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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 and Social Care 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 (EHC) plans. This includes refusals to assess or make an EHC plan or statement or to make amendments following annual review.
- The tribunal also has powers to make non-binding recommendations in relation to the health and social care parts of the EHC plan.
- Tribunal claims must be issued within two months of the date of the local authority's decision letter or one month from the date of the mediation certificate, whichever is later.
- Mediation must be considered before appeals in relation to special educational needs (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 is not being delivered and some other education decisions or failures to act such as school transport and funding cuts. 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 years provider, further education college or local authority must be made in the county court.

continued

- 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, young people 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 rights to independent mediation and disagreement resolution aimed at promoting the early resolution of disagreements at a local level and the introduction of a ‘single route of redress national trial’ in the First-tier Tribunal (Special Educational Needs and Disability) (the tribunal) to make recommendations in respect of health and social care.
- 11.2 Which route will provide the most practical and 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, not least because judicial review applications must be made ‘promptly’). 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 – the person is there to facilitate this and does not have the power to decide the outcome.

Complaints procedures

Overview

- 11.6 Where a disabled child or his or her 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) and so 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 Where the dispute concerns the lawfulness or otherwise of a policy operated by a public body, then judicial review may be a more appropriate remedy than a complaint.

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 1989 Part 3.² This covers such matters as assessments, care planning, reviews, support and services (including for example respite/short breaks support, adaptations, equipment, direct

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.

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 and there are good reasons for not bringing the case earlier.⁴

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 outlines problem solving techniques that can be useful in such cases.⁵

11.12 The children’s services 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 then 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 11.20.

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;⁶
- reassessing the needs of the child/young person/carer;

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

4 Children Act 1989 Representations Procedure (England) Regulations 2006 reg 9.

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

6 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.

- 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.⁷
- 11.15 The complaints statutory guidance⁸ 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).⁹
- 11.16 There is a separate complaints procedure for complaints made about adult social care.¹⁰ The Citizens Advice’s website provides a precedent adult social services complaint letter as well as a guide to ‘complaining about social services’.¹¹

Complaints about healthcare provision

- 11.17 National Health Service (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.¹²
- 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, that complaints are treated with respect and courtesy, that they receive a timely

7 Local Government Act 2000 s92.

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

9 Complaints Statutory Guidance, para 6.5.2.

10 For further information on complaints about adult social care see L Clements, *Community care and the law*, 7th edn, LAG, 2019, chapter 21.

11 Accessible at: www.citizensadvice.org.uk/health/nhs-and-social-care-complaints/complaining-about-social-care-services/where-to-start-if-you-have-a-problem-with-adult-social-care/.

12 Local 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.

and 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 local authority is under a duty to arrange free and confidential independent advocacy.¹³

13 Local Government and Public Involvement in Health Act 2007 s223A.

Table 1: Complaints procedure for children’s social care timetables

Stage	Procedure	Timescale
1 – Local Resolution	<ul style="list-style-type: none"> • Complaint is made verbally or in writing on the date it is first received by the local authority. • Staff at the point of service delivery should seek to address as quickly as possible although can agree to move straight to Stage two. • Complaints manager should be informed of outcome and letter should be written to complainant offering right to request reconsideration at Stage two. 	10 working days – can be extended by a maximum of a further ten working days for more complex decisions or if an advocate is required
2 – Investigation	<ul style="list-style-type: none"> • Complaints manager should arrange for a full and considered investigation of the complaint without delay. • The local authority must appoint an investigating officer (IO) and an independent person (IP). The IO will prepare a written report which should include: <ul style="list-style-type: none"> – details of findings, conclusions and outcomes are against each point of complaint (i.e. ‘upheld’ or ‘not upheld’; and – recommendations on how to remedy any injustice to the complainant as appropriate. • Good practice states that the IP should also provide a report once he has read the IO’s final report. • A senior manager acting as adjudicating officer should then consider the complaints, the IO and IP reports and prepare a response with his decision and actions it will take with timescales – this is the adjudication. • The local authority should then write to the complainant with its response enclosing the IO and IP reports and the adjudication. 	The time limit for completing stage two is 25 working days – can be extended to a maximum of 65 working days where there are several agencies of a key witness is unavailable
	<ul style="list-style-type: none"> • If the complainant is dissatisfied with the response they have a right to request further consideration at a review panel 	Request must be made within 20 working days

