simple guide to explain your child's legal rights and the steps you need to take when the system is letting them and you down.

Our specialist team of SEN lawyers are experts at helping families make successful claims and win appeals.

We provide practical and unrivalled legal advice based on years of experience to ensure that children and young people get the educational support they are not only entitled to, but deserve.



Knowing Your Rights

What rights does a child with SEN have?

Except in limited circumstances, children with SEN are entitled to be taught in mainstream nurseries, schools and colleges, and education settings have to provide support and reasonable adjustments so that they can take part fully in school life.

Mainstream schools (any school that is not a special school) and maintained nursery schools (funded by the local authority) must also ensure that children with SEN are included in activities together with those who do not have special educational needs.

Excluding a disabled child or young person from activities could amount to disability discrimination. **They can only be excluded from activities if:**

- It cannot reasonably be put into practice
- It would prevent them from receiving the support they need
- It would prevent the 'efficient' education of other children or use of resources

What SEN support is available?

Nurseries, schools and colleges have a legal duty to identify if a child or young person has SEN and to use their 'best endeavours' to provide support. This applies to all settings apart from wholly independent schools.

They should record what their needs are, what outcomes they expect them to achieve, and what provision is being put in place to achieve those outcomes in a SEN Support Record.

If they cannot meet your child's SEN, they can ask the local authority (LA) to carry out an Education, Health and Care plan (EHCP) needs assessment – parents, carers and young people (16-25) can request this, too. A request is made with a view to an EHC Plan being issued.

What is an EHC Plan (EHCP)?

An EHCP is a legal document describing a child or young person's special educational, health and social care needs, the extra or specialist support required to meet those needs, how that support will help them to achieve specific outcomes, and the named nursery, school, or college they will attend.

What is SEND?

SEND stands for Special Educational Needs and Disability – you will also see the term SEN used.

Both terms are used to describe the learning difficulties or disabilities that make it harder for a child to learn, compared to children of the same age.

For the purposes of this guide, we will use the term SEN.



Making a Complaint: Nursery, School or College

Do you feel that not enough is being done to provide the right SEN support? Has your child been prevented from joining in with activities or discriminated against because of a disability?

Maybe they have been denied exam access arrangements or excluded without following the correct procedures – children with SEN are more likely to be excluded than their classmates who do not have SEN.

These are all valid reasons for making a complaint.

Sometimes, having an informal chat with your nursery, school or college can resolve issues. However, you may be forced to take more formal action.

If an education provider is not fulfilling its legal duties, there are several ways you can challenge this.

Failure to use 'best endeavours'

Educational settings have a legal duty to use their 'best endeavours' to provide SEN support, which basically means doing everything they can. This includes:

- Mainstream schools
- Maintained nursery schools
- Academies for 16-19s
- Alternative provision academies
- Further Education institutions
- Pupil referral units





Making a Complaint: Nursery, School or College

If you feel that a nursery, school or college is not doing everything it can to give your child SEND support, you can take these steps:

Step 1 – Informal discussion

Ask the class teacher and SENCo (Special Educational Needs Co-ordinator) for a meeting to discuss your child's support and how it is being implemented.

Step 2 – Request

Ask for a copy of your child's records so that you can see all the information held on them, which could be very useful to your complaint.

Step 3 – Complain

If talking has not solved the problem, make a formal complaint following the nursery, school or college's complaints procedure (usually published on their website).

There is no fixed time in law for your complaint to be investigated, but the complaints procedure should detail the steps that will be taken to deal with your grievance.

Complaint about an EHC Plan

If your child has an EHCP, but it is not being implemented properly, raise it with the nursery, school or college and complain in writing to the local authority. It is the local authority's legal obligation to ensure that special educational provision stated in section F of an EHCP is being secured.

Appropriate Authorities

Maintained school/nursery – governing body

Academy school – proprietor/trust

Pupil referral unit – management committee

Sixth form/further education college – governing body/board

Escalating a Complaint: Nursery, School or College

If you're still unhappy with how a nursery, school or college has dealt with your formal complaint, you can escalate the matter further:

Schools/Colleges

Complain to the local authority (LA) for your school – they can intervene in some instances if your complaint has not been addressed or you are not satisfied with the outcome of your complaint.

If the LA is unable to resolve the matter, complain to the Department for Education (DfE) – it has considerable powers and can investigate a complaint about a school. Set out the facts, explain why the education provider's formal complaint procedure failed to achieve a satisfactory conclusion, and why you believe its actions are unreasonable or unlawful. Providing copies of letters or emails exchanged will strengthen your case.

