First-Tier Tribunal (SEND): making written representations

Contents

[Purpose of this guide 2](#_Toc66460156)

[How to complete the FFT written submissions template 5](#_Toc66460157)

[1. Introduction 5](#_Toc66460158)

[2. Summary of the facts 6](#_Toc66460159)

[3. Submissions – choosing your grounds 6](#_Toc66460160)

[4. Conclusions 10](#_Toc66460168)

[Presenting at the IRP meeting 11](#_Toc66460169)

# Purpose of this guide

This guide is to help you put together your written submission ahead of a First-Tier Tribunal (FTT) hearing, where you are advising the parents or caregivers of a pupil who has been permanently excluded from school. It is designed to be read alongside the template for making written representations to a First-Tier Tribunal, which you can download from [our website](https://councilfordisabledchildren.org.uk/information-advice-and-support-services-network/resources/exclusion-resources-equality-and-human-rights-commission).

Department for Education guidance

Throughout this document we use the phrase ‘the DfE guidance’. This refers to the Department for Education publication: ‘[Exclusions from maintained schools, academies and pupil referral units in England](https://www.gov.uk/government/publications/school-exclusion) – Statutory guidance for those with legal responsibilities in relation to exclusion’, September 2017. We also refer to the ‘[Special educational needs and disability code of practice](https://www.gov.uk/government/publications/send-code-of-practice-0-to-25): 0 to 25’, 2015.

## Challenging a permanent exclusion

When a child has been permanently excluded from school, there are two different routes parents or caregivers can take if they feel the decision was unfair and want to take action. These are:

* bringing an appeal in the First-Tier Tribunal (Special Educational Needs and Disability (SEND))
* challenging the decision before an Independent Review Panel (IRP)

There are significant differences between these two routes. It’s important you understand these before advising on which one to take.

**This guide is for the FTT route.** A separate guide is available for the IRP option.

## Advantages of a First-Tier Tribunal (FTT)

When compared to an IRP, the main advantages of the FTT are that:

* Your appeal will be heard before a legally qualified judge.
* The FTT can order anything reasonable to remedy the discrimination, other than paying financial compensation. The FTT can therefore directly order that a pupil be reinstated.
* The FTT can also make a formal declaration that discrimination has occurred and can order the school to make an apology, to remove the permanent exclusion from a pupil’s record, to provide extra tuition to make up for lost learning or to take specified actions to prevent the discrimination happening again (for example, by modifying its behaviour policy or providing training to staff).

By contrast, an IRP can only direct or recommend that the Governing Body reconsider the exclusion decision.

Note that neither an IRP nor the FTT has the power to award compensation.

## Deciding on the preferred route

In general, the FTT is likely to be preferable where any arguments based on breaches of the Equality Act 2010 are strong. An IRP is likely to be preferable where these arguments are weak, or there are other strong arguments which could not be put before the FTT.

Bear in mind, though, that there may be a delay in bringing an appeal in the FTT. Although exclusion appeals should be heard within around 6-8 weeks, it often takes longer due to a lack of FTT judges.

It is possible to pursue the claim using both routes, but it is likely to be time-consuming and most parents prefer to select just one.

## Who is the claim to the FFT against?

A claim to the FTT will be registered against the responsible body, which is usually the Governing Body (for a maintained school).

You cannot bring a claim against an individual person (such as the head teacher or any other teacher) even if you think that individual is responsible for the discrimination.

## Timings and deadlines

An appeal to the FTT under the Equality Act 2010 must be made **within six months** of the exclusion.

Following the FTT’s decision, or any appeal to the Upper Tribunal, the parent or caregiver has the option of taking the IRP route. In which case, the deadline for bringing the challenge before the IRP is **within 15 school days** of that judgement or appeal.

The DfE guidance makes it clear that a local authority must not delay or postpone an IRP where parents also appeal to the FTT. As a result, if the FTT is your preferred forum, it is best to issue only there – keeping open the option of an IRP afterwards. For example, if a parent requested an IRP and lodged proceedings at the FTT at the same time, the IRP would notdelay its meetingto wait for the FTT outcome.