<p>3 – Review Panel</p>	<ul style="list-style-type: none"> • The purpose of the review panel is to consider the adequacy of the stage two investigation and reach findings and recommendations to try to reach a resolution. • It must consist of three independent people and the complainant has a right to attend. • The review panel should not reinvestigate the complaints or consider substantively new complaints not considered at Stage two. • The guidance suggests that no party should feel they need to be represented by lawyers and states ‘and the presence of lawyers can work against the spirit of openness and problem-solving).^a • However, the complainant has a right to bring a representative to speak to his/her behalf. • The standard of proof applied by panels should be the civil standard of ‘balance of probabilities’. • The review panel must act in accordance with the United Nations Convention on the Rights of the Child and the best interests of the child or young person should be prioritised at all times.^b • The wishes and feelings of the child and young people should be ascertained, recorded and taken into account 	<p>The local authority must convene and hold the review panel within 30 working days of request</p> <p>Panel papers should be sent to panellists and other attendees, including complainant at least ten working days before the review panel meets</p>
<p>After the Panel</p>	<ul style="list-style-type: none"> • Review panel issue a written report of its findings containing a brief summary of the representations and their recommendations for resolution of the issues • Local authority must respond to the findings and advise complainant of right to refer complaint to ombudsman 	<p>Within five working days of panel meeting</p> <p>Within 15 working days</p>

a Complaints Statutory Guidance, para 3.10.3.

b Complaints Statutory Guidance, para 3.11.3.

- 11.21 Citizens Advice’s website provides a guide to the ‘NHS complaints procedure’.¹⁴

Complaints about education

- 11.22 The foreword from the Local Government Ombudsman Focus Report, *Education, Health and Care Plans: our first 100 investigations* (October 2017), stated that:

... we have seen some families having to push, persist, and go well beyond the call of duty just to confirm the type of support they should receive, and to get it provided.

It can be tough enough for these families, without the disproportionate burden of having to fight the educational system just to get the support to which they are entitled.

In some instances, our investigations have shown the new system to have the opposite of its intended effect.

- 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, young person or his or her family wish to challenge a decision in respect of special educational needs (SEN) provision, for example, in the contents of an Education, Health and Care (EHC) plan, it will usually be more appropriate to pursue 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 education provider’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.¹⁵

14 Accessible at: www.citizensadvice.org.uk/health/nhs-and-social-care-complaints/.

15 The requirements for complaints procedures in academies, free schools and independent schools are set out in Education (Independent School Standards) (England) Regulations 2010 S1 No 1997 Part 7; for Early Years providers the requirements are set out in the Early Years Foundation Stage (EYFS) Statutory Framework (April 2017) and for maintained schools under Education Act 2002 s29.

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;¹⁶
- exclusions;¹⁷
- child protection/allegations of abuse;¹⁸
- school transport.¹⁹

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

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 and Skills Funding Agency, see below at para 11.32.

Department for Education

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 unreasonably or has failed to carry out one of its duties.²⁰ His or her officials can also consider complaints about disability discrimination in relation to a pupil at a school.²¹ The secretary of state will not intervene in a case where there is another avenue of redress, such as the tribunal.²² The Department for Education cannot investigate individual complaints about an independent/private

16 School Standards and Framework Act 1998 s94.

17 Education Act 2002 s51A; and School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 S1 No 1033.

18 Children Act 1989 s47.

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

20 Education Act 1996 ss496–497.

21 Equality Act 2010 s87.

22 SEND Code, para 11.75.

school but does have powers as a regulator if the school is not meeting required standards in respect of education, welfare etc.²³

