

Chapter 11

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Key points

- There are a number of different statutory complaints procedures to deal with disputes relating to education, health and social care.
- The Local Government Ombudsman or Parliamentary and Health Ombudsman is able to investigate complaints about certain matters and has wide ranging powers to make recommendations to remedy injustice including an apology or compensation.
- The First-tier Tribunal (Special Educational Needs and Disability) hears appeals against decisions relating to education, health and care plans (EHC plans) and statements of special educational needs (SEN). This includes refusals to assess or make an EHC plan or statement or to make amendments following annual review. Tribunal claims must be issued within two months of the date of the local authority's decision letter.
- Mediation must be considered before appeals in relation to SEN and provision can be issued with the tribunal. Parents and young people can request mediation in relation to the education, health or social care provision which is in the EHC plan.

- Local authorities are also under a duty to offer dispute resolution arrangements to avoid or resolve disputes.
- If a child or young person has been discriminated against in school, a claim can be brought to the tribunal within six months of the discriminatory act.
- Judicial review is the legal procedure used to challenge decision-making of public bodies in relation to health or social care provision or where special educational provision which is specified in an EHC plan or statement is not being delivered and some other education decisions or failures to act. Judicial reviews must be brought promptly and within three months of the date of the decision.
- Claims in relation to disability discrimination against an early year's provider, further education college or local authority must be made in the county court.
- Legal aid remains available to support disabled children and their parents and young people to access legal advice and assistance in relation to most education, health and social care decisions.

Introduction

11.1 This chapter describes the varying and wide-ranging ways that disabled children and their families can challenge failures and decisions of public bodies. Alongside the traditional remedies such as complaints, the ombudsman and judicial review, this chapter also considers the procedures under the Children and Families Act (CFA) 2014 Part 3, including the introduction of a pilot scheme in the First-tier Tribunal (Special Educational Needs and Disability) (the tribunal) to make recommendations in respect of health and social care disputes, and new rights to independent mediation and disagreement resolution aimed at promoting the early resolution of disagreements at a local level.

11.2 Which route will provide the most effective remedy will depend on a number of factors including:

- whether the matter relates to education, health or social care;
- the type of decision which has been made and whether a specific appeal right has been triggered;
- what the individual wants to achieve through seeking redress;
- the urgency and seriousness of the issue; and
- the funding options available.

11.3 In all cases, it is important to identify from the outset the specific decision or failure which is being challenged and the date that it occurred as there are time limits for most types of remedy.

11.4 It should also be appreciated that there are many non-legal ways of resolving disputes/differences of view, which should always be investigated if at all possible. In exploring these options, as long as legal time limits are not missed, legal rights are not lost (although if a judicial review is being considered, a lawyer should always be consulted first on this question). In many cases (as this chapter explains), mediation must be considered before other legal options become available.

11.5 Disagreement resolution/conciliation/mediation may take different forms, but the essentials are that: (i) they should involve an independent person who has no vested interest in the outcome; (ii) the process must be voluntary; and (iii) unlike with tribunals, courts and arbitration, the independent person's role is to help find a solution acceptable to both parties. They are there to facilitate this and do not have the power to decide the outcome.

Complaints procedures

11.6 Where a disabled child or their family wish to challenge a decision by a public body or educational provider, then formal procedures exist to ensure that these complaints are considered properly.

11.7 A key consideration when deciding whether to pursue a complaint or make a legal challenge is the time it takes for it to be considered and whether it is likely to provide an effective remedy. For example, where the need is urgent the complaints process may be inappropriate (unless the authority has a 'fast track' procedure) whereas an application for interim relief through a judicial review (see below) may be the only effective remedy. In contrast, if an individual wishes to obtain financial redress or an apology for a past delay but where services are now in place then a complaint (if necessary, escalated to the ombudsman) is very likely to be a more effective remedy than a challenge by way of judicial review where the court does not generally have a power to award compensation.¹

Complaints about children's social care provision

11.8 Local authorities are under a statutory duty to have a procedure for complaints made in relation to the discharge of its functions under the Children Act (CA) 1989, Part 3.2 This covers such matters as assessments, care planning, reviews, support and services (including for example respite/short breaks

¹ Compensation may be awarded if a person's human rights have been breached.

² Children Act 1989 Representations Procedure (England) Regulations 2006 SI No 1738. Enabling powers: Children Act 1989 ss24D, 26, 26A and 59; Sch 7.

support, adaptations, equipment, direct payments) for (among others) disabled children, parent carers and young carers (see chapter 3).

11.9 Complaints may be made by any child or young person 'in need'³ or by a parent or someone who has parental responsibility. They can also be made by any other person that the local authority considers has sufficient interest in the child or young person's welfare, for example a grandparent. If a child or young person wishes to make a complaint, local authorities are required to provide them with information about advocacy services and offer help to obtain an advocate.

11.10 Generally, complaints must be made within one year of the matter which is the subject of the complaint, although local authorities have a discretion to consider complaints beyond this time limit where it is possible to consider it effectively and efficiently or there are good reasons for not bringing the case earlier.

11.11 Where possible, complaints letters should be succinct and should explain in simple terms what the local authority is expected to do as a result of the complaint. The website of the voluntary organisation, Cerebra, provides a precedent children's social services complaint letter as well as a 'toolkit' that

³ See para 3.13 above; a term that includes disabled children and young carers.

outlines problem solving techniques that can be useful in such cases.⁴

11.12 The complaints procedure includes three distinct stages that must be completed within specific timescales, although local authorities remain under a duty to act expeditiously throughout the procedure. Detailed guidance on the procedure for each stage of the complaint can be found in the statutory guidance from the Department of Education and Skills, *Getting the best from complaints: social care complaints and representations from children, young people and others*, 2006 ('the complaints statutory guidance').

11.13 A summary of the procedure and timetables as detailed in the complaints statutory guidance is set out in the table below at para 11.18.

11.14 Local authorities have wide powers to remedy their failings in individual cases, including:

- apologising and/or giving an explanation of what occurred;
- providing conciliation and mediation;⁵

⁴ Accessible at <https://w3.cerebra.org.uk/help-and-information/legal-entitlements-research-project/precedent-letters/>.

⁵ These are different forms of dispute resolution; where conciliation is more informal, mediation is a formal process which aims to result in a binding agreement between the parties.

- reassessing the needs of the child/young person/carer;
- taking practical action specific to the particular complainant;
- undertaking a wider review of its practice;
- ensuring that it will monitor the effectiveness of its remedy; and
- providing financial redress – for example, where there has been a quantifiable loss, a loss of a non-monetary benefit, loss of value, lost opportunity, distress; and for time and trouble.⁶

11.15 The complaints statutory guidance⁷ also suggests that where the complaint is about a proposed change to a care plan, a placement or a service, the decision may need to be deferred (frozen) until the complaint is considered and that:

... there should generally be a presumption in favour of freezing, unless there is a good reason against it (for example, if leaving a child or young person where they are would put them at risk).⁸

⁶ Local Government Act 2000 s92.

⁷ Department of Education and Skills, *Getting the best from complaints: social care complaints and representations from children, young people and others*, 2006.