# How to complete the FFT written submissions template

Remember that the template is only a starting point. Only use the sections that are relevant to you – and feel free to change any section if there are sensible reasons for doing so in your case. Here are some important points to bear in mind:

1. Use cross-references to avoid repetition: if the facts or arguments you rely on have already been covered somewhere else, say something like: ‘… for the reasons set out at paragraph X above’.
2. Use numbered paragraphs. This will help you and the Tribunal refer to the relevant sections of your representations at the hearing.
3. As a general rule (unless there is a good reason to do otherwise) the arguments should be put in the order in which the relevant sections appear in the Equality Act – as they have been in the template submissions.

## Introduction

When completing your submission, remember that the grounds given in the template are not in any particular order. Move them around (in the introduction and the body of the document) so your strongest arguments come first.

In general, discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments are likely to be the strongest grounds in cases involving discriminatory exclusions.

Keep similar or related grounds (for example, failure to make reasonable adjustments and indirect discrimination) next to each other.

## Summary of the facts

Set out the facts in chronological order, and be as specific as possible about dates. Try to separate out the facts so each numbered paragraph deals with one topic.

Where you wish to rely on facts that are not recorded in documents, you will need to ask questions of your witnesses at the hearing to ensure these are in evidence. If you do this, you can say at the relevant point in your submissions: ‘X will give evidence that…’ (or similar) – but avoid providing too much detail.

## Submissions – choosing your grounds

Set out your grounds so the strongest arguments come first. You can move these sections around in the template.

### Disputes of fact

Limit yourself to the disputes that are directly relevant to the types of discrimination or victimisation you have identified.

Include references to any evidence that supports your case, and any inconsistencies in, or other limitations to, the other side’s version of events.

When referring to the evidence that will be given by witnesses at the hearing, just give an overview. In cross-examination, the witness may not always say exactly what you expect them to, so it is best not to provide too much detail about this in any opening points.

### Disability

Make sure there is evidence before the Tribunal to support the fact that the person is disabled – for example, medical reports or other witness statements. The FTT template includes more information on the legal test for determining whether a person is disabled. The fact that a person is disabled is not always accepted.

### Direct discrimination

It is often difficult to show that a pupil was permanently excluded ‘because of’ their disability (rather than because of the behaviour that led the school to exclude). The difficulty in proving this is made easier by section 136 of the Equality Act, which states, ‘if there are facts from which the [Tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [Tribunal] **must** hold that the contravention [for example, the discrimination] occurred’, unless the respondent (usually the Governing Body) can prove otherwise.

An example of where a claim for direct discrimination is likely to be successful is where a non-disabled pupil who demonstrated almost identical behaviour was not permanently excluded.

### Discrimination arising from disability

The key here is to identify a reason for the exclusion (for example, violence, disruptive behaviour, etc.) that can be said to‘arise in consequence of’the pupil’s disability. For example, because the conduct is connected to or influenced by an underlying condition or its symptoms. This is much easier than showing that the exclusion was ‘because of’ the disability.

In most cases, the school will be able to identify a ‘legitimate aim’ and the dispute will centre on the proportionality of permanent exclusion.

Possible reasons the exclusion was not proportionate might include:

* the respondent was mistaken as to the facts (cross-referring to your ‘disputes of fact’ section)
* the respondent failed to take account of mitigating circumstances, including any distress the pupil might have been experiencing (particularly where this is affected by disability), previous bullying or teasing, or difficulties at home
* the pupil’s actions were reflexive or unintentional
* the conduct was not as risky or dangerous as the respondent assessed it to be

Reasons the relevant objective (for example, preventing harm to others or facilitating other pupils’ learning) would not be particularly well served by exclusion might include that the respondent over-estimated the risks or likely consequences of the pupil remaining in school – particularly if steps of the kind identified below were taken to support them.