The Education and Skills Funding Agency

- 11.32 The Education and Skills Funding Agency (ESFA) formed on 1 April 2017 and brought together the work of Education Funding Agency (EFA) and Skills Funding Agency (SFA). It can investigate complaints in relation to:
- a post-16 training provider, college or employer funded by the ESFA;
 - an academy or free school;
 - an independent admissions appeal panel.
- 11.33 ESFA has published guidance ‘Procedure for dealing with complaints about providers of education and training’.²⁴ 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, and there is separate guidance on complaints about academies.²⁵

Office for Standards in Education, Children’s Services and Skills (Ofsted)

- 11.34 Ofsted can consider complaints about early years provision and schools where the complaint is 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.²⁶

The Information Commissioner

- 11.35 The Information Commissioner can consider complaints on behalf of parents and young people in relation to access to information and records in educational establishments and local authorities including issues such as examination results, taking photos in schools and accessing pupil and official information.²⁷

23 Education Act 2002 s165.

24 At: www.gov.uk/government/organisations/education-and-skills-funding-agency/about/complaints-procedure.

25 See *Education Funding Agency, Procedure for dealing with complaints about academies*, 2014.

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

27 See: <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 and Social Care Ombudsman (LGSCO) (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 LGSCO 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 ESFA and the Department for Education (including the Secretary of State for Education). Both the LGSCO 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'²⁸ 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.

28 The LGSCO considers that maladministration can include: flaws in policies or decision making; poor administrative practice; failure to adhere to or consider statutory guidelines; failing to consider exceptional circumstances; not properly considering statutory powers or duties; failing to give an adequate service; see www.lgo.org.uk/information-centre/staff-guidance/guidance-on-jurisdiction.

- 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, including in some circumstances, pre-proceedings steps such as sending a letter before claim.
- 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:
- *Special Educational Needs*: The LGSCO found that the local authority delayed in issuing a final EHC plan for a year longer than the statutory timeframe which caused injustice to the child's mother who spent significant time pursuing the matter and was unable to work while her child was at home. The local authority apologised and made a payment of £1,000.²⁹
 - *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.³⁰
 - *Health*: The mother of a nine-year-old child with autism made a complaint to the PHSO following delays in arranging a full autistic spectrum disorder assessment following a referral from Child and Adolescent Mental Health Services (CAMHS) which

29 Complaint no 17/009/828 against Suffolk CC.

30 Complaint no 14/002/965 against Trafford Council.

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 (NICE). 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.³¹

- 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 11.36 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.

Disagreement resolution arrangements

- 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.³² 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 4.41 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

³¹ Summary 447/ September 2014.

³² CFA 2014 s57.

about any aspect of SEN provision, and any health and social care disagreements that arise during the EHC needs assessment and EHC planning process.

- 11.46 The Special Educational Needs and Disability Code of Practice (SEND Code)³³ 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 while waiting for tribunal appeals to narrow issues or reach partial agreement.³⁴ Disagreement resolution meetings are confidential and without prejudice to the tribunal process.

Mediation

- 11.48 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 Parents and young people have a right to request mediation where a decision is made against which an appeal to the tribunal may be brought (see below) or.³⁵ The right to mediation also extends to mediation in relation to the health and social care parts of the EHC plan.
- 11.50 There is also a 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.³⁶

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

34 SEND Code, para 11.8.

35 CFA 2014 s52.

36 SEND 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 This requirement does 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.³⁷

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 of the 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.

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.³⁸ It may be attended by any advocate or other supporter that the child's parent or the young person wishes to attend.³⁹ 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 mediation⁴⁰ and must have received accredited training.⁴¹

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

37 SEND Code, para 11.21.

38 SEND Regs 2014 reg 37.

39 SEND Regs 2014 reg 38.

40 SEND Regs 2014 reg 40.

41 SEND Code, para 11.15.

- relevant commissioning body (generally the clinical commissioning group (CCG)) within three working days.⁴² 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.⁴³
- 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.⁴⁴
- 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.⁴⁵ 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 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.⁴⁶
- 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.⁴⁷

Tribunal

- 11.60 The First-tier Tribunal (Special Educational Needs and Disability) has jurisdiction to hear appeals and claims by parents and young people in relation to:

42 SEND Regs 2014 reg 35.

43 SEND Regs 2014 reg 35.

44 SEND Regs 2014 reg 36.

45 SEND Regs 2014 reg 41.

46 SEND Regs 2014 reg 37.

47 SEND Regs 2014 reg 42.

- special educational needs and provision;
 - disability discrimination.
- 11.61 As noted below (paras 11.74–11.82), there is a national trial 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.

