SENlegal NEWSLETTER

Parent's Newsletter Edition 13

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Coming in November 2021

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As the 2020-21 academic year draws to a close, the SEND Tribunal meeting set out some interesting points, both in respect of what has already happened, and what is intended to happen.

Appeal Registrations

It will come as no surprise to parents and practitioners who were submitting Appeals late in the 2020-21 term, that the Tribunal's 10 day aim for registering Appeals became a distant memory, with Appeals taking 25 days on average to be registered. However, the good news is that they are now beyond the worst of it, and the normal 10-day registration service should be resuming as normal, (until the next phase-transfer window at least).

The delays at the Tribunal are predominantly attributed to the continuing rising number of Appeals, and ever-increasing cost pressures. The surge in Appeal submissions has exceeded even the Tribunal's own expectations. They were anticipating around a 10% rise in Appeals, but that has already been exceeded, and the year is not over yet.

Remote Hearings

It has also been confirmed that remote Hearings are here to stay and will be the primary/default Hearing arrangement until at least the New Year. For Tribunal users who need reasonable adjustments to be made, and require a live Hearing, this can be applied for, and we are assured will be accommodated. When live Hearings will become the norm again depends on the COVID-19 situation.

The good news (for some) is that remote Hearings, as an option at least, are here to stay. They have hugely increased efficiency, allowing panels to sit on Hearings from opposite ends of the country, sometimes several on one day, with a peak performance of 34 Appeals in one day. However, you don't have to be a mathematician to note that even performing at that peak, every day, on every school day of the year, the number of Appeals outstrips the number of panels. As such, we have unfortunately started to see some Appeals being vacated due to lack of Judicial availability, and this was confirmed as being a system wide issue.

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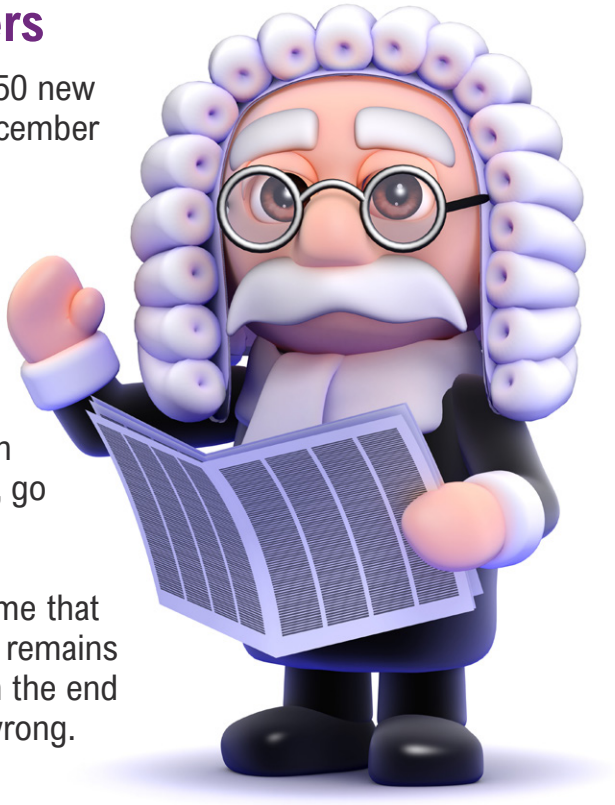
Recruitment of Judges/ Specialist Members



It is therefore great news that the Tribunal has recruited around 50 new fee-paid Judges, who will be coming to a panel near you in December 21- January 22.

Following a very successful recruitment competition, the Judges are joined by around 70 new specialist members, who have already begun sitting in tranches of 20. There is also another active recruitment happening right now for specialist members to sit on Extended Appeals (Appeals concerned Health and Social Care Sections of the EHC Plan), so if you have a background in Health or Social Care, and think sitting on panels could be for you, go over to the Judicial Appointments Committee and sign up!

