

#11 Mediation

ASK THE
JUDGE



Frequently asked questions for parents and young people

These Frequently Asked Questions have been prepared to provide a summary of the key duties on local authorities following the introduction of the Children and Families Act 2014. They are not to be treated as providing legal advice and should be used as a guide only.

If legal advice is required contact SEN4You directly on 01908 082422 or Advice@SEN4You.co.uk

KEY PROVISIONS

- Sections 52 – 56 of the Children and Families Act 2014
- The Education (Special Educational Needs and Disability) Regulations 2014
- Chapter 11 SEN and Disability Code of Practice 2014

What is mediation?

Mediation is an effective way to resolve disputes without the need to go to a court or a Tribunal hearing. Mediation is a voluntary, confidential process where people involved in conflict are helped by an independent specialist mediator to resolve their problems collaboratively. The goal of mediation is for the parties to speak with each other in an open and honest manner to try and reach a resolution that is acceptable to all parties in dispute.

Is there a difference between mediation and disagreement resolution?

Yes there is. While 'disagreement resolution' and 'mediation' are often used interchangeably, under the Children and Families Act 2014 they refer to different processes. Mediation is a process that is invoked where a parent or young person intends to appeal the contents of their Education, Health and Care (EHC) Plan to the First-Tier Tribunal.

Disagreement resolution refers to Special Educational Needs (SEN) non Tribunal matters and could be invoked at any time. This is a voluntary process and there is no requirement to have to consider mediation for SEN non Tribunal matters.

When should mediation be considered?

The mediation arrangements are specifically linked to decisions about EHC Needs Assessments and Plans. The Children and Families Act 2014 sets out two pathways for going to mediation, depending on whether the parent or young person wants to go to mediation about the matters which can be appealed to the Tribunal or whether they want to go to mediation about the health and social care elements of EHC Plans.

If parents or young people want it to, mediation can take place following decisions by a local authority not to carry out an EHC Needs Assessment, not to draw up an EHC Plan, after they receive a final EHC Plan or amended plan, following a decision not to amend an EHC Plan or a decision to cease to maintain an EHC Plan.

Is mediation compulsory?

No. Mediation is a totally voluntary process even if you are told otherwise. Although, from the 1st September 2014 parents and young people must prove to the First-Tier Tribunal service that they have considered mediation before an appeal can be lodged with them by sending them a mediation certificate obtained from a mediation adviser.

Do parents or young people have to seek mediation advice?

Yes. Parents and young people who wish to make an appeal to the Tribunal about the SEN element of an EHC Plan, may do so only after they have contacted an independent mediation adviser and discussed whether mediation might be a suitable way of resolving the dispute(s). Once the information has been provided it is for the parent or young person to decide whether they want to go to mediation before any appeal they might make to the Tribunal.

Are there any exceptions to the requirement to contact a mediation adviser?

Yes. Parents and young people do not have to contact the mediation adviser prior to registering their appeal with the Tribunal if their appeal is solely about the name of the school, college or other institution named on the plan, the type of school, college or other institution specified in the plan or the fact that no school or other institution is named.

What happens if the parent or young person decides not to go to mediation?

The mediation adviser will then issue a mediation certificate, within three working days of the parent(s) or young person's decision, to confirm that they have spoken to a mediation adviser but have decided not to go to mediation. The certificate will enable the parent or young person to lodge their appeal, either within two months of the original decision being sent by the local authority, or within one month of receiving the certificate, whichever is the later.

What happens if a parent or young person would like mediation?

The mediation adviser will notify the local authority of the parent or young person's decision to go to mediation. The local authority must ensure that a mediation session takes place within 30 days of the mediation adviser informing the local authority that the parent or young person wants to go to mediation, although it may delegate the arrangement of the session to the mediation provider.

If the local authority is unable to arrange mediation within 30 calendar days it must tell the mediator. The mediation adviser must then issue a certificate within three days. On receipt of the certificate the parent or young person can decide whether to appeal immediately or to wait for mediation to take place.



Can the local authority say no to a request for mediation?

No. If the parent or young person would like mediation then the local authority must also take part.

What happens if a parent or young person changes their mind about mediation?

