

## Refusal to Assess

# Advice pack for parents appealing to the Special Educational Needs and Disability Tribunal

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## How to use this pack

You have been sent these materials by the Independent Panel for Special Education Advice to help you take an appeal to the Special Educational Needs and Disability Tribunal.

Unfortunately IPSEA is not able to offer free representation to all the parents who use our advice service but we hope this pack will help you put together an effective case and benefit from our many years of supporting parents at Tribunal.

Many parents successfully represent themselves at the Tribunal. Its website, [www.sendist.gov.uk](http://www.sendist.gov.uk), provides a great deal of useful information on the procedures and how to submit your case.

There is no set way of using this pack – but it is probably useful to begin with the [Practicalities](#) section (page 3) which includes a checklist and timetable to help you remember important deadlines. The checklist can be downloaded from the IPSEA [refusal to assess web page](#) as a separate document.

Because this pack focuses on one area of appeal only – against a refusal to make a statutory assessment – we have been able to provide detailed advice on making your case and this forms the second part of the pack. You will see we refer and explain the law throughout but the statute – what the Education Act 1996 actually says – is left to the end so as not to overwhelm you at the start! You might want to look at this afterwards to see precisely what the law says local authorities must do and what your rights are as a parent to appeal. The [legal definitions](#) should be read in conjunction with the ‘Making your case’ section to help you focus on what precisely you need to show to establish that the LA ought to carry out a statutory assessment.

If you are unclear or unsure about anything, remember that IPSEA’s telephone advisers should be able to help (Tribunal helpline 0845 602 9579) or use one of the organisations listed in the [Further help](#) section.

Finally, we want to wish you well with your appeal and hope that our pack enables you to put the best possible case for your child.

## Key to abbreviations and terms

SEN	special educational needs
SENCO	special educational needs co-ordinator (the teacher responsible for overseeing provision for children with SEN)
SEND	Special Educational Needs and Disability Tribunal
LEA/LA:	local education authority or local authority (used interchangeably in this pack)
EP	educational psychologist
TA	teaching assistant
LSA	learning support assistant

## The practicalities

### What is the Tribunal?

The Special Educational Needs and Disability Tribunal is an independent national tribunal which hears parents' appeals against LA decisions about a child's special educational needs. It also hears claims of disability discrimination against schools and local authorities. There are separate tribunals for England and Wales.

It produces a free booklet, *How to Appeal*, and a video, *Right to be Heard*. The booklet includes the Appeal form.

Booklet and video are available via the Tribunal helplines 0870 241 2555 (England); 01597 829 800 (Wales) or from the postal addresses or websites below:

#### *England*

The Special Educational Needs and Disability Tribunal  
2nd Floor Old Hall  
Mowden Hall  
Staindrop Road  
DL3 9BG

[www.sendist.gov.uk](http://www.sendist.gov.uk)

#### *Wales*

The Special Educational Needs and Disability Tribunal  
Unit 32  
Ddole Road  
Enterprise Park  
Llandridnod Wells  
Powys  
LD1 6PF

[www.sentw.gov.uk](http://www.sentw.gov.uk)

### What powers and duties does the Tribunal have?

There are limits to what the Tribunal can decide. If you win your appeal it can order the local authority (LA) to make a statutory assessment. It cannot order an LA to draw up a statement at the same time and it cannot order a school to make provision (extra help for your child) if it concludes that a statutory assessment is not needed.

The Tribunal is governed by the law and regulations and has to follow case decisions made in the courts. The Tribunal must 'have regard' to the SEN Code of Practice which advises schools and LAs on identifying and making provision for children with SEN. The Tribunal is not bound to follow the Code to the letter but it generally accepts the Code's guidance in coming to its decisions.

The Tribunal stands in the shoes of the LA when it looks at the evidence put before it and decides whether the LA decision followed the law and SEN Code of Practice. It will also make a decision based on what is right for the child at the date of the hearing.

Chapter 7 of the Code is useful to read to understand how LAs make decisions about whether to assess. (See [Further help](#) for how to get a free copy).

## Your right of appeal against a refusal to make a statutory assessment

The letter from your LA turning down your request for a statutory assessment must tell you of your right of appeal.

This is an appeal under Section 329 or Section 329A of the Education Act 1996. (See [The legislation](#) at the back of this pack.)

**First**, look at the date on the letter from the LA – now make a note of the date two months after this. **This is your deadline by which you must get in your appeal.** Mark it on your calendar and in your diary. (If the two months ends in August you have until the first working day in September to get the form to the Tribunal.) If you have missed your deadline ring IPSEA for advice on 0845 602 9579 and/or the Tribunal on 0870 241 2555 (England); 01597 829 800 (Wales).

You have no right of appeal if the LA has carried out a statutory assessment in the past six months.

You must be a parent. In education law this means you are either a birth parent, have acquired parental responsibility or have care of the child (e.g. a foster parent or grandparent with whom the child lives).

## Filling out the Appeal form

The form that you use to register your appeal is at the back of the How to Appeal booklet.