⁸ Complaints Statutory Guidance, para 6.5.2.

11.16 There is a separate complaints procedure for complaints made about adult social care. The Citizens Advice Bureau's website provides a precedent adult social services complaint letter as well as a guide to 'complaining about social services'.⁹

Complaints about healthcare provision

11.17 NHS organisations must make arrangements for dealing with complaints about the provision of healthcare services (including services for disabled children). The detail of these procedures are set out in regulations.¹⁰

11.18 The regulations specify the requirements for complaints handling, which include:

- That each NHS body must make arrangements for the handling and consideration of complaints to ensure that complaints are dealt with efficiently and are properly investigated and that complaints are treated with respect and courtesy, that they receive a timely and

⁹Accessible at
www.citizensadvice.org.uk/healthcare/nhs-and-social-care-complaints/complaining-about-social-care-services/.

¹⁰Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 SI No 309 pursuant to the enabling powers in the Health and Social Care (Community Health and Standards) Act 2003.

appropriate response and action is taken if necessary in light of the outcome.

- The need to identify a 'responsible person': the regulations state that this should be the chief executive officer and a 'complaints manager' (who may be the same person) to deal with complaints.
- That complaints may be made by a person who receives or has received services from a responsible body; or a person who is affected, or likely to be affected, by the action, omission or decision of the responsible body which is the subject of the complaint. Alternatively, a complaint may be made by a person acting on behalf of a child or young person if they lack capacity within the meaning of the Mental Capacity Act (MCA) 2005.
- The requirement for organisations to co-operate when dealing with a complaint that spans more than one organisation.
- That the complaint should be made within 12 months of either the event being complained about or as soon as the matter came to the attention of the complainant. This time limit can be extended where there are good reasons as long as the complaint can still be investigated effectively and fairly.

- That the complaint must be acknowledged no later than three working days after the day the complaint is received.
- That the complaint must be investigated in an appropriate manner to resolve it speedily and efficiently and, as soon as reasonably practicable after completing the investigation, must send a response to the complainant in writing which includes:
 - an explanation of how the complaint has been considered; and
 - the conclusions reached and whether any remedial action needed.
- That the response must be sent within six months of the date the complaint was agreed unless the NHS body notifies the complainant in writing and explains the reason for the delay.
- The requirement to tell the complainant of their right to put the complaint to the ombudsman if dissatisfied.

11.19 Unlike the statutory procedure for complaints to children's social care services, the regulations regarding NHS complaints (which also apply to complaints in relation to adult social care) do not have specific stages and timescales or any requirement for an independent person.

11.20 If an individual requires support in making the complaint then the NHS is under a duty to provide free

and confidential independent advocacy through its NHS Complaints Advocacy Service.¹¹

11.21 The Citizens Advice Bureau's website provides a precedent adult social services complaint letter as well as a guide to the 'NHS complaints procedure'.¹²

Complaints about education

11.22 The foreword from the Local Government Ombudsman Focus Report, Special Educational Needs: preparing for the future (March 2014), stated that:

A common phrase I hear from families when seeking to resolve a complaint about SEN provision is that it feels like a constant battle. It should not have to be this way.

11.23 Often the first challenge for a parent or young person who wishes to complain about inadequacies with education provision is knowing which route to pursue.

11.24 Where a disabled child or their family wish to challenge a decision in respect of special educational needs provision, for example, the contents of an EHC plan, it will usually be more appropriate to pursue

¹¹National Health Service Act 2006 s248.

¹²Accessible at
www.citizensadvice.org.uk/healthcare/nhs-and-social-care-complaints/.

disagreement resolution/mediation procedures or an appeal to tribunal (see below) as a formal complaint is unlikely to achieve the outcome required.

11.25 However, where the educational issue cannot appropriately be dealt with through those procedures, complaints in relation to educational issues can be considered by a variety of organisations.

11.26 The starting point will almost always be to use the school or college's internal complaints procedure; the specific requirements for which will vary depending on the type of educational setting but in each case there is a legal process that must be followed.¹³

11.27 If it is not possible to resolve the matter at a local level then there are a number of bodies who are able to investigate complaints as follows:

The responsible local authority

11.28 All local authorities have statutory duties to consider complaints about certain decisions including:

- school admission appeals;¹⁴

¹³The requirements for complaints procedures in academies, free schools and independent schools are set out in Education (Independent School Standards) (England) Regulations 2010 SI No 1997 Part 7; for Early Years providers the requirements are set out in the Early Years Foundation Stage (EYFS) Statutory Framework and for maintained schools under Education Act 2002 s29.

¹⁴School Standards and Framework Act 1998 s94.

- exclusions;¹⁵
- child protection/allegations of abuse;¹⁶
- school transport.¹⁷

11.29 All of these decisions also have a further right of complaint to the Local Government Ombudsman if the individual remains dissatisfied following the local authorities' decision (see below at paras 11.36–11.43).

11.30 Local authorities do not have to consider complaints about academies, free schools or independent schools as these educational institutions are independent of the local authority. Complaints about academies and free schools should be addressed to the Education Funding Agency, see below at para 11.32.

Department for Education's (DfE) School Complaints Unit

11.31 The Secretary of State for Education can investigate complaints that either the governing body of a maintained school or a local authority has acted

¹⁵Education Act 2002 s51A and School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 SI No 1033.

¹⁶Children Act 1989 s47.

¹⁷Department for Education '*Home to school travel and transport guidance*' statutory guidance for local authorities, July 2014.

unreasonably or has failed to carry out one of its duties.¹⁸ His officials can also consider complaints about disability discrimination in relation to a pupil at a school.¹⁹ The secretary of state will not intervene in a case where there is another avenue of redress, such as the tribunal.²⁰ The DfE cannot investigate individual complaints about an independent/private schools but does have powers as a regulator if the school is not meeting required standards in respect of education, welfare etc.²¹

The Education Funding Agency

11.32 The Education Funding Agency investigates complaints about academies and free schools. Part of its role is to make sure academies comply with the terms of their funding agreement which is a contract between the academy and the secretary of state.²² Office for Standards in Education, Children's Services and Skills (Ofsted)

11.33 Ofsted can consider complaints about early years' provision and schools where the complaint is

¹⁸Education Act 1996 ss496-497.

¹⁹Equality Act 2010 s87.

²⁰SEND Code, para 11.75.

²¹Education Act 2002 s165.

²²See ***Education Funding Agency, Procedure for dealing with complaints about academies***, 2013.

about the educational institution as a whole rather than in relation to an individual child and can respond by bringing forward an inspection to look at the issues raised.²³

Skills Funding Agency

11.34 The Skills Funding Agency, on behalf of the Secretary of State for Education will investigate complaints about further education colleges, apprenticeships and post-19 education and training.²⁴

The Information Commissioner

11.35 The Information Commissioner can consider complaints on behalf of parents and young people in relation to access to information in educational establishments including issues such as examination results, taking photos in schools and accessing pupil and official information.²⁵

²³Education (Investigation of Parents' Complaints) (England) Regulations 2007 SI No 1089 and Education Act 2005, as amended by Education and Inspections Act 2006 s160.