While the DfE cannot deal with individual complaints about private schools, it can step in if a school is not meeting general standards in a number of areas, including education provision.

If your complaint is about a school and has not been resolved by the DfE, you can also escalate it to Ofsted.

However, Ofsted will not usually consider a complaint unless you have first followed a school's complaints procedure and then complained to the DfE.

Ofsted can order an immediate inspection of a school at short notice, if it feels your complaint is very serious.

Nurseries

Take your complaint directly to Ofsted – the DfE does not deal with grievances about nurseries or early years providers.

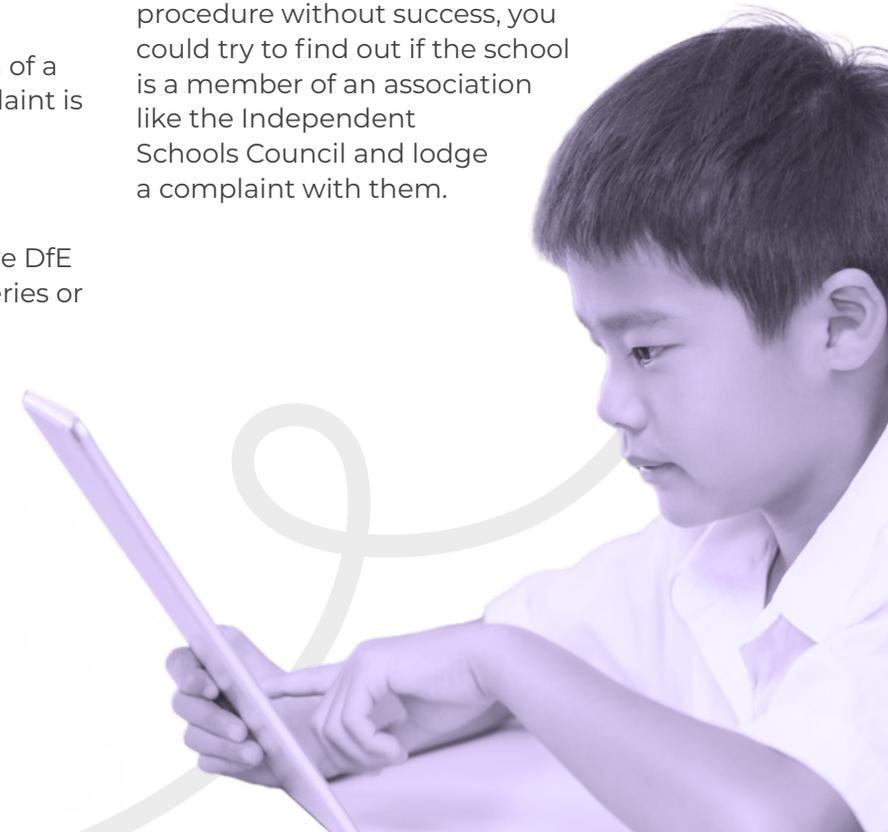
However, Ofsted will not usually consider a complaint unless you have first followed a nursery's complaints procedure.

Ofsted can order an immediate inspection of a nursery at short notice, if it feels your complaint is very serious.

Independent schools

Independent schools also have to publish a complaints procedure, which parents can request if it is not on their website.

If you have followed the complaints procedure without success, you could try to find out if the school is a member of an association like the Independent Schools Council and lodge a complaint with them.



Further Action

Information Commissioner's Office (ICO)

To make a complaint about a data protection issue or failure by a nursery, school or college to provide information that you have the right to access, contact the ICO.

Local Government and Social Care Ombudsman

If a nursery, school or college has not implemented your child's EHC plan properly, or you are not satisfied with how an admissions appeals panel or independent review panel (in the case of an exclusion) has followed the applicable processes, you can complain to the Local Government and Social Care Ombudsman.

Special Educational Needs and Disability Tribunal (SENDIST)

This is an independent national tribunal that hears claims of disability discrimination against schools (as well as appeals against LA decisions about EHC Plans). *Please see the sections: Disability Discrimination and Making a Claim.*

Judicial Review

Usually considered a last resort, you may feel it is necessary to seek a Judicial Review.

Courts can step in to judge if a decision taken by a public body was made in a lawful, fair and reasonable manner – and reverse it if necessary. *Please see the section: Judicial Review.*

Making a Complaint: Local Authority

If your dispute is with a local authority – for instance, you may feel that it is failing in its duties by not securing provision stated in section F of an EHC plan – the first port of call is the LA's own complaints procedure.