Fill in:

- Your child's name and date of birth
- Your name and address
- Details of anyone else who has parental responsibility (if you have difficulties with this talk to IPSEA)
- The name of your LA and the date you were informed in writing that they would not carry out a statutory assessment
- Any special requirements to make the process accessible to you: say here if, for instance, you need documents translated, wheelchair access, a reader or a signer, or cannot manage negotiations over the phone.
- In section 4 of the form, the box saying that you have asked the LA to assess your child but it has refused
- The reasons for your appeal (see [below](#))

With the completed and signed form send the Tribunal the following:

- A copy of the letter the LA sent you that told you of its decision
- Your evidence for your child needing assessment
- A document listing all your items of evidence

Don't send original documents, send photocopies, and keep a copy of everything you send, including the form.

## Appeal process

In the letter refusing assessment, your LA must provide you with the following information on your rights of appeal:

- That you have a right of appeal
- That you have a two-month deadline to appeal
- That parent partnership and disagreement resolution services are available
- That using the disagreement resolution service will not affect your right of appeal.

The Tribunal may well waive the two-month deadline if all this information is not provided and you would be allowed to appeal late.

## Giving your reasons

The Appeal form gives you space to write the reasons for your appeal. Put these on a separate sheet and write 'See separate sheet headed Reasons for Appeal' in the space on the form.

Try to put in your full case at this point. You must send in enough information for the LA to be able to respond.

### **DO**

- Keep it short and to the point.
- Separate your points into paragraphs.
- Number your paragraphs or organise them under headings.
- Refer to any evidence that backs up your points. (You can send more evidence later and should say so, if for instance you will be getting a speech therapy report when the LA has not obtained one.)
- Refer to the legal issues. (See the section [Making Your Case](#) and [The Legislation](#).)

### **DON'T**

Get bogged down on history. If there is a long history of difficulties between you and the LA let the evidence (e.g. letters between you and the LA) speak for itself.

## Evidence

It is important to obtain any written evidence as soon as you can. It is best to send in all your written evidence with your Appeal form because this means you have the main substance of the case set out with supporting evidence right from the start and you may discover more about the LA's arguments if it is able to respond fully. If you have a good case and evidence, the LA may give in rather than fight the appeal. If you are having difficulty getting information from the LA, you can write to the Tribunal well before the hearing explaining what the document is and ask the Tribunal for a 'direction' to make the LA release the document: contact the Tribunal and ask for a 'Request for Directions' form. Unless the LA has a good reason for not providing the

document the Tribunal will order the LA to release it.

You can provide more evidence later in the process and should tell the Tribunal what you expect to obtain and when. You should submit this evidence at the latest at least four weeks before the hearing.

## Witnesses

Witnesses are people who can give spoken evidence. They should be people who know your child and can talk about the kind and amount of help they need, and may be able to state what help the school can provide. They are in addition to you as the parent(s), an observer/supporter if you need one (who is not allowed to take part), your representative if you have one, and any signer or translator or other special assistant.

The How to Appeal booklet states that you should ask for no more than three witnesses. However, the law does not limit the number and you can ask for more if it is necessary, but you must say why they are needed.

Before you decide if someone should be a witness check their views on every important issue in the case. They may be asked questions by the LA or the Tribunal members on any aspect of the case, and if they disagree with part of your case, this will not help you. A witness does not have to be on anyone's side, of course, and generally will have more credibility if they are seen to give their professional opinion without being on anyone's side.

Some LA employees and teachers may be reluctant to attend the Tribunal as your witness. Others may be prevented by practicalities such as not being able to get cover. If this is the case, you should seek a witness summons from the Tribunal. Write well in advance of the hearing (it should be at least 10 working days) to the Tribunal requesting that it issues a 'summons'. You need to give the name and address of the witness (this can be their workplace address). You also need to say why you consider their evidence is important and that you believe they might not attend voluntarily.

Before you do this, discuss with your potential witness the possibility of their being summoned to prepare them and to reassure them that any risk of criticism for attending a Tribunal at a parent's request can be avoided in this way. You may want to tell them that the former Tribunal President said to witnesses:

*You may have been summonsed because your employer has asked you not to attend because of a potential conflict of interest. In the Tribunal's opinion, your duty to provide the panel with helpful and objective evidence takes precedence over your obligations to your employer, and you should not be penalised for helping the tribunal.*

You should offer travel expenses to your summoned witness. The Tribunal will reimburse you if you pay these to a witness in these circumstances. All witnesses can claim travel expenses and a fixed amount for loss of earnings from the Tribunal. Witnesses will normally stay for the whole hearing.

When the Tribunal lets you know the deadline for written evidence, it also sends you a form to complete giving the name of anyone who is coming to the hearing. You will need to give the name of your representative if you have one and the names of any witnesses.

## Legal help and representation

Under the legal help scheme administered by the Legal Services Commission, a parent on a low income may be able to get limited free legal help from a solicitor. For a parent preparing for the Tribunal, this could cover a second expert opinion and preparing a written case, but not providing a representative. For details see [www.clsdirect.org.uk](http://www.clsdirect.org.uk)

You can bring a solicitor or barrister to represent you at Tribunal but you will not get public funding for this. A recent survey by a children's disability charity found that parents were on average paying over £5,000 for legal representation at the Tribunal.

A few organisations like IPSEA provide free representation but high demand means this is not available to all those who would like it.

Nearly half of parents represent themselves at the hearing. The Tribunal's annual report 2006/07 shows that 23 per cent had legal representation while 29 per cent were represented by another representative. Ten per cent of local authorities use legal representation. You will be heartened to know that a majority of parents – 62% – won their appeal against refusal to assess in 2006/07, and in IPSEA's experience many find their LA gives in before the hearing. Tribunal chairs say that parents are often good advocates for their child and their evidence can be crucial in deciding a case in their favour.