²⁴For further information see Skills Funding Agency, ***Procedure for dealing with complaints about Providers of Education and Training.***

²⁵See <https://ico.org.uk/for-the-public/schools/>.

Ombudsmen

11.36 Where an individual has followed the local authority or NHS complaints procedures and the complaint remains unresolved, the complainant can ask for a further investigation by the Local Government Ombudsman (LGO) (where the complaint relates to the local authority or schools) or by the Parliamentary and Health Service Ombudsman (PHSO) (for NHS bodies and government departments). The LGO and PHSO can also carry out joint investigations, for example, where the complaint relates to concerns about the delivery of health provision within an EHC plan. The PHSO can also investigate a number of other organisations: Ofsted, the Education Funding Agency, the Skills Funding Agency, and the Department for Education (including its School Complaints Unit and the Secretary of State for Education). Both the LGO and the PHSO will generally expect the individual to have completed the organisation's own complaints procedure first.

11.37 A complainant retains the right to approach the ombudsman at any time during the course of the complaint (for example if the complaint is not being investigated fairly or expeditiously). However, the ombudsman would ordinarily expect the local authority or NHS body to consider the complaint initially and may refer the complaint back to the relevant complaints manager if this has not been done. All complaints should usually be made within 12 months of becoming aware of the issue, unless there are good reasons to extend the timeframe. The ombudsman aims to make a decision on whether they will investigate the

complaint within 20 working days and in most cases come to a final decision within three months although this will generally be longer in complex cases.

11.38 When deciding what remedy is likely to be most effective, it is important to consider that the ombudsman's remit is only to investigate allegations of 'maladministration'²⁶ by public bodies which have resulted in some form of injustice. This is different to the test of 'unlawfulness' which is necessary for legal challenges (for example by way of a judicial review). For example, the public body may not have acted 'unlawfully' but its behaviour could have been sufficiently unreasonable that it amounted to maladministration and, in these circumstances, a complaint to the ombudsman would be more appropriate.

11.39 The ombudsman will not consider a complaint where there is an alternative remedy such as tribunal, and importantly, will not (save for limited exceptional circumstances) consider a complaint where legal proceedings have already been commenced.

²⁶The LGO considers that maladministration can include: delay; incorrect action or failure to take any action; failure to follow procedures or the law; failure to provide information; inadequate record-keeping; failure to investigate; failure to reply; misleading or inaccurate statements; inadequate liaison; inadequate consultation; and broken promises; see www.lgo.org.uk/guide-for-advisers/maladministration-service-failure/.

11.40 The ombudsman does have significant powers that in some cases may provide a better remedy for a disabled child and their family than judicial review. These include recommending that the public body:

- apologises;
- provides a service the disabled child should have had;
- makes a decision that it should have done before;
- reconsiders a decision that it did not take properly in the first place;
- improves its procedures so similar problems do not happen again;
- makes a payment.

11.41 Recent examples of successful complaints to the ombudsman include:

- **School transport:** The complaint alleged that the local authority had wrongly decided to discontinue school transport after the family were forced to move. The family stated that the school transport appeal did not take account of all relevant information. The ombudsman upheld the complaint and found fault causing injustice and recommended the local authority should take the following actions:
 - apologise to the parents

- put in place home-school transport for the couple's daughter as soon as possible;
- pay the parents £1,000 to reimburse the costs they incurred as a result of the council's faults; and
- pay the parents a further £1,000 to acknowledge the avoidable stress the council's faults caused the family.²⁷
- Children's social care: The complaint alleged that there had been an 11 month delay by a local authority in paying a personal budget to the mother of a disabled child to enable the child to take part in leisure activities. In finding maladministration, the ombudsman recommended that the local authority:
 - pay the mother the original personal budget figure for the 12-month period on a backdated basis; and
 - pay a sum of £2,000 to the mother to recognise the lost opportunity for the child to take part in activities and the mother's time and trouble in pursuing the matter.²⁸
- Health: the mother of a nine-year-old child with autism made a complaint to the PHSO following

²⁷Devon County Council (14 009 771).

²⁸Trafford Council (14 002 965).

delays in arranging a full autistic spectrum disorder assessment following a referral from CAMHS which led to the mother paying for a private assessment. The PHSO found that the waiting time was far longer than the three-month wait specified in relevant guidelines from the National Institute for Health and Care Excellence. Although it found that the Trust was not under an obligation to reimburse the costs of the private treatment, the Trust paid £500 to the mother in recognition of the impact of its poor communication regarding the waiting times and steps it was taking to address them.²⁹

11.42 Making a complaint to the ombudsman can, therefore, offer advantages over a legal challenge: not only can the ombudsman make wide recommendations but the process is free and does not expose an individual to the risks of adverse costs if the complaint is not upheld (see para 11.75 below).

11.43 Although a public body does not have to comply with the recommendations in the same way that a court order would be binding, in the vast majority of cases it will, and where a public body fails to comply with the recommendations of an ombudsman that decision could be challenged by way of a judicial review.

²⁹Summary 447/ September 2014.

Disagreement arrangements **resolution**

11.44 Since 1 September 2014, local authorities are now under a legal duty to make arrangements with a view to avoiding or resolving disagreements with the parents of disabled children and young people in relation to EHC needs assessments, the preparation and review of review of EHC plans, and re-assessment of educational, health care and social care needs.³⁰ Local authorities are also under duties to avoid or resolve disagreement between the parents of a child with SEN or young person with SEN and the school or post 16-institution. This process can also be used to resolve disagreements between local authorities and health commissioning bodies that do not involve parents and young people.

11.45 Details of each local authorities' disagreement resolution arrangements should be set out in its local offer (see para 4.72 above). The process must be independent of the local authority and its use is voluntary and must be with the agreement of all parties. Dispute resolution services should be available to be used by all children with SEN (not just those with an EHC plan) and will cover disagreements about any aspect of SEN provision, and any health and social care disagreements that arise during the EHC needs assessment and EHC planning process.

³⁰CFA 2014 s57.

11.46 The Special Educational Needs and Disability Code of Practice (SEND Code)³¹ states that these services:

... can provide a quick and non-adversarial way of resolving disagreements. Used early in the process of EHC needs assessment and EHC plan development they can prevent the need for mediation, once decisions have been taken in that process, and appeals to the Tribunal.

11.47 Where disagreement resolution is being considered, parents and young people should ensure that any process is completed in sufficient time to enable them to pursue a legal remedy such as tribunal or judicial review within the legal time limits if resolution does not prove possible. The SEND Code states that disagreement resolution services can be used whilst waiting for tribunal appeals to narrow issues or reach partial agreement.³² Disagreement resolution meetings are confidential and without prejudice to the tribunal process.

³¹Department for Education, *Special educational needs and disability code of practice: 0 to 25 years*, 2014, para 11.7.

³²SEND Code, para 11.8.

Mediation

11.48 CFA 2014 Part 3 introduced new rights and requirements in relation to mediation. Mediation is a formal disagreement resolution process where the parties seek to achieve a binding agreement with the assistance of an independent mediator.