Visit its website for this or ask for a copy, and follow the guidance – it is a good idea to keep copies of everything and proof of delivery, when your complaint is sent by email or post.

Additionally, you may also wish to write directly to the LA's Director of Children's Services as well as the council's monitoring officer, whose job it is to make sure that the authority is sticking to the law, along with your local ward councillor.

The next steps

What should you do if your formal complaint to the LA falls on deaf ears or it fails to act?

You could potentially take your dispute to the Local Government and Social Care Ombudsman.

For disputes over an EHC Plan or assessment, you can appeal to the Special Educational Needs and Disability Tribunal (SENDIST) – also known as the First-tier Tribunal, if you have the right to do so.

You could request a Judicial Review to judge whether a decision was lawful, fair and reasonable.

Please see the section on Judicial Review.



SEND Tribunal Appeals

You can appeal to the Special Educational Needs and Disability Tribunal (SENDIST) against a local authority's refusal to:

- Assess a child or young person's EHC needs
- Reassess their EHC needs
- Issue an EHCP
- Change what is in an EHCP (including the nursery, school, college or other educational setting)
- Maintain an EHCP

What is a Special Educational Needs and Disability Tribunal (SENDIST)?

This tribunal considers appeals by parents and carers (either a birth parent or one with parental responsibility), or young people, against LA decisions about the above, as well as disability discrimination claims against schools.

You must consider mediation before appealing. This does not mean that you actually have to go through mediation, but you do have to consider it in most cases – unless, for example, your appeal is about a named school placement for your child.

Please note, it is the parent who has the right of appeal for a child under 16 – above this age, it is the young person (up to the age of 25).

You can also appeal about the health and social care sections of an EHCP, although SENDIST has limited powers when it comes to these actions.



Judicial Review

There are a number of grounds for taking a public body to Judicial Review if there is no other way to resolve your complaint and your child is missing school as a result.

These include:

- The LA fails to issue a final EHCP within the statutory timescales
- It does not secure provision laid out in the EHCP
- It randomly or unreasonably stops home-to-school transport
- A school refuses admission to a child even though the school is named in their EHCP (without a formal exclusion)

The court will only consider the way a decision has been made – not the decision itself – and only if you have given the public body an opportunity to rectify the situation.

A parent or carer must be able to show that the nursery, school, college or LA is failing or simply refusing to comply with its legal duty.

The courts can force the public body to take a particular course of action or even reverse a decision.

Public bodies that can be subject to a Judicial Review include:

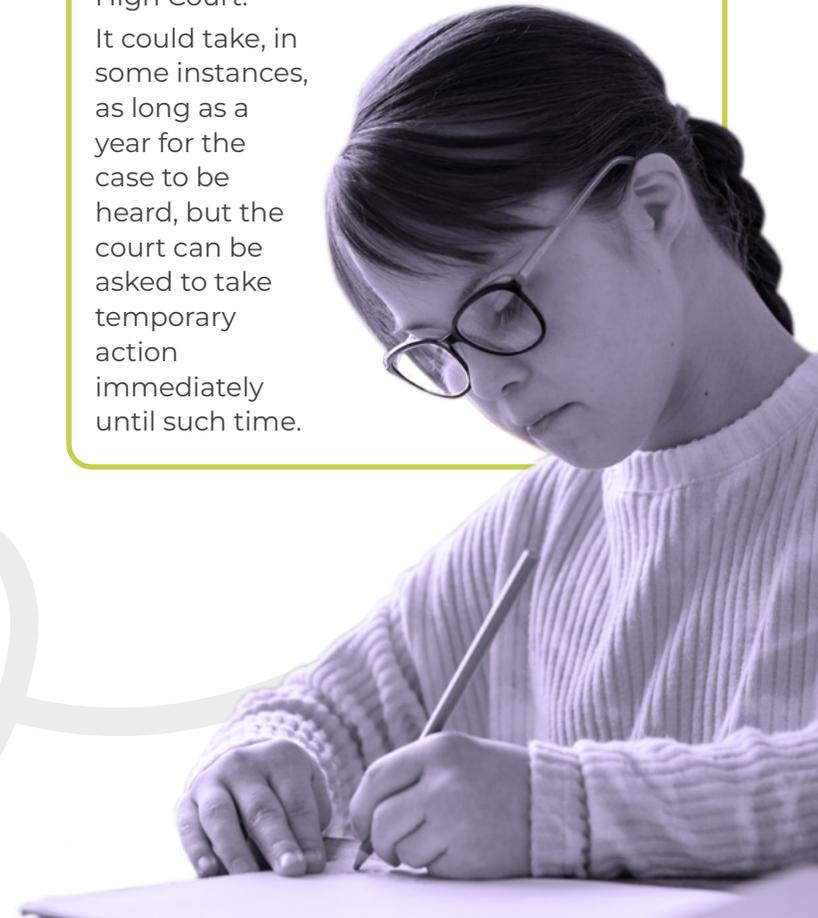
- Local Authorities
- School governing bodies
- Governors of maintained nurseries
- Governors of Further Education institutions
- Independent review panels for permanent exclusions
- Admission appeal panels