## Preparing yourself for the hearing

At least two weeks before the hearing, the Tribunal staff will send you a numbered bundle of copies of the documents sent in by you and the LA. Check that nothing is missing and make a note of where your key documents are in the bundle. Those documents you will want close at hand throughout the hearing should be easy to find. Make a note of the page numbers, mark them with coloured sticky paper and mark any key paragraphs with a highlighter pen.

Read through your Reasons for Appeal and the LA's response. Work out the following:

- 1 What are the main points you want to make?** Your Reasons for Appeal should include these.
- 2 What are the main issues of dispute between you and the LA?** Check through the LA points carefully. Which witness will cover each issue? You will not be able to control what the witnesses say but if you list the topics on which they are likely to be most helpful, you should make sure that nothing important is missed. For example,

*Mrs Jones, educational psychologist:*

- Amir's difficulties with handwriting and physical education
- the amount and kind of help he needs.

*Mrs Smith, SENCO:*

- the help the school has provided for Amir so far

- what help the school can provide in the near future
  - the school's special needs budget.
- 3 What evidence do you plan to give?** The Tribunal will ask you questions but you should make sure you provide information about any recent developments which brings your evidence up to date and how your child's learning difficulties are revealed at home, including their emotional state.
  - 4 What questions (if any) you will need to ask LA witnesses?** Remember the LA witnesses may not agree entirely with the authority's position. You could draw them out or highlight discrepancies in the LA's case by asking questions.
  - 5 Are there any particular points in the documents that you want to be sure the Tribunal has noted?** Consider how you will draw these out – perhaps as part of a question to a witness or in your own evidence or summing up?

## The hearing

Hearings normally last around three hours and are held as close to your home as possible. They are usually held in private.

A tribunal panel is made up of three people who will hear your appeal. The chair is a legally qualified Tribunal judge and the other two members will have knowledge and experience of special educational needs.

Your child can go to the hearing and give evidence. However, you should generally arrange for a friend or relative to come to look after your child.

The chair will suggest that different parts of the case are dealt with one at a time so you will not have to make a single statement about the whole of the case. This will give everyone the chance to look at the points as they come up, without getting muddled. Witnesses will be able to give evidence on each point. Both you and the LA will be able to ask them questions. You will have the chance to add anything you feel is important but has not been mentioned. Make a list beforehand of what you would like the Tribunal to consider and tick the matters off as they are discussed. At the end you can bring up any which were left out.

At the end you and the LA can summarise your cases. Make use of this opportunity to end the hearing with your main points. You will probably also want to comment briefly on what was said by witnesses and the main points made in the LA's summing up. For example, you might want to draw out a point made to support your case or say why you disagree with another point. You cannot bring up new issues in the summary, however.

Finally, keep your summing up brief and to the point but remind the panel of how important the decision will be to your child and family.

## Action checklist

- 1 Get hold of the booklet How to Appeal from the Tribunal. (See [Further help](#) section or the [Useful links](#) on our web site.)
- 2 Work out the last date to send in your appeal and make a note of this. (See [Timetable](#) below.)
- 3 Complete the Appeal form including your Reasons for Appeal. Make sure you sign the form and your reasons if they are separate.
- 4 Make copies of the LA's decision letter, your Appeal form, and any evidence you are sending to the Tribunal. Make another set of copies for your adviser if you intend to seek advice.
- 5 Write to the LA and school if you need further information. (You can use the model letters in [Making your case](#). The model letters are also downloadable from the [Refusal to assess](#) page on our web site.)
- 6 Arrange for any independent reports on your child. (See [Evidence about my child](#) in the **Making your case** section.)
- 7 Get hold of a copy of the SEN Code of Practice (See [Further help](#) section or 'Official publications' on our [Useful links](#) web page.)
- 8 Send the Appeal form, Reasons for Appeal and any other documents to the Tribunal office within the deadline.
- 9 Make notes of the deadlines for the LA to respond, for your sending in further information and details of witnesses, and the date of the hearing sent you by the Tribunal.
- 10 Decide who to ask as witnesses and ask the Tribunal to issue a summons if needed. (See [Timetable](#) below for the latest date you can do this.)
- 11 Gather any remaining evidence and submit as soon as possible, at the latest at least four weeks before the date of the hearing.
- 12 Prepare for the hearing.

## Timetable of the appeal process

- LA sends decision letter to you. Your appeal must reach the Tribunal within **two months** of the date on the letter.
- After you send in your appeal, the Tribunal replies within **10 working days**<sup>1</sup> registering your appeal.
- In this response, the Tribunal tells you about important dates. It gives you a deadline to send further information and details of your witnesses. It tells you the hearing date and asks if this is not possible for you.
- At the same time, the Tribunal writes to the LA, sending them a copy of your appeal documents.
- The LA submits its response to the Tribunal **within 30 days of receiving your appeal documents from the Tribunal**. The LA must state whether it opposes your appeal and why. The LA must send you a copy of its response at the same time: tell the Tribunal if you do not get it within the 30 days.
- If you need to request that the Tribunal summon a witness do this as soon as possible and at the latest at least **14 days** before the hearing. The summons will be sent to you and you should ensure that it gets to the witness at least **14 days** before the hearing unless the Tribunal has agreed a shorter time and specified it: hand the summons to the witness or send it by Recorded Delivery.
- Ensure that late evidence gets to the Tribunal at least **four weeks** before the day of the hearing, and send a copy to the LA at the same time.
- At least **10 working days** before the hearing, the Tribunal will send you and the LA the 'bundle', copies of the documents the Tribunal has received in the case.
- The date and venue for the hearing will be confirmed **not less than ten working days** before the date unless a shorter period has been agreed.