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).⁴⁸
- 11.63 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.⁴⁹

⁴⁸ CFA 2014 s51.

⁴⁹ See SEND Code, paras 9.108 and 11.45.

- 11.64 The procedure for tribunal appeals is set out in the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.⁵⁰ 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.
- 11.65 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.⁵¹
- 11.66 Local authorities must comply with decisions of the tribunal within specified time limits.⁵²
- 11.67 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.⁵³
- 11.68 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/appeal-ehc-plan-decision
Email: sendistquiries@hmcts.gsi.gov.uk
Telephone: 01325 289 350 Fax: 0870 739 4017

Disability discrimination claims

- 11.69 The tribunal also has jurisdiction to hear claims on behalf of parents against schools and academies (including independent schools) under the Equality Act 2010 for disability discrimination in relation to:

⁵⁰ SI No 2699.

⁵¹ SEND Regs 2014 reg 43.

⁵² SEND Regs 2014 reg 44.

⁵³ Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI No 2699 r10.

- 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 4.216); 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).
- 11.70 Further coverage of the tribunal's role in determining disability discrimination claims is found in chapter 9 at para 9.131.
- 11.71 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.
- 11.72 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.
- 11.73 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 para 9.129 above).

Recommendations regarding health and social care needs and provision

- 11.74 Following a voluntary trial involving a small group of local authorities in 2015–16, on 3 April 2018, the government launched a two-year national trial⁵⁴ which extended the powers of the SEND Tribunal to consider disputes and make non-binding recommendations concerning the health and social care elements of an EHC plan.⁵⁵ The trial was extended to 31 August 2020 to allow for evaluation.⁵⁶

54 'SEND Tribunal: a single route of national redress' – at: www.gov.uk/government/publications/extended-powers-send-tribunal-national-trial.

55 Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 SI No 1306. Although as noted above the national trial has been announced for two years, the regulations are not in fact time limited; *NHS West Berkshire CCG v First-tier Tribunal (interested parties: (1) AM; (2) MA; (3) Westminster City Council)* [2019] UKUT 44 (AAC) at [33].

56 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844245/SEND_extension_trial_letter.pdf.

- 11.75 The national trial provides that where an appeal is made in the SEND Tribunal in relation to any of the existing rights of appeal on the education aspects of the EHC plan, then parents and young people will also be able to request recommendations on:
- the health and social care needs specified in the EHC Plan (sections C and D);
 - the health and social care provision specified in the EHC Plan (sections G and H).
- 11.76 The national trial regulations place a number of duties on local authorities, including the requirement to inform parents and young people of the tribunal's new powers, and to provide evidence from health and social care if requested by the tribunal. In addition, health and local authority social care commissioners are required to respond to any requests by the tribunal for information within a specified timeframe and they must send a witness to attend the hearing to give oral evidence if required.
- 11.77 Where recommendations are made by the tribunal, commissioners will have five weeks to provide a formal response on what steps it will take and reasons for the same.
- 11.78 A toolkit has been published providing further information and support on the trial: www.sendpathfinder.co.uk/send-single-route-of-redress-national-trial.
- 11.79 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.
- 11.80 Although, 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. However the limited force of the tribunal's recommendations was emphasised by the Upper Tribunal in *NHS West Berkshire CCG v First-tier Tribunal (interested parties: (1) AM; (2) MA; (3) Westminster City Council)*⁵⁷ upholding a decision by the tribunal that fairness did not require a CCG to be joined as a respondent to a tribunal appeal where health recommendations were sought. Following this decision, it is likely that local authorities will be the sole respondents to the vast majority of appeals where health recommendations are sought, with the CCG's interests

