



Some of the most complex appeals to the First-tier Tribunal (Special Educational Needs and Disability Tribunal) (“**Tribunal**”) we work on include those registered to include health and social care issues.

## BACKGROUND

Education, Health, and Care (“**EHC**”) Plans detail the education, health and social care needs and provision that is to be made for a child or young person up to the age of 25 who requires special educational provision that is not normally available.

Where a child’s parents or a young person do not agree with a local authority decision regarding special educational needs (“**SEN**”), they have the right to appeal the decision to the Tribunal. The Tribunal’s remit was originally limited to appeals against the need for an EHC needs (re)assessment, the need for an EHC plan to be issued or maintained, or the description of SEN, special educational provision or educational placement specified in an EHC Plan.

In 2015, a recommendations pilot was undertaken by 17 local authorities for 15 months which explored the effect of expanding appeals to consider the health and social care aspects of EHC Plans, and to make non-binding recommendations on these. However, few appeals were received and only 9 went to a hearing. It was therefore decided to run a national trial in order to gather more robust evidence.

The “National Trial” therefore tested the extended powers of the Tribunal from 3 April 2018 to 31 August 2021. After the National Trial had been concluded, the Department for Education (“**DfE**”) confirmed that it would be continuing the extended powers given to the Tribunal to make non-binding recommendations about health and social care aspects of EHC Plans, as long as the appeal also includes education elements (except for appeals against the refusal to carry out an EHC needs assessment). Beyond August 2021, appeals involving health and/or social care are referred to as “Extended Appeals”.

The Tribunal therefore now represents a single route of redress for children and young people with SEN, who also have health and social care needs.<sup>1</sup>

## WHAT POWERS DO THE TRIBUNAL HAVE?

The regulations outlining the Tribunal’s extended powers sit alongside the **Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008**.



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<sup>1</sup> [SEND tribunal: extended appeals](#) – GOV.UK ([www.gov.uk](http://www.gov.uk))

The Tribunal can make binding decisions in relation to the educational elements of the EHC Plan and under the **Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017**, the Tribunal can make non-binding recommendations in relation to:

- 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**.

It is important to note that the Tribunal should only make a recommendation about health and social care needs, or provision related to a child or young person's learning difficulties or disabilities which result in them having SEN, except for any social care provision made under **Section 2** of the **Chronically Sick and Disabled Persons Act 1970**. The Tribunal should not make decisions relating to conflicted clinical diagnoses from medical professionals concerning health needs or health provision.<sup>2</sup>

## WHY DOES THE TRIBUNAL HAVE EXTENDED POWERS?

The DfE have confirmed that the policy aims of the extended powers are to:

- *"Create a more holistic, person-centred view of the child or young person's needs at the Tribunal*
- *Bring appeal rights in line with the wider remit of EHC Plans*
- *Encourage joint working between education, health and social care commissioners.*
- *Bring about positive benefits to children, young people and parents."*<sup>3</sup>

## WHAT IS REQUIRED FROM LOCAL AUTHORITIES' SOCIAL CARE DEPARTMENTS AND HEALTH COMMISSIONERS FOR EXTENDED APPEALS?

When an appeal is registered as an Extended Appeal, the following is required from the local authority's social care department and health commissioners:

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

## DOES THE LOCAL AUTHORITY OR HEALTH COMMISSIONER HAVE TO FOLLOW A NON-BINDING RECOMMENDATION MADE BY THE TRIBUNAL?

In short, no. As non-binding recommendations, local authorities and health commissioners are not required to follow them.

However, the recommendations are made by a specialist Tribunal and the DfE's Guidance on Extended Appeals<sup>4</sup> makes clear that the responsible local authority and/or health commissioning body are expected to follow them. The recommendations should not

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<sup>2</sup>SEND tribunal: extended appeals – GOV.UK ([www.gov.uk](http://www.gov.uk))

<sup>3</sup>SEND tribunal: extended appeals – GOV.UK ([www.gov.uk](http://www.gov.uk))

<sup>4</sup>SEND tribunal: extended appeals – GOV.UK ([www.gov.uk](http://www.gov.uk))

therefore be ignored or dismissed without careful consideration first. Any reason(s) for not following a recommendation, or any part of it, must be reasonable and explained to the parents/ young person in sufficient detail.