### *After the hearing*

- Generally you will receive the decision and reasons in writing **within ten working days** of the hearing.
- If the Tribunal decides in your favour, the LA has **four weeks** to begin the statutory assessment.
- If you feel there has been an error or have some other serious reason for thinking the decision is wrong, you have **28 days** to apply for a Tribunal review. Look at the [complaints section of IPSEA's website](#) and if necessary contact IPSEA for advice.

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<sup>1</sup> Working days do not include Saturdays, Sundays, bank holidays, any day between 25 December to 1 January, or any day in August

## Making your case

The LA has turned down your request for a statutory assessment. How do you begin challenging this? The [Practicalities](#) section gives you a guide to the type of evidence you will need, but what exactly are you trying to prove?

### The law and your case

The Education Act 1996 says that local authorities must identify and make a statutory assessment of those children in their areas who have special educational needs and who probably need a statement. (See [the Legislation](#) section.)

**This means you will need to convince the Tribunal that a statutory assessment is necessary to provide the right help for your child.**

Generally there are three ways of establishing this. By saying that:

- 1 a full assessment is the only way to find out what your child's difficulties are and what help your child needs;
- 2 the school could not give all the educational help your child needs unless it receives extra help from the LA;
- 3 the school has given your child all the help that could be expected but he or she has not made enough progress.

**Now you need to plan your case around the points which fit your case.**

There are at least two different approaches to take:

- A Where point 1 (above) applies, you need to make the case that advice from a number of different professionals is needed to fully understand your child's difficulties. In other words, your child "is a puzzle" and only a statutory assessment can help everyone understand the nature and severity of their difficulties and decide the help they need. Often this is not enough on its own to persuade the Tribunal that your child needs a statutory assessment. You will also have to show that they probably need a statement if their needs are to be met (see B).
- B For points 2 and 3, you need to make the case that your child's needs probably cannot be met without a statement of special educational needs. You do not have to prove a statement is necessary, only that it is probably necessary. The law says that where an LA needs to determine the provision needed by a child with a learning difficulty, then the LA must draw up and maintain a statement. (See the Legislation, [Section 324](#) and [Legal definitions](#)).

In many cases both approaches will apply. Whichever you decide fits your case best, keep going back to the points as you plan your case to make sure that you are focusing on what you have to prove to the Tribunal.

## What if the school could do more?

An appeal against a refusal to assess is easiest if the school backs you but this is not essential. The problem comes if you believe that your child is not progressing because of the failure of the school to provide the help that is well within its resources.

If the Tribunal finds that the school could do more for your child, you are likely to lose your appeal and will have wasted your time and effort. If this applies to you, you could consider withdrawing your appeal and seeking advice on how to make the school fulfil its duties (contact our advice line on 0800 0184016). You can always request another assessment if it is still necessary after the school has provided further help.

There are some cases, however, where the Tribunal may feel it is necessary for the LA to determine your child's help just because the school won't or can't make provision. This can occur in a variety of situations. Often it is where the school has a different understanding of your child's difficulties to yours and refuses to increase the help. But it could be the result of in-school factors such as staffing problems, where inspectors have found the school is failing to provide a proper education, or where the school has spent its special educational needs budget on something else.

Sometimes the school will say that it has done all it can but the LA argues that more could be done from within school resources. This leaves you and your child in a difficult position. You may be unsure who is right but you could begin by asking the LA what help it normally expects local schools to provide for children with your child's learning difficulty.

The LA has to explain, in its publications and on its web site, what help it expects local schools to provide for children with SEN at School Action and School Action Plus. It also has to explain its criteria for assessment. Unfortunately many fail to do this in full or in a way that is helpful to parents and you may have to press the LA for information. The law which says LAs must make this information available is reproduced at the end of the English SEN Code of Practice: *The Education (SEN) (Provision of Information by LEAs) (England) Regulations 2001*. The equivalent Welsh regulations are available on <http://www.opsi.gov.uk/legislation/wales/wsi2002/20020157e.htm>

You can write to ask for the information using model letter 1 below. If the LA delays in replying, do not miss your deadline for appealing. You can always withdraw your appeal if the information you receive makes you think again about your case.

### **Model letter 1**

*(You should send this letter to the address on the letter refusing your request for statutory assessment )*

Dear Head of SEN

I am considering whether to appeal against the authority's decision to refuse a statutory assessment of my child (*give name, school and date of birth*). I would like you to provide me with the following information as required under

the Education (SEN) (Provision of Information by LEAs) (England) Regulations 2001. (If you live in Wales, refer instead to the Education (SEN) (Provision of information by LEAs) (Wales Regulations 2002.)

- Details of the help you expect local schools to provide for children at School Action Plus with my child's special educational needs/disability. (*Describe their special educational needs and/or disability briefly here.*)
- The amount of money you delegate to my child's school for children on School Action and School Action Plus
- Details of the criteria you use to decide when to make a statutory assessment of children with my child's special educational needs/disability.