57 [2019] UKUT 44 (AAC). See, for example, [90]; 'A recommendation does not determine a CCG's legal obligations under the NHS legislation'.

protected by their entitlement to provide evidence. At [95], the Upper Tribunal held that:

In so far as the Department for Education's healthcare recommendations guidance might support the argument that CCGs are entitled to be joined as parties in healthcare recommendation cases, there is a simple explanation for that. The guidance is either wrong or poorly drafted.

- 11.81 Local authorities and CCG's will be awarded grant funding of up to £4,000 per case for participation in the national trial to cover associated costs such as liaising between teams, attending hearings, gathering evidence and preparing responses.
- 11.82 The national trial guidance states that Ofsted and the Care Quality Commission (CQC) will be incorporating the national trial into their SEND inspections.

Appeal rights for young people

- 11.83 The CFA 2014 gives significant new rights directly to 'young people', who are brought within the SEN 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 he or she turns 16) and under 25.⁵⁸ 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.
- 11.84 Capacity will need to be considered in the context of the particular decision be made, although for all decision-making rights the presumption will be that the individual has capacity.
- 11.85 Young people who have capacity to do so will bring their own appeal. 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

58 CFA 2014 s83(2).

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, 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.⁵⁹

- 11.86 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.⁶⁰ 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.
- 11.87 The representative will be a deputy appointed by the Court of Protection, or a person who has a lasting or enduring power of attorney, where a deputy or attorney have been appointed.⁶¹ 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 would need to be a personal welfare deputy or attorney.⁶²
- 11.88 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.

59 See *Hillingdon LBC v WW* [2016] UKUT 253 (AAC) at [11];

Young persons who have capacity are in no different position from anyone else. They may appoint someone to help and act for them. That person may be a parent or someone with some form of professional position. Their role is as an assistant and an advocate. The appeal is brought under section 51 by the young person. The person who helps is merely assisting them.

60 CFA 2014 s80 and SEND Regs 2014 reg 64. The legislation effects ‘a statutory substitution of the alternative person for the young person’; *Hillingdon LBC v WW* [2016] UKUT 253 (AAC) at [13].

61 CFA 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.

62 CFA 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’.

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.⁶³

- 11.89 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 the young person themselves. The alternative option is for the parent to apply to become a personal welfare deputy themselves.
- 11.90 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.
- 11.91 Where there is a dispute as to whether a young person lacks capacity to bring an appeal, the SEND Tribunal will determine this as a matter of fact as a preliminary issue.⁶⁴

Judicial review

- 11.92 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).⁶⁵ Judicial review claims can be made by individuals, organisations and also (although much less frequently) by one public body against another.⁶⁶ It is a remedy of last resort and so cannot be used if there is another

63 SEND Regs 2014 reg 65.

64 *Hillingdon LBC v WW* [2016] UKUT 253 (AAC).

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

66 On the latter point, see for example (*R (An Academy Trust) v Medway Council*) [2019] EWHC 156 (Admin), where an academy successfully challenged a council’s amended EHC Plan which had ‘eviscerated’ the contents of a previous plan made by a different council.

convenient and effective remedy, for example where there is an appeal right to the tribunal in relation to the decision that needs to be challenged⁶⁷ or if pursuing the complaints procedure would provide an alternative effective remedy.⁶⁸ If a claim for judicial review is made where there is an appropriate alternative remedy then it is likely that the court will refuse ‘permission’ (see paras 11.101 below).

Grounds

11.93 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.⁶⁹ More recently, the Divisional Court stated that one example of irrationality would be where ‘reasoning involved a serious logical or methodological error’.⁷⁰ 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 information on which a proper decision can be based.⁷¹
- *Illegality*: This includes where a public body:
 - acts beyond its powers – this is known as acting ‘*ultra vires*’;

67 Although given that the tribunal can only make non-binding recommendations on health and social care issues under the national trial (see para 11.74 above), in the opinion of the authors this appeal right may not be an alternative remedy such that permission to apply for judicial review should be refused in cases concerning health and/or social care disputes.