If the parent or young person initially indicates that they want to go to mediation but changes their mind, they can contact the mediation adviser who can then issue a certificate, (within three working days) with which an appeal can be registered.

Can the local authority commission its own internal mediators?

No. Any mediation provision must be independent of the local authority. No one who is directly employed by a local authority can provide information about mediation or act as a mediator.

Any mediation provision must also be independent of a clinical commissioning group, local authority or the National Health Service Commissioning Board. No one who is directly employed by the above can provide information about mediation or act as a mediator.

Can anyone be a mediator?

No. The local authority must ensure that the mediators have the appropriate skills, knowledge and expertise in disagreement resolution; an understanding of SEN processes, procedures and legislation; have no role in the decisions taken about a particular case, nor any vested interest in the terms of the settlement; maintain confidentiality; carry out the process quickly and to the timetable decided by the parties.

What are the timescales involved where parents/young people want to go to the Tribunal but still use the mediation process?

Parents and young people have one month from receiving the certificate from the mediation adviser to register an appeal with the Tribunal or two months from the original decision by the local authority, whichever is the later.

Who has to attend the mediation session?

A person with authority to make decisions on behalf of the local authority needs to attend the mediation session.

When would mediation on the health and social care elements of an EHC Plan arise?

When contacting the local authority the parent or young person must tell the local authority about the matters they wish to go to mediation about. In particular, they must inform the local authority if they want to go to mediation about the fact that no health care provision, or no health care provision of a particular kind is specified in the plan and they must also inform the local authority of the health care provision which he or she wishes to be specified in the plan.

If the parent or young person wants to go to mediation about the health care matters then the local authority must inform each relevant commissioning body within three days about those matters.

What if the parent(s) or young person is only concerned with mediation about the health provision in an EHC Plan?

Then it is the responsible health commissioning body or bodies that are responsible for arranging a mediation session which is solely about the health care elements of the plan and they must do so within 30 days of being informed of the parent or young person's decision by the local authority.

Can the issues discussed at mediation be raised outside of that process?

No. Mediation meetings are confidential and without prejudice to the Tribunal process and the Tribunal will disregard any offers or comments made during them. Partial agreement achieved through mediation can help to focus any subsequent appeals to the Tribunal on the remaining areas of disagreement.

Is there a cost to parents and young people?

No. These services are provided free of charge to young people and parents/carers of children with SEN as it is paid for by the local authority.

Can parents or young people claim expenses for attending mediation?

The local authority/relevant commissioning body will pay reasonable travel expenses and other expenses to the parent or young person taking part in mediation, but not disagreement resolution. For example:

Travel Costs

Standard class public transport fares for the parent and their child or the young person.

A mileage rate of 25p per mile for travel by car or motorcycle.

Taxi fares.

Repayment for loss of earnings

Loss of earnings up to £45.

Registered child or young person

Engagement of a registered child or adult carer at expenses £5.35 per hour, per child or young person.

Overnight expenses

Expenses up to £81 per night for inner London or £71 per night for elsewhere or £21 per night if the stay is with family or friends.

Local authorities must not unreasonably refuse the payment of expenses to parents and young people.

Some agreement has been reached through mediation. Are there any timescales in implementing the agreement?

Yes. The Special Educational Needs and Disability Regulations 2014 set out time limits for local authorities to implement agreements made at mediation. For example, where the mediation issues are those that a parent or young person can appeal to the Tribunal on, the local authority has to comply with the mediation agreement as if it were an order from the Tribunal.

If the local authority does not implement the agreements within the set time limits, or ones which have been agreed with the parents or young people instead, the parents or young person can appeal to the Tribunal.

However, if the mediation agreement concerns an issue that cannot be appealed to the Tribunal, then the local authority or health commissioner must do the thing agreed within two weeks.

Can an enforceable agreement be reached through mediation?

Yes. This would be done through a mediation agreement which is prepared by the mediator. Timescales will also be agreed for undertaking the agreed actions. However, reaching an agreement does not prevent the parents/young person appealing to the SEN Tribunal. The Tribunal can have regard to what might have been agreed but can depart from it.