Although this ongoing recruitment is great to see, it appears to me that whilst the number of Appeals continues to rise, recruitment remains reactive rather than proactive. Sadly, I do not think we have seen the end of vacated Hearings, though I would be delighted to be proven wrong.

Extended Appeals

The "National Trial" is no more, in the sense that the trial is over, and Appeals seeking recommendations in respect of health and/or social care are here to stay. Any Appeals registered from 1st September onwards including Health and Social Care are now called "Extended Appeals". I look forward to tripping over the change in terminology for many months to come.

There is no new law surrounding this, and things will continue exactly as they did pre-September 2021. The Tribunal's intention is to continue to case manage and issue directions at the point of registration, but this will be subject to Judicial availability.

As 2021 nears its close, we eagerly await the publication of the SEND Tribunal statistics, which should provide a clearer picture of the trends we have seen over the last academic year. These should be published on or around the 10th December 2021. We have no doubt that they will continue to paint a worrying picture of both increasing Appeals in terms of number, whilst also showing that the number of Appeals in respect of appealable decisions remains very low.

Waking Day Curriculums – are they Education or Social Care?

The SEND Tribunal only has legal power to make binding Orders in relation to the educational sections of an EHC Plan. That is Sections B (the child/young person's special educational needs), F (special educational provision) and I (placement).

It is a common misconception that a waking day curriculum (i.e. a residential placement for educational purposes across all waking hours), is social care provision, and not educational provision. This misconception often arises due to Local Authority funding arrangements, where the residential element of a school placement is wrongly defined as being for social care reasons, in order that social services contribute.

A waking day curriculum is not social care, and never has been. It is an educational provision, and the advice of an Educational Psychologist is essential in establishing whether there are educational reasons for a waking day curriculum to be written into an EHC Plan.

Section **21(5) of the Children and Families Act 2014** sets out the legal basis for a waking day curriculum as being educational. This section reads:

"Healthcare provision or social care provision which educates or trains a child or young person, is to be treated as special educational provision (instead of healthcare provision or social care provision)."

As a waking day provision is educational in nature, a report from an Independent Social Worker is insufficient on its own, to support a waking day curriculum. It is important to bear in mind that an expert can only give evidence from within their own sphere of expertise. Therefore, a social worker is limited to giving evidence about social care needs/provision. They cannot stray into the realms of an Educational Psychologist, who can give evidence as to whether the waking day curriculum is required to educate or train (as per the legal test above). Whilst it may be very sensible to obtain the evidence of a social worker in an Appeal concerning waking day, it is only one piece of the puzzle. Without the evidence of an Educational Psychologist, our view is that you are very unlikely to succeed.

As set out above, the National Trial is no longer a trial it is permanent. Appeals involving Health and Social Care are now 'Extended Appeals'. Under an Extended Appeal, you can ask the Tribunal to consider and make non-binding recommendations about the contents of the Health/Social Care Sections of an EHC Plan. However, Health and Social Care cannot be looked at by the SEND Tribunal, unless there is an educational appeal.

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Further, all the Tribunal has power to do is make recommendations in respect of the Health and Social Care sections which can be ignored by your Local Authority – this is another reason why waking day should never be dealt with solely as Social Care.

If your Local Authority does go on to ignore a recommendation by the SEND Tribunal relating to Social Care, your recourse lies in a Judicial Review in the Administrative Division of the High Court, based on irrationality. Judicial Review claims can be lengthy, time consuming and ultimately expensive. Thus, if you are considering a waking day placement - think educational provision, **not** social care.

SENlegal WEBINARS

Free Legal Advice Webinars for Parents, Schools & Professionals.

Coming this November...