11.49 In particular, where a decision is made against which an appeal to the tribunal may be brought (see below) or an EHC plan for a child or young person is made, amended or replaced, then parents and young people now have a right to mediation.³³ The right to mediation also extends to mediation in relation to the health and social care parts of the EHC plan even where there is no tribunal appeal right in relation to the same.

11.50 However, with this new right, also comes a new requirement to 'consider mediation' and obtain a mediation certificate from a mediation adviser before an appeal to the tribunal can be lodged. The mediation adviser must be contacted within two months after written notice of the decision is received.³⁴

³³CFA 2014 s52.

³⁴SEND Regs 2014 SI No 1530 reg 33. If a parent fails to comply with reg 33 and the time for obtaining a mediation certificate has elapsed, leave to appeal to the tribunal may still be sought; see reg 34(3) and Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI No 2699 r19.

11.51 Importantly, these new rules do not mean that a parent or young person must participate in mediation before they can appeal, only that they must consider it after receiving information from a mediation adviser. The SEND Code states that:

The mediation information which is given to parents and young people:

- should be factual and unbiased, and
- should not seek to pressure them into going to mediation. Where there is more than one available, the mediation adviser should not try to persuade the parents or young people to use any particular mediator.³⁵

11.52 The mediation adviser must then issue a certificate within three working days of either being informed by the parent or young person that they do not wish to pursue mediation or the conclusion mediation that has been pursued. This will then enable the parents or young person to proceed with the tribunal appeal.

11.53 There is no requirement to consider mediation where the appeal solely relates to a challenge in respect of the school or other institution named in the EHC plan. The mediation advice arrangements also do not apply to disability discrimination claims.

³⁵SEND Code, para 11.21.

11.54 Mediation must be conducted by an independent person and the public body arranging it must ensure that it is attended by someone who has authority to resolve the issues in dispute.³⁶ It may be attended by any advocate or other supporter that the child's parent or the young person wishes to attend.³⁷ This can include legal representation although each party would have to pay for it themselves. The mediator must take reasonable steps to ascertain the wishes of the child or young person. Mediators must have sufficient knowledge of the legislation relating to special educational needs, health and social care to be able to conduct the mediation³⁸ and must have received accredited training.³⁹

11.55 Where a parent or young person wishes to pursue mediation then they must inform the local authority and confirm the issues that they wish to pursue at mediation. If this includes an issue in relation to health care provision in the EHC plan, or the fact there is no health care provision in the EHC plan, the parent or young person must also inform the local authority what health care provision they wish to be specified in the plan and the local authority must notify the relevant commissioning body (generally the clinical

³⁶SEND Regs 2014 reg 37.

³⁷SEND Regs 2014 reg 38.

³⁸SEND Regs 2014 reg 40.

³⁹SEND Code, para 11.15.

commissioning group) within three working days.⁴⁰ If the mediation issues are limited to healthcare provision, the commissioning body must arrange the mediation and ensure it is conducted by an independent person and must participate in the mediation.⁴¹

11.56 If the mediation includes any educational and social care issues, then the local authority must arrange it within 30 days of being informed that the parent or young person wishes to pursue mediation.⁴²

11.57 The body responsible for arranging mediation must pay travel costs, loss of earnings, child care and any overnight expenses of the child's parent or young person at a prescribed rate provided prior agreement is obtained where required and upon receipt of supporting evidence of the expenses claimed.⁴³ The mediation adviser should provide this information to parents and young people.

11.58 The mediation session should be arranged, in discussion with the parents or young people, at a place and a time which is convenient for the parties to the disagreement. The body (or bodies) arranging the mediation must inform the parent or young person of

⁴⁰SEND Regs 2014 reg 35.

⁴¹SEND Regs 2014 reg 35.

⁴²SEND Regs 2014 reg 36.

⁴³SEND Regs 2014 reg 41.

the date and place of the mediation at least five working days before the mediation unless the parent or young person consents to this period of time being reduced.⁴⁴

11.59 The outcome of the mediation must be recorded in writing in a 'mediation agreement' and where the agreement requires the local authority or responsible commissioning group to do something, it must do that thing either within the timescales set out for complying with a tribunal order on the same issue, or, where that doesn't apply, within two weeks of the date of the mediation agreement.⁴⁵

Tribunal

11.60 The tribunal has jurisdiction to hear appeals and claims by parents and young people in relation to: special educational needs and provision; disability discrimination.

11.61 As noted below (paras 11.75–11.80), there is a pilot scheme to allow the tribunal to hear appeals in relation to social care and health provision in the context of EHC plans, although with limited powers of redress in those cases.

⁴⁴SEND Regs 2014 reg 37.

⁴⁵SEND Regs 2014 reg 42.

Special educational needs

11.62 Subject to the requirement to consider mediation as outlined above, the tribunal hears all appeals against the following decisions:

- a decision of a local authority not to secure an EHC needs assessment for the child or young person;
- a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan;
- where an EHC plan is maintained for the child or young person:
 - the child's or young person's special educational needs as specified in the plan (section B);
 - the special educational provision specified in the plan (section F);
 - the school or other institution named in the plan, or the type of school or other institution specified in the plan (section I).
- the fact that no school or other institution is named in the plan;
- a decision of a local authority not to secure a re-assessment of the needs of the child or young person following a request to do so (provided

- the local authority has not carried out an assessment within the previous six months);
- a decision of a local authority not to secure the amendment or replacement of an EHC plan it maintains for the child or young person following a review or re-assessment; or
 - a decision of a local authority to cease to maintain an EHC plan for the child or young person (in these circumstances, the local authority must maintain the plan until the tribunal's decision is made).⁴⁶

11.63 In addition, the tribunal continues to hear appeals in relation to statements of SEN, including decisions to cease to maintain, and appeals in respect of Parts 2, 3 and 4 following an annual review of the statement pending transfer to an EHC plan. These appeal rights will continue until all children with statements have transferred to EHC plans, the deadline for which is April 2018; see chapter 4 at para 4.44.

11.64 The tribunal does not hear appeals about personal budgets, but will hear appeals about the special educational provision to which a personal budget may apply.⁴⁷

⁴⁶CFA 2014 s51.

⁴⁷See SEND Code, paras 9.108 and 11.45.

11.65 The procedure for tribunal appeals is set out in the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.⁴⁸ All appeals must be lodged within two months of the date of the letter of notification from the local authority informing the parent or young person of the decision or within one month of a certificate being issued following mediation or the parent or young person being given mediation information. There are expedited appeals processes, for example, in relation to post-16 transfer appeals, where the tribunal aims to hold a hearing within seven weeks.

11.66 When determining the appeal, the tribunal's powers include dismissing the appeal or ordering the local authority to:

- arrange an EHC needs assessment or re-assessment;
- make and maintain a plan or continue to make a plan;
- name a specified school or other institution in the EHC plan; and
- maintain a plan with specified amendments in respect of the special educational needs and provision.⁴⁹

⁴⁸SI No 2699.

⁴⁹SEND Regs 2014 reg 43.