It is also vital not to simply ignore or refuse to follow the recommendations without properly considering all of the relevant factors as the parents/ young person can challenge the decision in the following ways:

- Complaint to the Local Government and Social Care Ombudsman (“**LGSCO**”) or Parliamentary and Health Service Ombudsman (“**PHSO**”) about failure to agree to follow a Tribunal recommendation or failure to deliver on an agreed aspect of the social care/ health section of an EHC Plan. The LGSCO/ PHSO could recommend a remedy such as an apology, reconsideration of decisions, or financial remedies for loss of provision or emotional distress.
- Apply for judicial review of the decision. In this instance, a judge would review the lawfulness of the local authority/ health commissioner’s decision in response to a Tribunal recommendation. This happened in the recent case of **LS, R (on the Application Of) v London Borough of Merton [2024] EWHC 584 (Admin)** where the court quashed the local authority’s social care decision not to follow a Tribunal recommendation “*due to a failure to take into account all relevant matters or a failure to assess, weigh, calibrate and balance those factors*”.<sup>5</sup>

Both of these routes of redress can be reputationally and financially damaging to the local authority/ health commissioner.

## CONCLUSION

It can be argued that the health and/or social care needs of children/young people with SEN are being better met as a result of Extended Appeals. However, they evidence the need for a more holistic approach from local authorities’ education and social care departments and health commissioners at an early stage. An Extended Appeal should not be the first time these services are working together for the child / young person.

It is also critical that where an appeal is lodged as an Extended Appeal that social care and health commissioners fully engage with the local authority’s education service and the Tribunal. There may be opportunities to reach agreement before the final hearing or if agreement cannot be reached, the Tribunal will be able to fully consider the local authority/ health commissioner’s position and evidence when deciding to make any recommendations.

The recent case of **LS, R (on the Application Of) v London Borough of Merton** also serves as a reminder that the Tribunal’s recommendations, although non-binding, should not be ignored or rejected without proper consideration.

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<sup>5</sup> [LS, R \(On the Application Of\) v London Borough of Merton \[2024\] EWHC 584 \(Admin\) \(14 March 2024\) \(bailii.org\)](#) #91.

#### About Pathfinder Legal Services Ltd's SEN Team

We have a highly skilled team of lawyers specialising in Special Educational Needs and Disability Tribunal cases. We advise and represent local authorities in appeals and advise schools in respect of disability discrimination claims. Our lawyers have a wealth of experience in identifying needs, provision, and placement issues and work closely with SEN officers, educational psychologists, and other specialist witnesses. We pride ourselves on our collaborative approach with parents, for whom the tribunal process can be very stressful. We get to know our client and their schools and colleges very quickly and are able to tailor our service to our client's needs.

#### About Pathfinder Legal Services Ltd

As a 'social enterprise law firm', Pathfinder Legal Services Ltd is one of the first of its kind to be established in the UK and is wholly owned by Cambridgeshire County and Central Bedfordshire Councils. We are experts in our field and provide a tailored legal service exclusively to the public and not-for-profit sectors, our clients are key, and our fees reflect this: our charging rates are substantially reduced and our billing system transparent. Our credibility, values and focus remain paramount to all that we do as a publicly owned legal service provider, with clients including Local Authorities, Integrated Care Boards, Foundation Trusts, Charities and Fire Services. In 2021 the firm was awarded 'Law Firm of the Year' (under its previous trading name of LGSS Law Ltd) at the prestigious Cambridgeshire Law Society's legal awards.

If you are keen to find out more about Pathfinder Legal Services including how our services work, our billing process and how to instruct us, please contact us at [operations@pathfinderlegal.co.uk](mailto:operations@pathfinderlegal.co.uk)

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