Less drastic steps the respondent could and should have taken are described in the DfE guidance (paras 16-25) and in the SEND Code of Practice.

### Indirect discrimination

For a claim of indirect discrimination to succeed here, you must show that a ‘provision, criterion or practice’, such as a school’s behaviour policy, has been applied to all pupils but has particularly disadvantaged disabled pupils, including the pupil you are supporting. Indirect discrimination can be justified if the respondent shows the provision, criterion or practice is a proportionate means of achieving a legitimate aim. More information is available in the FTT template document.

There is usually more than one way of setting out the relevant ‘provision, criterion or practice’. If you are not sure which way is most likely to be persuasive, set out more than one. For example, these are all different ways of setting out the same policy:

* The provision of the school’s behaviour policy, which states that ‘Any student who brings a banned object onto school premises will be considered to meet the test for permanent exclusion’.
* The policy of permanently excluding any pupil who brings a banned object onto school premises.
* The practice of permanently excluding pupils for bringing a banned object onto school premises without considering the impact of any disability on their behaviour.

### Failure to make reasonable adjustments

A failure to comply with the duty to make reasonable adjustments is considered a form of disability discrimination (section 21(2) Equality Act 2010). More information about the different elements of the duty is included in the FTT template. In summary, the duty to provide reasonable adjustments relates to:

1. a provision, criterion or practice
2. a physical feature (for example, of a building or premises)
3. providing an auxiliary aid or service

A significant amount of cross-referencing is likely to be appropriate if arguments are made about both indirect discrimination and failure to make reasonable adjustments. This is because part of the duty to make reasonable adjustments includes taking reasonable steps to avoid a substantial disadvantage caused by a provision, criterion or practice. Remember that once an adjustment is considered ‘reasonable’ there is no justification for not making that adjustment, whereas indirect discrimination can sometimes be justified.

Note that a claim based on a ‘failure to do something’, such as a ‘failure to provide an auxiliary aid or service’, is a stronger way of expressing the point, rather than a breach based on a policy, criterion or practice. For example, a deaf pupil is not provided with text-to-speech software, despite this being requested. Although you can say that the school has a policy of ‘not providing text-to-speech software’ to any pupils (including non-deaf pupils), it is much more natural to say that the absence of text-to- speech software, an auxiliary aid, puts a deaf pupil at a substantial disadvantage.

It is helpful to include any available evidence about the potential cost or difficulty of implementing the adjustments or providing the aids or services identified, to show that it was reasonable in all the circumstances.

When identifying potential reasonable adjustments, there is no need to be too specific – but it’s important to give a general idea of the kind of things the school could reasonably have done.

### Victimisation

Victimisation is treating someone badly because they have done a ‘protected act’, or you believe that they have done or are going to do a protected act. Examples of protected acts are: making a complaint of discrimination under the Equality Act, helping someone to make a complaint by providing information or evidence, or alleging that someone has breached the Equality Act.

A claim for victimisation can succeed even where the pupil involved is not disabled.

It is important to be able to show a clear link between the ‘protected act’ identified and the permanent exclusion. The provisions about burden of proof described above in relation to direct discrimination also apply here.

## Conclusions

You can suggest remedies in your conclusions. Guidance on the circumstances in which it will be appropriate to direct the school to make an apology was provided by the Upper Tribunal in Ashdown House School v. JKL [2019] UKUT 259 (AAC), which also confirmed the power of the FTT to order reinstatement under para 5 of Schedule 17 to the Equality Act. You may wish to consider this case and incorporate any relevant points or quotations into this section of your representations.

# Presenting at the IRP meeting

We hope you’ve found this guide helpful. You can find top tips on presenting your arguments before an IRP or FTT in our document: *‘*Practical tips on presenting your case in the Independent Review Panel (IRP) or First-Tier Tribunal (FTT)’.

You can download the tips from our [website](https://councilfordisabledchildren.org.uk/information-advice-and-support-services-network/resources/exclusion-resources-equality-and-human-rights-commission).