11.67 Local authorities must comply with decisions of the tribunal within specified time limits.⁵⁰

11.68 The usual order for costs in a tribunal is that each party meets their own costs. There are exceptions to this where a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.⁵¹

11.69 Further help and guidance can be accessed via:

Special Educational Needs and Disability Tribunal
1st Floor, Darlington Magistrates Court
Parkgate
Darlington
DL1 1RU
www.gov.uk/special-educational-needs-disability-tribunal/appeal-to-tribunal
Email: sendistqueries@hmcts.gsi.gov.uk
Telephone: 01325 289 350 Fax: 0870 739 4017

Disability discrimination claims

11.70 The tribunal also has jurisdiction to hear claims on behalf of parents against schools and academies

⁵⁰SEND Regs 2014 reg 44.

⁵¹Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI No 2699 r10.

(including independent schools) under the Equality Act 2010 for disability discrimination in relation to:

- the provision of education and associated services and the making of reasonable adjustments, including the provision of auxiliary aids and services;
- fixed-term and permanent exclusions (although parents should be aware of the right to appeal to an independent review panel against permanent exclusions from state-funded schools and academies, see further chapter 4 at para 4.226); and
- admissions to independent and non-maintained special schools (note the tribunal cannot hear a claim for admissions in relation to academies and state-funded schools where there are separate appeal procedures).

11.71 Further coverage of the tribunal's role in determining disability discrimination claims is found in chapter 9 at paras 9.129–9.130.

11.72 The claim for disability discrimination must be received by the tribunal within six months of the alleged discrimination. The tribunal can allow a late claim, but it will only do so if this is considered justified.

11.73 The tribunal has powers to make any remedy to counter-act the alleged discrimination including

reinstatement of the child save that it is not able to award financial remedies.

11.74 Where the disability discrimination claim is against an early year's provider, further education college or local authority, the claim must be brought in the county court (see paras 11.104–11.107 below). Recommendations regarding health and social care needs and provision

11.75 In 2015, regulations made provision for a pilot scheme which enabled the tribunal to consider disputes concerning the health and social care elements of an EHC plan ('the pilot scheme regulations').⁵²

11.76 The pilot scheme regulations state that where an appeal is made against a pilot local authority, the tribunal has the power to recommend:

- the health care needs and health provision that should be specified in the EHC plan;
- the social care needs and social care provision that should be specified in the EHC plan.

11.77 This power can be contrasted to the power of the tribunal to order the inclusion of special educational needs and provision within the EHC plan and to order that a particular school or institution be named, see para 11.62 above.

⁵²Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015 SI No 358.

11.78 Where recommendations are made in respect of healthcare needs or provision, a copy must be sent by the tribunal to the responsible commissioning body who must respond to the child's parent or young person and the local authority within five weeks to confirm what steps it has decided to take following consideration of the recommendation and give reasons for any decision not to follow the recommendation. Mirror provisions apply to recommendations in respect of social care needs and provision. Although at present, the recommendations are not binding, a failure to give good reasons for departing from the recommendations may give rise to challenge by way of judicial review. There is no right of appeal to the tribunal against these recommendations.

11.79 As at November 2015, the pilot scheme applied to Barking and Dagenham, Bedford, Blackpool, Cheshire West and Chester, Ealing, East Riding, Hackney, Kent, Lambeth, Liverpool, Sandwell, Stockport and Wokingham.

11.80 In non-pilot areas, the main routes for disabled children and their families to challenge health and social care decisions will be through complaints procedures and judicial review. However, dependent on the outcome of the pilot scheme, in the future, the tribunal may provide a more holistic and effective remedy to challenge all the contents of a child or young person's EHC plan.

Appeal rights for young people

11.81 The CFA 2014 gives significant new rights directly to 'young people', who are brought within the special educational needs system for the first time. A young person is defined as a person over compulsory school age (the end of the academic year in which they turn 16) and under 25.⁵³ The following decision-making rights are transferred from parents to young people who have capacity to make the relevant decisions (see chapter 7 in relation to mental capacity and decision-making):

- the right to request an assessment for an EHC plan (any time up to their 25th birthday);
- the right to make representations about the content of their EHC plan;
- the right to request that a particular institution is named in their EHC plan;
- the right to request a personal budget;
- the right to appeal to the tribunal.

11.82 Parents, or other family members, can continue to support young people in making decisions, or to act on their behalf, provided that the young person is happy for them to do so, and it is likely that parents will remain closely involved in the great majority of cases. A young person can ask a family member or friend to support them in any way they wish, including, for example, receiving correspondence on their behalf,

⁵³CFA 2014 s83(2).

filling in forms, attending meetings, making telephone calls and helping them to make decisions. However, the final decision rests with the young person, if they have capacity to make the relevant decision.

11.83 The CFA 2014 and the SEND Regs 2014 specify that where a person lacks mental capacity to make a particular decision, that decision will be taken by an 'alternative person' instead of the young person.⁵⁴ The alternative person will be either a representative, or where there is no representative, the young person's parent(s). Where the parent(s) themselves lack capacity, then the decision-making power transfers to their representative(s). The decisions which are taken by the 'alternative person' alone are set out in Part 2 of Schedule 3 to the SEND Regs 2014 and are summarised in the Code of Practice. They include decisions in relation to needs assessments, EHC plans and appeals to the tribunal.

11.84 The representative can be a deputy appointed by the Court of Protection, or a person who has a lasting or enduring power of attorney.⁵⁵ However, in the opinion of the authors, deputies (and attorneys) will only qualify as 'representatives' where they have been appointed to make decisions on education and related health and care matters and, therefore, this

⁵⁴CFA 2014 s80 and SEND Regs 2014 reg 64.

⁵⁵CFA 2014 s80(6). In the vast majority of cases, a young person will have a deputy rather than an attorney, as attorneys can only be appointed when a person has capacity to do so.

would need to be a personal welfare deputy or attorney.⁵⁶

11.85 In the case of a young person who does not have such a representative, the relevant decision will be taken by the young person's parent. The SEND Code suggests that 'this is likely to be the case the majority of the time'. However, the scheme is silent as to what happens in a case where a young person has no parent, or the parent lacks capacity themselves and does not have a representative. In such cases, the authors would suggest that an application needs to be made to the Court of Protection so that an appropriate person is appointed as a personal welfare deputy.⁵⁷

11.86 Where there is a personal welfare deputy for a young person, there does not appear to be a mechanism to allow them to 'step aside' to allow a parent to take the relevant decisions. Regulation 64 creates a hierarchy where 'the alternative person' with decision-making rights and responsibilities is a representative, and it is only where the young person does not have a representative that the parent is able to make the decision. It, therefore, will fall to the deputy to make decisions under Part 3 of the CFA 2014, of course consulting closely with the parents and giving their views significant weight alongside those of

⁵⁶CFA 2014 s80(6)(a) refers to 'a deputy appointed by the Court of Protection ... to make decisions on the parent's or young person's behalf in relation to matters within this Part'.

⁵⁷SEND Regs 2014 reg 65.

the young person themselves. The alternative option is for the parent to apply to become a personal welfare deputy themselves.

11.87 There are some occasions when a local authority must take account of the views of the young person as well as any representative. These are conveniently listed in Annex 1 to the SEND Code.