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

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

70 *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) at [98].

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

- 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 s42⁷²;
 - 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 2.22 above), have been breached, particularly in the context of HRA 1998 claims.⁷³
- *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;
 - the right to a fair hearing;

72 See *R (AD) v Hackney LBC* [2019] EWHC 943 (Admin), where a claim that a council’s policy for funding schools was unlawful because it was inconsistent with the section 42 duty to ‘secure’ provision was rejected by the court. At the time of writing (May 2019) an application for permission to appeal had not been determined by the Court of Appeal.

73 *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 United Nations Convention on the Rights of the Child.

- 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;⁷⁴ 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).⁷⁵

Procedure and time limits

- 11.94 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.⁷⁶ For claims brought under the HRA 1998, a narrower test is applied that requires the claimant to be an actual or potential victim of the alleged breaches, although this can include family members.⁷⁷
- 11.95 To bring a claim for judicial review, it is necessary to have ‘capacity to conduct proceedings’, 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 capacity to conduct proceedings 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’.⁷⁸ 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.⁷⁹ In

74 See *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213. A more recent example of this is *R (RD) v Worcestershire CC* [2019] EWHC 449 (Admin), where the court held that a council acted unlawfully by breaching a legitimate expectation that transitional arrangements would be put in place to mitigate the impact of the withdrawal of its portage service for young disabled children and their families.

75 See *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947. In *R (KE) v Bristol CC* [2018] EWHC 2103 (Admin); (2018) 21 CCLR 751 the court held that a council had acted unlawfully by failing to consult before making significant cuts to its budget for special educational provision. However, in *R (Hollow) v Surrey CC* [2019] EWHC 618 (Admin) the court held that no such obligation arose on the facts of that case and declined to follow the Bristol judgment.

76 Senior Courts Act 1981 s31(3).

77 HRA 1998 s7.

78 Civil Procedure Rules (CPR) 21.2.

79 CPR 21.4(3).

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.

11.96 Most judicial review cases involving disabled children are reported on an anonymised basis, usually by reference to actual or substitute initials – for example, *R (JL) v Islington LBC*⁸⁰ and *R (L and P) v Warwickshire CC*.⁸¹ 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 10.⁸² Provided information concerning the child's identity is not already in the public domain, it is virtually certain in practice that an application for anonymity for a disabled child would be granted. Similarly, an application for anonymity for a disabled adult who lacks capacity to conduct proceedings themselves would also almost certainly be granted.

11.97 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.⁸³ 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 individuals seek advice from a specialist legal adviser at the earliest possible stage.

11.98 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).⁸⁴ 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

80 [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.

81 [2015] EWHC 203 (Admin); [2015] ELR 271.

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

83 CPR 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.

84 See: www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv.

be given 14 days to respond, although the timetable can be 'abridged,' or in exceptional emergency cases it may not be possible 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 or making an order for costs.

- 11.99 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, Cardiff, 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 and in the Administrative Court Guide (2018). 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 or if court procedures are not followed properly resulting in additional costs being incurred. 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 11.106 below) in most cases.
- 11.100 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 Children Act 1989 s20) pending the final determination of the claim.
- 11.101 Before a case can proceed to a full hearing, the court must first consider whether to grant 'permission'.⁸⁵ 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.
- 11.102 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 occurred⁸⁶

⁸⁵ Senior Courts Act 1981 s31(3).

⁸⁶ Senior Courts Act 1981 s31 as amended by the Criminal Justice and Courts Act 2015 s84.

(the so called ‘no difference test’). The 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.