Tues 2nd | Hayley Mason, Senior Solicitor
Preparing for Adulthood — LIVE

Thurs 4th | Melinda Eriksen, Specialist OT
What is Sensory Integration? — REC

Tues 9th | Nicole Lee, Senior Solicitor
Social Care- Child to Adult Transition — LIVE

Thurs 11th | Juanita Hurley, S.A.L.T
ASD vs DSD — LIVE

Tues 16th | Melinda Nettleton, Principal Solicitor
Taking Back Control — REC

Thurs 18th | Various Guest Speakers
SEND Signposting — REC

Tues 23rd | Richard Nettleton, Solicitor
Non-SEND Tribunal Remedies — LIVE

Thurs 25th | Cathleen Long, Social Worker
SEND parents accused of fabricating/inducing their child's illness. — LIVE

Tues 30th | James Brown, Solicitor
Transport — LIVE

For more information, go to senlegal.co.uk/legal-webinars

Respite provision

Respite provision can be provided to parents and children under **Section 2 of the Chronically Sick and Disabled Persons Act (CSDPA) 1970** or **Section 17 of the Children Act (CA) 1989.** If the respite could arguably be provided under either piece of legislation, the question may arise - which piece of legislation should the respite provision be provided under?

In such circumstances, the services must be provided under the **CSDPA 1970,** because provision under the **1970 Act** is a specific duty with which the Local Authority must comply. In contrast, the duty under **Section 17** of the **CA 1989**, is only a target duty, as set out in **R v Bexley LBC ex parte B [2000] 3CCLR 15.**

It is possible to be awarded only limited respite under **CSDPA 1970**, such as an overnight *"in home"* service, or as a community-based day service. Sadly, overnight respite cannot be provided through the **1970 Act,** as confirmed in **R (JL) v Islington LBC (2009) EWHC 458 (Admin); (2009) 12 CCLR 322**,

Consequently, if overnight respite is required, it must be provided under **Section 17(6)** of the **Children Act 1989. Schedule 2, Paragraph (1) (c)** of the **Children Act 1989** requires the Local Authority to provide services:

"(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively by giving them breaks from caring."

Short Breaks Statutory Guidance was issued by the Department for Children, Schools and Families in April 2010.

Regulation 4 requires Local Authorities to provide *"a range of services which is sufficient to assist carers to continue to provide care, or do so more effectively."*

Regulation 5 requires publication on the LA website of the range of services, any eligibility criteria and how the services are designed to meet the needs of carers. It is usually possible for parents to self-refer.

The SEND Code of Practice requires at **Para 4.44** that the short break service statement should also be published with the *"local offer"* for each Local Authority.

In **LW: RE Judicial Review (2010) NIQB 62,** the Court decided that following identification of need for respite care, adequate, effective and reasonable steps must be taken to ensure that it is provided. This would include identifying alternative provision, if a particular respite care facility is unavailable.

If, due to administrative of inertia this does not happen, and the Local Authority provides no convincing evidence of a reasonable effort to discharge the continuing statutory duty, then its unreasonable behaviour will entitle the Court to hold that the Local Authority is in breach of its statutory duty.