Judicial review

11.88 Judicial review is the legal procedure by which decisions, actions or failures of public bodies can be challenged in the High Court (known as the Administrative Court for such proceedings).⁵⁸ It is a remedy of last resort and so cannot be used until other remedies have been exhausted, for example where there is an appeal right to the tribunal in relation to the decision that needs to be challenged or if pursuing the complaints procedure would provide an alternative effective remedy.⁵⁹

⁵⁸For a general guide to judicial review, see J Manning, S Salmon and R Brown, *Judicial Review Proceedings: a practitioner's guide*, LAG, June 2013.

⁵⁹*R (Cowl) v Plymouth CC* [2001] EWCA Civ 1935; [2002] 1 WLR 803.

Grounds

11.89 A claim for judicial review cannot be brought simply because an individual does not agree with the decision that has been made. The challenge must be brought under one of the recognised public law grounds of claim:

- **Irrationality/unreasonableness:** in this context irrationality and unreasonableness have a legal meaning that describes where the decision is so 'outrageous' or 'absurd' that it 'defies logic' and no reasonable body of persons could have reached it. It is sometimes referred to as 'Wednesbury unreasonableness' – being named after an early case in which this challenge was defined.⁶⁰ Many challenges against individual assessment or service provision decisions are based on grounds of irrationality. A high threshold is to be applied to this test and, therefore, few claims are brought on this ground alone. A public body can also act irrationally if:
 - it takes into account irrelevant considerations or fails to take into account relevant or material considerations; or
 - it has failed to ask the right questions and make sure that it has sufficient

⁶⁰*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, CA.

information on which a proper decision can be based.⁶¹

- Illegality: this includes where a public body:
 - acts beyond its powers – this is known as acting ‘ultra vires’;
 - delegates decisions to other bodies or organisations which by law only that public body is permitted to take;
 - unlawfully fetters its discretion – for example, by using a blanket policy when applying an eligibility criteria without considering the individual facts of the case or allowing exceptions;
 - misdirects itself about the extent of its powers;
 - misunderstands its legal obligations and makes an error of law;
 - acts in breach of a requirement under a particular statute. In the context of challenges relating to the legal rights of disabled children, this is the most common type of illegality – for example, a local authority may fail to arrange the special educational provision specified in a child’s EHC plan and, thereby, breaches the requirements of CFA 2014 s42;

⁶¹*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014.

- breaches the Human Rights Act (HRA) 1998. The vast majority of the rights contained in the ECHR are now part of English law as a result of the HRA 1998 and, as a result, it is unlawful for a public body not to act in accordance with those rights. The courts are increasingly willing to consider whether rights contained in other international instruments, for example, the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities (see for example para 2.24 above), have been breached, particularly in the context of HRA 1998 claims.⁶²
- Procedural fairness/impropriety: specific grounds of judicial review which fall under this heading includes:
 - a breach of the rules of natural justice;
 - a failure to follow procedural requirements which are set out in law;
 - where there is actual bias or an appearance of bias;
 - where there has been an abuse of power;

⁶²*R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; the Supreme Court held that the benefit cap was in breach of the government's obligations to treat the best interests of the child as a primary consideration under the UNCRC.

- the right to a fair hearing;
- there has been a 'procedural' or 'substantive' breach of a legitimate expectation. This may occur where a public body says that it will act in a particular way: such a representation may give rise to a legitimate expectation that the public authority will do as it said it would and the court may enforce this;⁶³ or
- failure to consult in a situation where the law requires that there be consultation (for example a substantial reconfiguration of services or the introduction of new charging or eligibility rules).⁶⁴

Procedure and time limits

11.90 A claim for judicial review can be brought by any individual or organisation who has a sufficient interest in the outcome of the legal challenge.⁶⁵ For claims brought under the HRA 1998, a narrower test is applied that requires the claimant to be an actual or potential

⁶³See *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

⁶⁴See *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947.

⁶⁵Senior Courts Act 1981 s31(3).

victim of the alleged breaches, although this can include family members.⁶⁶

11.91 To bring a claim for judicial review, it is necessary to have 'litigation capacity', or in plain English to understand the nature and potential consequences of going to court and to have capacity (under the Mental Capacity Act 2005, see further chapter 7) to make the necessary decisions. As many disabled children will not have litigation capacity as a result of their age and/or their impairment(s), any claim brought on their behalf will need to be made by a 'litigation friend'.⁶⁷ The test for a person to act as litigation friend is that they can: (a) fairly and competently conduct the proceedings; and (b) have no interest adverse to that of the child.⁶⁸ In most cases, one of the parents will act as litigation friend for a disabled child in judicial review proceedings, although this role can also be taken by another family member, a family friend or an advocate.

11.92 Most judicial review cases involving disabled children are reported on an anonymised basis, usually by reference to actual or substitute initials – for

⁶⁶HRA 1998 s7.

⁶⁷Civil Procedure Rules (CPR) 21.2.

⁶⁸CPR 21.4(3).

example *R (JL) v Islington LBC*⁶⁹ and *R (L and P) v Warwickshire CC*.⁷⁰ There is no automatic right to anonymity; an application must be made to show that the child's privacy rights under ECHR article 8 outweigh the public interest in free reporting of court proceedings under ECHR article 10.⁷¹ It is virtually certain in practice that an application for anonymity for a disabled child would be granted. An application for anonymity for a disabled adult who lacks capacity to litigate themselves would also almost certainly be granted.

11.93 It is important to note that any judicial review challenge must be brought 'promptly' and, in any event, within three months after the grounds to make the claim first arose.⁷² The time limits may not be extended by agreement between parties. The court has discretion to extend time where it is fair and just to do so but it cannot be assumed that this will happen in any particular case. It is, therefore, essential that

⁶⁹[2009] EWHC 458 (Admin); (2009) 12 CCLR 322. See, however, *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302; [2005] 1 WLR 2884 for a case reported under the family's name.

⁷⁰[2015] EWHC 203 (Admin); [2015] ELR 271.

⁷¹See *Re Guardian News and Media Ltd and others* [2010] UKSC 1; [2010] 2 AC 697.

⁷²CPR 54.5(1). If the challenge relates to a planning decision then the time limit is six weeks and in respect of procurement decisions just 30 days.

individuals seek advice from a specialist legal adviser at the earliest possible stage.

11.94 Before proceedings can be issued, the claimant, or their advisers, must send a letter before claim which complies with the requirements of the Pre-Action Protocol for Judicial Review (the protocol). The requirements to follow the protocol do not affect the time limit for issuing a claim. The protocol requires both claimants and defendants to consider whether some form of alternative dispute resolution procedure would be more suitable and the court may ask for evidence that this has been considered. This could include using the ombudsman or mediation procedures. Defendants should normally be given 14 days to respond, although the timetable can be 'abridged,' or in exceptional emergency cases it may not be necessary to send a letter before claim at all. However, in all cases, the claimant must give some notice to the defendant. Where the court considers that a subsequent claim is made prematurely, it may impose sanctions, including refusing permission for the claim to proceed (see para 11.97 below).

11.95 A judicial review claim can be issued in the Administrative Court Office of the High Court at the Royal Courts of Justice in London, or at one of the regional administrative courts in Birmingham, Leeds or Manchester – or less frequently in other major cities. The procedural requirements for making a claim are outlined in the Civil Procedure Rules (CPR) Part 54 and its accompanying Practice Direction 54A. However, the authors would stress that specialist legal advice should be sought before any claim for judicial review is made.