I should be grateful if you could reply promptly.

Yours faithfully

(your name)

## What the LA may reply

The LA is likely to say that it delegates (passes on) most of the money for special educational needs to its schools so the school can decide the help your child should get. Remember that although LAs across the country are delegating greater amounts of the SEN budget to schools, they cannot delegate their legal duties to children with special educational needs.

The LA may say your child does not fit its criteria for making a statutory assessment. The Tribunal is not bound by the authority's criteria, however, and, while it will take into account the way the authority organises its SEN support, it will want to be sure that the school fully understands your child's needs and can make all the provision your child needs. If it is not convinced this is the case, then it may order a statutory assessment.

Some authorities may say they never issue statements for children in mainstream schools or for children with a particular disability. These are blanket policies and are unlawful and the Tribunal will know this. You can also complain to the Secretary of State if your LA continues to use this 'reason' after you have pointed out what is wrong with it. (See ['How to complain'](#) on IPSEA's website.)

If after considering all these points you decide that your school should be providing more, then seek further advice about what to do. If you decide that the LA must determine the help your child should get, then you will need to proceed with an appeal against their decision to refuse your request for a statutory assessment.

## Your Reasons for Appeal

When you lodge your appeal with the Tribunal you will be asked to give your reasons. Although you can provide evidence at a later stage, this is the time to give your arguments.

Go back to the points 1–3 listed above. Now set out your reasons to go with your appeal form, using whichever of these points (there may be more than

one) fits your child's case, giving at least a little detail about why you believe this.

For example:

#### Example 1

A full assessment is the only way to identify my child's difficulties and find out what my child needs. Jack has been excluded from school twice in the past term. Although he receives a lot of extra help for his behaviour, Jack doesn't seem to understand what he has done wrong. I believe difficulty with understanding school work may be a factor but nobody seems sure about why Jack has difficulty learning or why he behaves as he does.

#### Example 2

The school could not normally give all the educational help my child needs unless it receives extra help from the local authority. The nursery school has had to provide much more help for Riath than they would normally provide at Early Years Action Plus. The staff at the nursery believe Riath will need a statement to manage mainstream school.

#### Example 3

The school has given my child all the help that could be expected but she has not made enough progress. Leila has received help on School Action Plus for over a year and her progress is very slow. The other children are leaving her further and further behind.

Now you need to plan how you can back up your point of view with evidence. The Tribunal will decide your appeal on the evidence that you and the LA put before it so it is vital that you produce the best possible evidence.

## Evidence about your child's difficulties

Begin by looking at the evidence the LA used to make its decision. This is likely to include school reports; Individual Education Plans (IEP) and IEP review reports; any advice from the LA's educational psychologist or other professionals who may have been involved. If the decision seems at odds with all the available evidence you may need to look no further than the school reports and those of the LA's own professionals.

If the evidence clearly supported the LA's decision you will have to look elsewhere for evidence to back up your case. Reports from professionals such as educational psychologists can be extremely important to your case but they can also be very expensive.

If you are eligible for Legal Help (formerly known as Legal Aid) because you are on Income Support or on a very low income, it may be possible for a solicitor to arrange free reports from professionals. (See [Legal help and](#)

[representation](#) in the Practicalities section.)

Other sources of written evidence may be available from:

- Teachers: ask them to be precise and to quantify exactly what is needed for your child.
- Health service, e.g. speech therapist, paediatrician, clinical psychologist or occupational therapist may write a report. Get your GP to refer you.
- Others involved with your child, e.g. social workers, youth workers, Connexions advisers.
- Information from voluntary groups relating to the child's learning difficulty.
- References to relevant research and findings.
- Extracts from books, magazines etc.
- School reports, including results of national tests and assessments.
- Individual Education Plans (IEPs) and IEP review reports.
- Home-school diaries.
- Your own evidence: for example, has a younger brother or sister overtaken your child? Is he or she anxious about going to school? Do you get bed-wetting, particularly in term time?
- Evidence from your child, written via a third party or where appropriate by their attendance as a witness.
- Your child's school work if this demonstrates a point you want to make, such as the limited progress they have made, or a particular difficulty which is in dispute.
- If your child has made little progress over a period of time, it sometimes makes it clearer if you can show this visually by a chart or graph – perhaps using the school's record of the National Curriculum level reached by your child over a period of time. You may also be able to show uneven achievement between one particular subject or skill and another.
- Information from your child's school record. You have a legal right to a copy of this. Put your request in writing to the chair of the governing body at the school. (See **model letter 2** below.) You may be charged for photocopying. The record includes your child's school reports, your child's attendance record and details of any exclusions. If behaviour is a difficulty for your child, their disciplinary record may help you show whether this is getting worse, whether the school and your child needs more help to manage it and whether there is a pattern.

The SEN Code of Practice says that LAs should look for evidence of a child's rate and style of progress when deciding whether to make a statutory assessment. The suggestions listed above may help you to demonstrate that your child's progress is slow or uneven, or that they have complex needs involving more than one difficulty. The Code says your child's attainment is a factor, but this must be considered in the context of their peers' attainment, their progress over time and what is expected of your child's performance. If

you can show, for example, that their performance in some areas is much lower than other areas or below what their general intelligence indicates is possible, then this should be a factor in deciding whether to assess.