- 11.103 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

- 11.104 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 Children Act 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.
- 11.105 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.⁸⁷

Funding

- 11.106 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 para 11.113), 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.
- 11.107 Where legal aid or other forms of funding (such as conditional fee agreements or legal expenses insurance, for example under a home insurance policy) are not available, claimants may wish to consider crowdfunding their legal costs, including potential adverse costs from the defendant. Crowdfunding allows claimants to raise funds from family, friends and members of the public on a particular legal issue or challenge.⁸⁸
- 11.108 Otherwise, 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

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

⁸⁷ *R v Ealing LBC ex p Parkinson* (1996) 8 Admin LR 281.

⁸⁸ One example of a crowdfunding platform which specifically supports legal challenges is Crowdjustice – see www.crowdjustice.com/. Judicial review cases which have been brought using Crowdfunding include a judicial review to challenge the closure of three special schools in Wiltshire.

- 11.110 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 para 9.129). 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;
 - claims against schools where the child was not a pupil at the time of the alleged discrimination; or
 - access to sports, leisure and other recreational facilities.
- 11.111 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. However, the tribunal will generally only consider individual allegations and incidents that have occurred within the six months before the claim was issued. Courts have the discretion to consider a claim brought outside the six-month period if they consider that it is fair to do so.
- 11.112 Remedies in the county court include damages, injunctions and mandatory orders; see para 11.104 above for more on these remedies.

Availability of legal aid

- 11.113 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.⁸⁹
- 11.114 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:

⁸⁹ See the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

- 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 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.⁹⁰
 - *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.
- 11.115 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.⁹¹
- 11.116 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

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

91 See 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.

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 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.

- 11.117 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,⁹² 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.⁹³

- 11.118 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 state, housing, family, mental health, crime, welfare benefits, debt and discrimination.
- 11.119 Since 2013, certain types of advice could 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

⁹² For the purposes of legal aid eligibility, a child is a person under the age of 18.

⁹³ Ministry of Justice, *Guide to determining financial eligibility for controlled work and family mediation*, April 2015, para 9.

specialist advice provider assesses them as unsuitable to receive advice in this way. These categories are:

- education;
- debt;
- discrimination.

11.120 There are provisions that allow for certain ‘exempt persons’ to still be able to access face-to-face advice if they choose.⁹⁴ These include a person deprived of his or her 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, he or she will fall back under the mandatory gateway rules.

11.121 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’ website⁹⁵ or telephone the CLA service.

11.122 In February 2019, the government published a post-implementation review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 which examined the impact of the changes introduced in 2013. As a result of that review and concerns raised about the mandatory telephone gateway, the government has announced that it will reinstate immediate access to face-to-face advice in discrimination, debt and special educational needs cases by spring 2020.

Other sources of advice and support

11.123 Where parents of disabled children or young people find themselves unable to access legal aid or other funding 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 provides advice on a wide

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

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

range of issues, including education and benefits. Advice on SEN issues is also available from other charities such as SOS!SEN.⁹⁶

Information, Advice and Support Services

- 11.124 Under the CFA 2014,⁹⁷ 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’.
- 11.125 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.⁹⁸
- 11.126 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.⁹⁹
- 11.127 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.¹⁰⁰
- 11.128 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

96 See: www.ipsea.org.uk/Pages/Category/service-overview.

97 CFA 2014 s32.

98 CFA 2014 s32(3).

99 SEND Regs 2014 Sch 2 para 15.

100 CFA 2014 s19(c).

commissioning of the service.¹⁰¹ Local authorities should review and publish information annually about the effectiveness of the information, advice and support provided, including customer satisfaction.¹⁰²

11.129 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.¹⁰³

11.130 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.¹⁰⁴

11.131 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 complaints on matters related to SEN and disability.¹⁰⁵

11.132 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.¹⁰⁶

11.133 Further information in relation to IAS services can be accessed via the Information, Advice and Support Services (IASS) Network at cyp.iassnetwork.org.uk.

101 SEND Code, para 2.5.

102 SEND Code, para 2.8.

103 SEND Code, para 2.10.

104 SEND Code, para 2.15.

105 SEND Code, para 2.19.

106 SEND Code, paras 2.20–2.22.