Not only is the procedure technical and relatively complex, there is also the fact that, once a claim is issued, the claimant may be ordered to pay the defendant's costs if it fails or is later withdrawn. These costs can run into tens of thousands of pounds if the claim reaches a full hearing but fails at that stage. Claimants with the benefit of legal aid obtained through a specialist solicitor will have the benefit of protection from these costs (see para 11.102 below) in most cases.

11.96 The Administrative Court has a procedure for dealing with urgent cases which allows applications to be made for interim relief – for example to provide a disabled child with accommodation (under CA 1989 s20) pending the final determination of the claim.

11.97 Before a case can proceed to a full hearing, the court must first consider whether to grant permission. At this stage, the court will decide whether there is an 'arguable' case for granting the relief sought by the claimant and if there is any other reason why the claim should not be heard, for example, a failure to exercise an alternative remedy.

11.98 The Administrative Court is required to either refuse permission on an application for judicial review or refuse a remedy if it considers it highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred⁷³ (the so called '*no difference test*'). The

⁷³Supreme Court Act 1981 s31 as amended by the Criminal Justice and Courts Act 2015 s84.

test does not apply where the court considers that there is an 'exceptional public interest' in the case proceeding (and a court may hold a hearing to determine the issue). Although this is an additional barrier to justice, it should not affect the vast majority of cases involving disabled children in practice.

11.99 Following changes to legal aid rules, where permission for the claim to proceed is refused, a claim may not be made against the legal aid agency for payment of the claimant's own legal costs, although there is a limited discretion to make payment for costs where permission is neither granted nor refused – for example where the defendant concedes the claim after it is issued but before permission is considered by the court.

Remedies

11.100 The Administrative Court has the power to grant wide-ranging remedies, both at interim stage and following a substantive hearing although all remedies are discretionary. Remedies include making:

- A mandatory order that a public body must do something. For example, that the public body must carry out an assessment of the disabled child (under CA 1989 s17).
- A prohibiting order preventing a public body from doing something. This could include not

implementing a decision to close a respite/short break care centre or a reduction in the hours of care provided. Prohibiting orders are often granted at an interim stage pending final determination of the claim.

- A quashing order that 'quashes' the decision being challenged, setting it aside so that it is as if the decision was never made.
- A declaration that the public body has acted in a way which is unlawful. This can include declarations of incompatibility under the HRA 1998.
- The court can also award damages for breaches of the HRA 1998. Apart from this instance, it does not have the power to make financial awards.

11.101 More than one remedy can be granted and they are often used together. For example, the court could make a declaration that a decision made to reduce a disabled child's care arrangements was unlawful, make an order quashing the decision and make a mandatory order to carry out a fresh assessment of the child's needs. In many cases, the relief granted will be limited to a declaration and a quashing order, with the public body expected to then act in the light of the judgment and these orders. Mandatory orders are generally reserved for cases where there is only one lawful action that the public body can take.⁷⁴

⁷⁴*R v Ealing LBC ex p Parkinson* (1996) 8 Admin LR 281.

Funding

11.102 One of the most significant difficulties with a judicial review challenge is the issue of costs. Not only can the costs of bringing a claim be prohibitively expensive, but in the event that the claim is unsuccessful, even in part, the claimant is exposed to the risk of an adverse costs order being made which means that the claimant will be responsible for the defendant's legal costs as well. Where legal aid is available (see below at paras 11.108–116), it will cover the legal costs of bringing a claim and provide some protection against the liability of an adverse costs order. Although this is not a complete protection, it can be expected that a legally-aided claimant (and any 'litigation friend' if they have one) will not have to pay the other side's costs where the correct legal aid certificate is in place unless they act in a wholly unreasonable manner.

11.103 Where legal aid or other forms of funding (such as conditional fee agreements or insurance) are not available, the costs of a judicial review will in most cases represent a barrier for disabled children and their families in accessing the courts to seek a remedy and, in those circumstances, other routes to redress such as the ombudsman will need to be pursued. A specialist solicitor will be able to advise on the potential mechanisms for funding any given claim.

County court claims

11.104 The county court is able to hear a wide range of claims. These include personal injury claims, landlord and tenant disputes and contract disputes.

11.105 The most common types of cases that may be heard in the county court in relation to disabled children and young people are disability discrimination claims under the Equality Act 2010 that cannot be heard by the tribunal (see further chapter 9 at paras 9.123–9.128). This would include:

- claims about access to childcare provision and whether a childcare provider has made reasonable adjustments to enable a child access to a suitable service that meets their needs;
- claims on behalf of students against further or higher education settings, including making reasonable adjustments to its policies, criteria, provision of aids and services and physical features; or
- access to sports, leisure and other recreational facilities.

11.106 A claim must normally be brought within six months of the alleged discrimination. Where there has been a continuing process of discrimination taking place over a period of time, the six months begins at the date of the last discriminatory act. Courts have the

discretion to consider a claim brought outside the six-month period if they consider that it is fair to do so.

11.107 Remedies in the county court include damages, injunctions and mandatory orders; see para 11.100 above for more on these remedies.

Availability of legal aid

11.108 Despite the significant cuts to legal aid in many areas, it remains available to provide advice and assistance to children, young people and their parents to challenge decisions of public bodies in relation to most education, health and social care decisions where a 'means' and 'merits' criteria are met.⁷⁵

11.109 There are two main types of legal aid funding for advice relating to services for disabled children:

- **Legal Help:** this level of funding provides general advice and assistance in relation to:
 - preparing for a tribunal appeal including obtaining expert reports; but does not cover the costs of representation at the tribunal hearing itself; and
 - accessing health and social care services, including sending pre-action letters

⁷⁵See the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

before claim to public bodies in relation to a potential challenge by way of judicial review. It does not cover issuing or conducting court proceedings, instructing an advocate or providing advocacy. This level of funding may cover advice in relation to making complaints.

- **Legal Representation:** this type of funding covers the provision of advice and assistance in relation to proceedings or contemplated proceedings and is provided at two levels:
 - Investigative Representation: this level of funding is used where the prospects of success are unclear and investigatory work is required in order to investigate the merits of a claim, including seeking advice from a barrister and complying with the pre-action protocol for judicial review. It does not cover the issuing of court proceedings. In relation to judicial review claims, the Legal Aid Agency will expect the provider to explain why the work in completing the pre-action protocol could not be completed at Legal Help level; this will usually be where there is evidence that significant investigatory work is required. Before investigative representation funding can be granted, the individual must have notified the

proposed defendant of the potential challenge and given a reasonable time for the defendant to respond.⁷⁶

- Full Representation: this level of funding covers representation in a claim for judicial review and some other proceedings such as health and welfare applications to the Court of Protection in relation to adults who lack capacity under the MCA 2005.