**Model letter 2**

Dear Chair of the Governing Body (*your school will provide the name and address or send it c/o the school*)

(*Give your child's name and Year Group here*)

I am writing to ask for a copy of my child's school record which I believe will be helpful for my appeal to the Special Educational Needs and Disability Tribunal against the local authority's refusal to assess my child's special educational needs.

I understand I am entitled to these within 15 school days under the Pupil Information Regulations and that you may charge the cost of photocopying.

Thank you for your attention to this.

Yours faithfully,

(*Your name*)

**Evidence about the school and what it can provide**

In some cases it will be enough to provide evidence of your child's problems or to show the difficulty in understanding their problems and the help they need.

However, in most appeals against a refusal to assess, you will need the school to provide detailed evidence of what help they have provided. The SEN Code of Practice tells LAs that they should look at evidence to show that the school has made appropriate provision – your child's Individual Education Plans (IEPs) should help show the help that has been put in place and the school may have written to the LA when you asked for a statutory assessment to say what help it had provided. The SEN Code lists typical help in Chapter 7 (paragraphs 7:55 – 7.63) under four different headings:

- 1 Communication and interaction
- 2 Cognition and learning
- 3 Behaviour, emotional and social development
- 4 Sensory and/or physical needs.

As well as the help provided by the school, you will need to know what help is available from outside that the school can call in, for example the LA's educational psychologist, their behaviour support team, health service speech therapists, and specialist teachers. You will also need details about their special needs budget and the number of children it covers.

This is not information which will be readily available to you.

Ask someone from the school to tell you about it and, if possible, to come as a witness. You could point out to them that in this kind of appeal you are likely to be unsuccessful without this information. It may help to put your request in writing using model letter 3.

### **Model letter 3**

Dear Headteacher (or Special Educational Needs Co-ordinator)

As you may know, the local authority has refused my request for a statutory assessment of my child (*give name and year group*).

I am appealing against that decision and need information about the school's special educational needs provision to put my case.

Could you tell me:

1. The SEN budget for the current academic year.
2. The number of children this covers.
3. The number of children at each stage of the SEN Code of Practice i.e. those at School Action, at School Action Plus and with a statement of SEN.

Could you also describe the typical help which is given for children with my child's difficulties at School Action Plus and whether this is the maximum generally available?

I very much appreciate the time and trouble you will take to provide this information which I need in writing. I have been advised that the Tribunal will find it hard to decide the case without full details of school provision.

*(You could also ask here if someone from the school would act as a witness though it might be better to do this in person once you know the views of different members of staff.)*

Yours sincerely

*(give name*

It may also be helpful to use **model letter 1** (above, p. 12) to ask the LA for details of how much funding it delegates to schools and what help it expects schools to make. (See [What if the school could do more?](#) above.) If there appears to be a mismatch between what the school is saying it can do and the LA expects it to do, this may help your case.

## **Witnesses**

The most persuasive evidence about your child's learning difficulties and the help they need is likely to be from someone who is professionally qualified in the relevant field and has recent direct knowledge of your child.

The best way of presenting evidence from a professional is to combine their written report on your child with their attendance as a witness. This gives the Tribunal an opportunity to consider their evidence, while attendance at the hearing allows the professional to answer any follow up questions and to respond to points against your case raised by the LA or their witnesses. If you

are paying for an independent report, ask if the fee includes the professional's attendance at the Tribunal.

In appeals against refusal to assess, it is always best to have someone from the school as a witness and not to rely on written evidence alone. You will need someone who has knowledge of how special educational needs help is organised in your child's school. In particular, it is helpful if whoever supplies the information about the school's resources – the SEN budget, staffing, facilities etc – can be a witness. This will usually be the head teacher or the special educational needs co-ordinator (SENCO). It would be useful if they could work out the cost of what your child requires as a proportion of the whole special needs budget.

Remember you can seek a summons for them to attend as a witness if they are uncomfortable in being seen to back you against the LA. (See [the Practicalities](#) section.) However, remember that there is no point in calling a witness whose evidence is unlikely to support your case.

## The legislation

This includes key sections of the Education Act 1996 that relate to the LA's responsibilities to carry out statutory assessments (Sections 321, 323 and 324) and a parent's right to appeal against refusal to make a statutory assessment (Section 329 and 329A).

### Identification and assessment of children with special educational needs

#### 321 General duty of local education authority towards children for whom they are responsible

- (1) A local education authority shall exercise their powers with a view to securing that, of the children for whom they are responsible, they identify those to whom subsection (2) below applies.
- (2) This subsection applies to a child if—
  - (a) he has special educational needs, and
  - (b) it is necessary for the authority to determine the special educational provision which any learning difficulty he may have calls for.
- (3) For the purposes of this Part a local education authority are responsible for a child if he is in their area and—
  - (a) he is a registered pupil at a [maintained school] [or maintained nursery school],
  - [(b) education is provided for him at a school which is not a maintained school [or maintained nursery school] but is so provided at the expense of the authority,]
  - (c) he does not come within paragraph (a) or (b) above but is a registered pupil at a school and has been brought to the authority's attention as having (or probably having) special educational needs, or
  - (d) he is not a registered pupil at a school but is not under the age of two or over compulsory school age and has been brought to their attention as having (or probably having) special educational needs.