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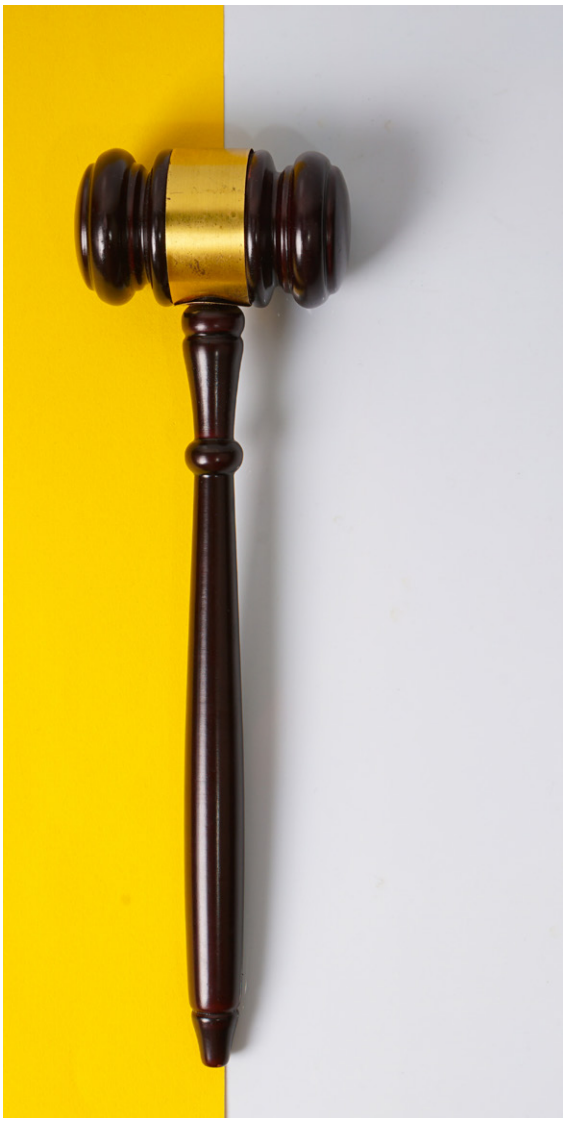
Respite Provision - Legal Enforcement



After both stage 1 and stage 2 of the LA complaints procedure has been completed, it is possible to complain to the Local Government Ombudsman. This means a very long wait from the start of the complaint to the conclusion, which is unlikely to be suitable where short breaks are concerned.

A speedier alternative is Judicial Review in the Administrative Division of the High Court, for which legal aid may be available in the name of the child.

The third alternative, is to use the SEND Tribunal's Health and Social Care recommendations powers. In order to ask the Tribunal to exercise these powers, there must be an educational appeal. That is to say amendments must be sought to either Section B, F or I of the EHC Plan in order that a social care recommendation can be requested.

The SEND Tribunal is evidence based, and therefore an Independent Social Worker's report will be required. If the Local Authority failed to honour the Tribunal's recommendation, then the remedy is again by way of Judicial Review, on the basis of irrationality (i.e. it is irrational not to follow the recommendation of an expert body).

In urgent cases relating to short breaks, the SEND Tribunal recommendations route is unfortunately also likely to be too slow, and Judicial Review the only viable option.

Recording Conversations

Parents sometimes ask whether they can record conversations which take place between them, the Local Authority, and its agents e.g. assessing professionals, schools, social care workers and case officers.

Recording a conversation in secret is not a criminal offence, and is not prohibited, **as long as the recording is for personal use,** (for example, you may be severely Dyslexic yourself). You don't need to obtain consent or let the other person know that you are recording. However, if the recording is solely for your personal use, then it will be of only limited value to you if something is stated which you will later want to use in evidence.

On occasion, parents have recorded conversations which contain information to support their position. This could for example be a school confirming orally that they cannot meet a child's needs and that an EHC Plan/specialist placement is necessary, whilst stating for the purposes of an SEND Tribunal that they are able to meet a child's needs. If this recording was obtained without the knowledge of the school, the question arises – can it be used?

If you wanted to use the recording as evidence in the SEND Tribunal, it is necessary to argue that the recording is in the public interest. In other words, the onus would be on you as the maker of the recording to show that sharing the recording is reasonably necessary to protect your lawful interests. In this case, it would of necessity have to be something relating to your child or young person's education, health or social care needs or provision.

The First President of the SEND Tribunal, the late Trevor Aldridge, admitted a recording made by a lovely family, in which a Local Authority Officer admitted that the LA placement could not meet need, but that the Local Authority were not naming a much needed, more specialist provision, on solely financial grounds. The appeal succeeded.

There is therefore scope of serving recordings made without the knowledge of the other party to be accepted into evidence, and to be very persuasive in terms of the outcome of the case overall. However, this should be approached with caution. Each Judge has discretion in respect of the admission of evidence, and not all Judges may take the view of Judge Aldridge. Each request to admit this kind of evidence will be dealt with on its own merits, on a case-by-case basis.