11.110 Legal representation funding is not available for appeals to the tribunal unless the case falls within the Legal Aid Agency 'exceptional funding' criteria – a scheme which has received significant judicial criticism due to the difficulty in accessing funding via this route.⁷⁷

11.111 A financial eligibility or 'means' test will need to be met in every case. For tribunal appeals where the appeal right is with the parent then eligibility will be based on the parents' means. In all other cases, where work is carried out at 'Legal Help' level of funding then the Legal Aid Agency guidance states that when

⁷⁶Civil Legal Aid (Merits Criteria) Regulations 2013
SI No 104 reg 54(b) (i).

⁷⁷See for example, *IS v Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) and *R (Gudanaviciene) v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622.

assessing the means of a child, the resources of a parent, guardian or other person who is responsible for maintaining him or who usually contributes substantially to the child's maintenance must be taken into account, as well as any assets of the child. This can be a significant barrier for many families being able to access advice and assistance under the Legal Help scheme.

11.112 There is a discretion not to aggregate assets in this way if it appears inequitable to do so, having regard to all the circumstances including the age and resources of the child and any conflict of interest between the child and the adult(s). The Legal Aid Agency gives as an example that:

... in consideration of the age and resources of the child,⁷⁸ the provider may determine that it is inequitable to aggregate a child aged 17 years who is estranged from his parents, living separately from them and who is fully financially independent from his parents.

or

Where a child is a 'looked-after' child, it would usually be inequitable for his or her foster carer's/social worker's income and capital to be aggregated with that of the child.⁷⁹

⁷⁸For the purposes of legal aid eligibility, a child is a person under the age of 18.

⁷⁹Ministry of Justice, *Guide to determining financial eligibility for controlled work and family mediation*, April 2015, para 9.

11.113 Unless there are exceptional circumstances, legal aid can only be offered by an advice centre or law firm that has a contract with the Legal Aid Agency to provide that type of service in the office where the client wishes to access advice. For example, there are separate contracts for community care (which includes judicial reviews in relation to social care and healthcare), education (which includes SEN and discrimination appeals to tribunal) and public law (which includes all judicial review challenges and some human rights act claims). There are also contracts for clinical negligence, actions against the police, housing, family, mental health, crime, welfare benefits, debt and discrimination.

11.114 Since 2013, certain types of advice can only be accessed via a mandatory telephone gateway provided by the Civil Legal Advice (CLA) service on 0345 345 4 345. If a person is eligible, the CLA will provide legal advice, normally by phone, online or by post unless the specialist advice provider assesses them as unsuitable to receive advice in this way. These categories are:

- education;
- debt;
- discrimination.

11.115 There are provisions that allow for certain 'exempt persons' to still be able to access face-to-face advice if they choose.⁸⁰ These include a person

⁸⁰Civil Legal Aid (Procedure) Regulations 2012 SI No 3098 reg 20.

deprived of their liberty, a person under the age of 18 and a person previously assessed as requiring face-to-face advice within the last 12 months. These provisions will not offer much assistance to families needing to access advice in tribunal appeals as the appeal right will lie with the child's parent until the end of the school year in which the child turns 16 and once the young person turns 18, they will fall back under the mandatory gateway rules.

11.116 In order to find a face-to-face legal adviser in the other categories of work, individuals can go to the 'find a legal adviser' website⁸¹ or telephone the CLA service.

Other sources of advice and support

11.117 Where parents of disabled children or young people find themselves unable to access legal aid for advice and assistance in relation to SEN issues including tribunal appeals, the charitable organisation, Independent Parental Special Education Advice (known as IPSEA), provide invaluable free legal advice and assistance (including tribunal support) via their excellent website. A number of other charities, including the National Autistic Society and the Downs Syndrome Association, offer condition-specific advice through their helplines. The Contact a Family helpline

⁸¹<http://find-legal-advice.justice.gov.uk/>.

provides advice on a wide range of issues, including education and benefits. Advice on SEN issues is also available from other charities such as SOS!SEN.⁸²
Information, Advice and Support Services

11.118 Under the CFA 2014,⁸³ local authorities now have specific legal duties to arrange for children and young people for whom they are responsible, and the parents of children for whom they are responsible, to be provided with advice and information about matters relating to the special educational needs and disabilities of the children or young people concerned. These are known as 'Information, Advice and Support (IAS) Services'.

11.119 The local authority must take steps to ensure that these IAS services are known to:

- parents of children in its area;
- children in its area;
- young people in its area;
- head teachers, proprietors and principals of schools and post-16 institutions in its area; and
- other such persons as appropriate.⁸⁴

⁸²www.ipsea.org.uk; advice line on 0800 018 4016 and tribunal helpline on 0845 602 9579.

⁸³CFA 2014 s32.

⁸⁴CFA 2014 s32(3).

11.120 Details of how information, advice and support can be accessed and how it is resourced must also be set out in each local authority's local offer.⁸⁵

11.121 These duties are consistent with the key principles set out in the CFA 2014 which all local authorities must have regard to when exercising their functions under the Act and in particular:

... the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions.⁸⁶

11.122 The SEND Code states that IAS Services should be free, impartial, confidential and accessible and should have the capacity to handle face-to-face, telephone and electronic enquiries and that children, young people and parents should be involved in the design and commissioning of the service.⁸⁷ Local authorities should review and publish information annually about the effectiveness of the information, advice and support provided, including customer satisfaction.⁸⁸

⁸⁵SEND Regs 2014 Sch 2 para 15.

⁸⁶CFA 2014 s19(c).

⁸⁷SEND Code, para 2.5.

⁸⁸SEND Code, para 2.8.

11.123 Although many children will access information, advice and support services via their parents, the local authority must also ensure that it is possible for children to access information, advice and support separately from their parents.⁸⁹

11.124 Young people must be provided with confidential and impartial information, advice and support from staff who are trained to enable them to participate fully in decisions. The SEND Code reflects that young people 'may be finding their voice for the first time' and may need support in exercising choice and control over the support they receive and advocacy should be provided where necessary.⁹⁰

11.125 Local authorities must provide the following types of support through their IAS Services:

- signposting to additional sources of advice, information and support that may be available locally or nationally;
- individual casework and representation for those who need it which should include support in attending meetings, contributing to assessments and reviews;
- help when things go wrong, including arranging or attending early disagreement resolution meetings, supporting in managing mediation, appeals to the First-tier Tribunal, exclusions and

⁸⁹SEND Code, para 2.10.

⁹⁰SEND Code, para 2.15.

complaints on matters related to SEN and disability.⁹¹

11.126 The SEND Code also states that local authorities should adopt a key working approach which provides children, young people and parents with a single point of contact to help ensure the holistic provision and co-ordination of services and support.⁹²

11.127 Further information in relation to IAS services can be accessed via the IASS Network at www.iassnetwork.org.uk.

Independent Support Programme

11.128 During the implementation of the SEND reforms (see chapter 4 at paras 4.42–4.71); the government has funded a two-year programme of support to children, young people and their parents called the Independent Support Programme. This programme is managed by the Council for Disabled Children and provides a range of time-limited advice and support through the statutory EHC needs assessment and planning process.⁹³

⁹¹SEND Code, para 2.19.

⁹²SEND Code, paras 2.20–2.22.

⁹³For more information see www.councilfordisabledchildren.org.uk/what-we-do/our-networks/independent-support/what-is-independent-support.