There is a time limit for applying for Judicial Review – within three months from the date when the decision or action being complained about happened. However, it is recommended that this is done as soon as possible and after taking legal advice.

Starting an action

Permission to bring Judicial Review will need to be sought from the Administrative Court in the Queen's Bench Division of the High Court.

It could take, in some instances, as long as a year for the case to be heard, but the court can be asked to take temporary action immediately until such time.



Disability Discrimination

What is disability discrimination?

A disability is recognised and protected in law (Equality Act 2010) as a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out their normal day-to-day activities.

While not all children or young people with special educational needs will be disabled and not all disabled students will have special educational needs, most are likely to fall under both legal definitions.

It is unlawful for a school or other education provider to treat a disabled student unfavourably in the following ways:

Direct discrimination

This happens when someone is treated unfavourably because of a characteristic protected by law, which includes disability. This could be a school refusing admission to a student or excluding them because of a disability.

Indirect discrimination

This is when a school's policies, practices or procedures that apply to everyone are less fair to a disabled student. For instance, telling a child that they have to complete their work in the same timeframe as all other students even though their disability might prevent them from being able to do so.

Unfavourable treatment arising from a disability

This means when a pupil is treated badly or put at a disadvantage, not because of a disability itself, but due to something related. For example, penalising a disabled student for having to take time off school for medical appointments or not allowing them extra toilet breaks because there are not enough staff available to help.

Failing to make reasonable adjustments

Schools and other education settings have a duty to provide reasonable adjustments for disabled pupils, meaning a measure or action introduced to help them take part in their education on the same basis as other students. What is 'reasonable' very much depends on a particular situation, but an example would be providing hearing aids.

Harassment

This happens when a disabled person is treated in a way that makes them feel humiliated, offended or degraded. For instance, a teacher shouting at a pupil for not paying attention when their disability makes it hard for them to concentrate.

Victimisation

When someone treats your child badly because you have complained about discrimination, this is known as victimisation. A school that suspends a disabled child because their parents have made a formal complaint about harassment could be accused of victimisation.

Making a Claim: Disability Discrimination

If you feel your child has been treated unfairly because of their disability, you can make a claim for discrimination.

Step 1

Establish what type of disability discrimination has taken place.

Step 2

Make a formal complaint to the nursery, school or college – explain how you think your child has been discriminated against and what action you expect them to take to remedy the situation.

Step 3

Escalate your complaint – if you are not satisfied with how they have responded, you could:

- Complain to the Department for Education (DfE)
- Complain to Ofsted
- Make a legal claim for disability discrimination

Before taking Step 3, you may wish to consider what more the education setting could be doing to help your child, whether it could provide more SEN support, or whether you need to apply for an EHC assessment or get an existing plan reviewed.

If you decide to make a claim for disability discrimination, this will be heard by the SENDIST.

This tribunal will deal with a claim against a school of any type (state-funded or independent), or a maintained nursery.

However, a claim relating to a private nursery, further education college or local authority, would be heard in a County Court.

If a nursery, school, college or local authority falls foul of disability discrimination laws, they can be ordered to take a number of actions. For example, they might be told to train staff, change their policies, make reasonable adjustments or, in the case of a permanent exclusion, re-admit that child or young person.

How We Can Help You

As a specialist team of solicitors, we understand just how challenging this field of law is and how important SENDIST and Judicial Review appeals are to you and your child.

This is why we are fully committed to protecting the rights of children and young people to ensure they receive the education they deserve.

We can assist and be instructed in the following areas:

- Appealing a refusal to undertake an Education Health Care Needs
- Appealing a refusal to issue an EHCP
- Appealing the contents of an EHCP
- Appealing a refusal to undertake a re-assessment
- Appealing a decision to cease to maintain an EHCP
- Judicial Review
- Disability discrimination claims

Ready to get the support your child needs?

Our team is here to help.

Email Thomas

Call 02045 861281





Phone: 01206 204088

Email: enquiry@birkettlong.co.uk

Web: birkettlong.co.uk