#### 323 Assessment of educational needs

- (1) Where a local education authority are of the opinion that a child for whom they are responsible falls, or probably falls, within subsection (2), they shall serve a notice on the child's parent informing him—
  - (a) that they [are considering whether] to make an assessment of the child's educational needs,
  - (b) of the procedure to be followed in making the assessment,
  - (c) of the name of the officer of the authority from whom further information may be obtained, and
  - (d) of the parent's right to make representations, and submit written evidence, to the authority within such period (which must not be less than 29 days beginning with the date on which the notice is served) as may be specified in the notice.

- (2) A child falls within this subsection if—
  - (a) he has special educational needs, and
  - (b) it is necessary for the authority to determine the special educational provision which any learning difficulty he may have calls for.
- (3) Where—
  - (a) a local education authority have served a notice under subsection (1) and the period specified in the notice in accordance with subsection (1)(d) has expired, and
  - (b) the authority remain of the opinion, after taking into account any representations made and any evidence submitted to them in response to the notice, that the child falls, or probably falls, within subsection (2), they shall make an assessment of his educational needs.
- (4) Where a local education authority decide to make an assessment under this section, they shall give notice in writing to the child's parent of that decision and of their reasons for making it.
- (5) Schedule 26 has effect in relation to the making of assessments under this section.
- (6) Where, at any time after serving a notice under subsection (1), a local education authority decide not to assess the educational needs of the child concerned they shall give notice in writing to the child's parent of their decision.

### **324 Statement of special educational needs**

- (1) If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27, it is necessary for the local education authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.
- (2) The statement shall be in such form and contain such information as may be prescribed.
- (3) In particular, the statement shall—
  - (a) give details of the authority's assessment of the child's special educational needs, and
  - (b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by subsection (4).
- (4) The statement shall—
  - (a) specify the type of school or other institution which the local education authority consider would be appropriate for the child,
  - (b) if they are not required under Schedule 27 to specify the name of any school in the statement, specify the name of any school or institution (whether in the United Kingdom or elsewhere) which they consider would be appropriate for the child and should be specified in the statement, and
  - (c) specify any provision for the child for which they make arrangements under section 319 and which they consider should be specified in the statement.

[(4A) Subsection (4)(b) does not require the name of a school or institution to be specified if the child's parent has made suitable arrangements for the special educational provision specified in the statement to be made for the child.]

(5) Where a local education authority maintain a statement under this section, then—

(a) unless the child's parent has made suitable arrangements, the authority—

(i) shall arrange that the special educational provision specified in the statement is made for the child, and

(ii) may arrange that any non-educational provision specified in the statement is made for him in such manner as they consider appropriate, and

(b) if the name of a [maintained school] [or maintained nursery school] is specified in the statement, the governing body of the school shall admit the child to the school.

[(5A) Subsection (5)(b) has effect regardless of any duty imposed on the governing body of a school by section 1(6) of the School Standards and Framework Act 1998.]

(6) Subsection (5)(b) does not affect any power to exclude from a school a pupil who is already a registered pupil there.

(7) Schedule 27 has effect in relation to the making and maintenance of statements under this section.

### **329 Assessment of educational needs at request of child's parent**

(1) Where—

(a) the parent of a child for whom a local education authority are responsible but for whom no statement is maintained under section 324 asks the authority to arrange for an assessment to be made in respect of the child under section 323,

(b) no such assessment has been made within the period of six months ending with the date on which the request is made, and

(c) it is necessary for the authority to make an assessment under that section,

the authority shall comply with the request.

(2) If in any case where subsection (1)(a) and (b) applies the authority determine not to comply with the request—

(a) they shall give [notice in writing of that fact] to the child's parent, and

(b) the parent may appeal to the Tribunal against the determination.

[(2A) A notice under subsection (2)(a) must inform the parent of the right of appeal under subsection (2)(b) and contain such other information as may be prescribed.]

(3) On an appeal under subsection (2) the Tribunal may—

(a) dismiss the appeal, or

(b) order the authority to arrange for an assessment to be made in respect of the child under section 323.

**[329A Review or assessment of educational needs at request of responsible body]**

- (1) This section applies if—
- (a) a child is a registered pupil at a relevant school (whether or not he is a child in respect of whom a statement is maintained under section 324),
  - (b) the responsible body asks the local education authority to arrange for an assessment to be made in respect of him under section 323, and
  - (c) no such assessment has been made within the period of six months ending with the date on which the request is made.
- (2) If it is necessary for the authority to make an assessment or further assessment under section 323, they must comply with the request.
- (3) Before deciding whether to comply with the request, the authority must serve on the child's parent a notice informing him—
- (a) that they are considering whether to make an assessment of the child's educational needs,
  - (b) of the procedure to be followed in making the assessment,
  - (c) of the name of their officer from whom further information may be obtained, and
  - (d) of the parent's right to make representations, and submit written evidence, to them before the end of the period specified in the notice (“the specified period”).
- (4) The specified period must not be less than 29 days beginning with the date on which the notice is served.
- (5) The authority may not decide whether to comply with the request until the specified period has expired.
- (6) The authority must take into account any representations made, and any evidence submitted, to them in response to the notice.
- (7) If, as a result of this section, a local education authority decide to make an assessment under section 323, they must give written notice to the child's parent and to the responsible body which made the request, of the decision and of their reasons for making it.
- (8) If, after serving a notice under subsection (3), the authority decide not to assess the educational needs of the child—
- (a) they must give written notice of the decision and of their reasons for making it to his parent and to the responsible body which made the request, and
  - (b) the parent may appeal to the Tribunal against the decision.
- (9) A notice given under subsection (8)(a) to the child's parent must—
- (a) inform the parent of his right to appeal, and
  - (b) contain such other information (if any) as may be prescribed.
- (10) On an appeal under subsection (8) the Tribunal may—
- (a) dismiss it, or
  - (b) order the authority to arrange for an assessment to be made in respect of the child under section 323.

(11) This section applies to a child for whom relevant nursery education [relevant early years education] is provided as it applies to a child who is a registered pupil at a relevant school.

(12) “Relevant school” means—

- (a) a maintained school,
- (b) a maintained nursery school,
- (c) a pupil referral unit,
- (d) an independent school,
- (e) a school approved under section 342.

(13) “The responsible body” means—

- (a) in relation to . . . a pupil referral unit, the head teacher,
- (b) in relation to any other relevant school, the proprietor or head teacher, and
- (c) in relation to a provider of relevant nursery [early years] education, the person or body of persons responsible for the management of the provision of that nursery [early years] education.

(14) “Relevant nursery education” has the same meaning as in section 123 of the School Standards and Framework Act 1998, except that it does not include nursery education provided by a local education authority at a maintained nursery school.

[(14) “Relevant early years education”—

- (a) in relation to England, has the same meaning as it has (in relation to England) in section 123 of the School Standards and Framework Act 1998 except that it does not include early years education provided by a local education authority at a maintained nursery school for a pupil at the school;
- (b) in relation to Wales, has the same meaning as it has (in relation to Wales) in section 123 of the School Standards and Framework Act 1998 except that it does not include early years education provided by a local education authority at a maintained nursery school.]

(15) “Prescribed”, in relation to Wales, means prescribed in regulations made by the National Assembly for Wales.]

## Legal definitions

In ‘Making your case’ we explain that the Education Act 1996 says that local authorities must identify and make a statutory assessment of those children in their area who have special educational needs and who probably need a statement.

Section 324 of the Act says that for a statement to be made:

- The child must have a learning difficulty
- The learning difficulty must require special provision
- It must be necessary for the LA to determine the special educational provision.

Here we explain the legal definitions for special educational needs, learning difficulties and special educational provision. The issue of whether the LA must determine the provision is dealt with in Making your case.

***Special educational needs***

Section 312 of the Education Act 1996 provides the key definition of which children have special educational needs.

It says that:

A child has “special educational needs” for the purposes of this Act if he has a learning difficulty which calls for special educational provision to be made for him.

***Learning difficulty***

The Act goes on to define learning difficulty and special educational provision.

It says that a child has a learning difficulty if:

- (a) he has a significantly greater difficulty in learning than the majority of children of his age,
- (b) he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools within the area of the local education authority, or
- (c) he is under [compulsory school age] and is, or would be if special educational provision were not made for him, likely to fall within paragraph (a) or (b) when of . . . that age.

A child whose home language or form of language is different from that in which he will be taught is not to be taken as having a learning difficulty for that reason alone.

***Special educational provision***

The Act goes on to define special educational provision:

- (a) in relation to a child who has attained the age of two, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local education authority (other than special schools) . . . , and
- (b) in relation to a child under that age, educational provision of any kind.

## Further help

### ***Special Educational Needs and Disability Tribunal***

#### *England*

#### [Special Educational Needs and Disability Tribunal \(SEND\)](#)

2nd Floor Old Hall  
Mowden Hall  
Staindrop Road  
DL3 9BG  
helpline 0870 241 2555  
[www.sendist.gov.uk](http://www.sendist.gov.uk)

#### *Wales*

#### [Special Educational Needs Tribunal for Wales \(SENTW\)](#)

Unit 32  
Ddole Road  
Enterprise Park  
Llandridnod Wells  
Powys  
LD1 6PF  
Helpline 01597 829 800  
[www.sentw.gov.uk](http://www.sentw.gov.uk)

English How to Appeal booklet and forms (appeal, further information, request for directions) from:

<http://www.sendist.gov.uk/FormsGuidance/forParents.htm>

### ***Independent Panel of Special Education Advice (IPSEA)***

Help and advice on all aspects of the law on special educational needs

#### [IPSEA](#)

6 Carlow Mews  
Woodbridge  
Suffolk  
IP12 1EA

#### **Helplines**

Before LA writes refusing to assess:  
**0800 0184016**  
After LA writes refusing to assess:  
**0845 602 9579**

### ***Community Legal Services***

for details of where to get legal help

[www.clsdirect.org.uk](http://www.clsdirect.org.uk)

Phone 0845 345 4345

### ***Education Law Association***

for help and advice from a legal educational professional

Phone or fax 0118 9669866

Email [secretary@educationlawassociation.org.uk](mailto:secretary@educationlawassociation.org.uk)

### ***Useful information***

SEN Code of Practice

Free from 0845 60 222 60 if you live in England, or download from:

[www.teachernet.gov.uk/docbank/index.cfm?id=3724](http://www.teachernet.gov.uk/docbank/index.cfm?id=3724)

Free from 029 2082 6078 if you live in Wales, or download from:

[www.learning.wales.gov.uk/scripts/fe/news\\_details.asp?NewsID=1206](http://www.learning.wales.gov.uk/scripts/fe/news_details.asp?NewsID=1206)