

# CHILDREN AND FAMILIES ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **PART 3 - children and young people in England with special Educational Needs OR DISABILITIES**

##### **Appeals, mediation and dispute resolution**

##### *Section 51: Appeals*

259. This section sets out the decisions taken by a local authority in relation to assessments and EHC plans against which a parent or young person can appeal. These are set out in *subsection (2)*.
260. This section extends the current right of appeal to the First-tier Tribunal to young people aged up to 25 and, in the case of young people in school, transfers the right from the parent to the young person. The section also extends the right of appeal to the Tribunal to the parents of children under 2 years of age.
261. An appeal can only be made after mediation has been considered and, where the parent or young person has decided to take part in mediation, this has taken place in accordance with section 52. The Secretary of State may make regulations in relation to appeals. The Secretary of State's powers include the power to make regulations giving the Tribunal the power to make recommendations about the health and social care elements of EHC plans in pilot areas (see section 51(4)(a)).
262. *Subsection (5)* recreates an offence, carried over from the Education Act 1996. A person commits an offence if, without reasonable excuse, they fail to comply with any requirement to provide or allow for inspection of documents, or attend a Tribunal hearing to give evidence or produce documents, where that requirement is imposed by the Tribunal Procedure Rules in relation to an SEN appeal. Under *subsection (6)* a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale. Under the Tribunal Procedure Rules nobody may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law.
263. This section replaces, in England, sections 325, 326, 328, 328A, 329 and 336(5A) and (6) of, and paragraphs 8 and 11 of Schedule 27 to, the Education Act 1996.

##### *Section 52: Right to mediation*

264. This section sets out that local authorities must inform parents and young people, following a decision in relation to an assessment or a plan or after the plan is made, amended or replaced, of their right to mediation about educational, health and social care issues.
265. Mediation is different to an appeal, in that it seeks to resolve matters through agreement between parents/young people and local authorities rather than through a judicial

decision. The mediator must be independent, meaning that he or she cannot be an employee of a local authority.

266. The local authority must also inform parents and young people that before making certain appeals to the Tribunal they must obtain a certificate, either following the receipt of information about mediation or following mediation. If the parent wishes to pursue mediation then they must tell the local authority that they intend to do so and what they want to pursue mediation about and, if they want health provision or a particular kind of health provision included in the plan, what that health provision is.

### ***Section 53: Mediation: health care issues***

267. This section sets out that where the parent or young person wants to pursue mediation and the mediation issues include health care provision then the local authority must inform the relevant health commissioning body, either the clinical commissioning group or the NHS Commissioning Board, of the mediation issues and of any health care provision that the parent or young person wants. If the parent or young person just wants mediation about health care provision then the responsible commissioning body or bodies must arrange for mediation, ensure that the mediation is conducted by an independent person and participate in the mediation. If the mediation issues include education and/or social care then the local authority must arrange the mediation, ensure it is conducted by an independent person and the local authority and the responsible health commissioning body must participate. An independent person, in this context, is someone who is not employed by a local authority in England or a clinical commissioning group or the NHS Commissioning Board.

### ***Section 54: Mediation: educational and social care issues etc***

268. This section ensures that where the mediation does not include health care issues but involves education and/or social care, the local authority must arrange the mediation, make sure that it is conducted by an independent person and participate in the mediation.

### ***Section 55: Mediation***

269. When a parent or young person wishes to bring an appeal about the special educational needs element of a plan, they may do so only if an independent mediation adviser has provided them with information about mediation and how it might help. It will be up to the parents or young person to decide whether to go forward to mediation. Where they decide to do so, they must take part in mediation before they can bring an appeal to the First-tier Tribunal. Where they decide against mediation they will be able to go straight to appeal.
270. The mediation adviser must issue a certificate to the parent or young person if he or she has provided them with information and advice about pursuing mediation and the parent or young person has informed the adviser that they do not wish to pursue mediation about assessments, the drawing up of plans or the special educational element of the EHC plan. The adviser must also issue a certificate if they have provided information and advice, the parent or young person has told them they wish to pursue mediation with the local authority and has participated in mediation. Parents and young people do not have to contact the mediation adviser if they want mediation about the health or social care elements of the plan.
271. Appeals which only concern the name of a school, college or other institution specified in the EHC plan or the type of school, college or institution specified in the EHC plan or the fact that the EHC plan does not name any school, college or other institution can be made without getting mediation information or going to mediation. This is because the parent or young person will already have been able to request a particular school or institution in the further education sector, and had discussions with the local authority about which institution should be named on the EHC plan. Requiring mediation in these circumstances would involve repeating the same discussions. This section gives

the Secretary of State regulation-making powers concerning mediation as listed in this section, including about giving notice, imposing time limits, qualifications and experience of mediation advisers and local authority action following mediation.

### ***Section 56: Mediation: supplementary***

272. This section gives the Secretary of State the power to make regulations about mediation, about such things as giving notice, imposing time limits and enabling a local authority or commissioning body to take prescribed steps following the conclusion of mediation. It also defines “mediation adviser”, and makes clear that the adviser cannot be an employee of a local authority, clinical commissioning group or the NHS Commissioning Board. This section also defines “commissioning body” in relation to mediation.

### ***Section 57: Resolution of disagreements***

273. Local authorities must make arrangements for avoiding or resolving disagreements where the parents of a child with special educational needs, or a young person with such needs, do not agree with how the local authority or an education body (listed in *subsection (9)*) with duties under Part 3 of the Act has carried out those duties. It must also make arrangements to avoid or resolve disagreements between the parents of a child or a young person and any school or post-16 institution specifically about the special educational provision made by the institution for that child or young person. The disagreements in this section also cover disagreements between parents or young people on the one hand and the responsible health commissioning bodies on the other about health care provision at the time assessments or re-assessments are being undertaken or EHC plans are being drawn up or reviewed. Disagreement resolution can also cover disagreements between local authorities and their responsible health commissioning bodies.
274. The section does not require either parents or young people on the one hand, or education bodies, local authorities or health commissioning bodies on the other, to participate in resolving disagreements – use of these arrangements is entirely voluntary.
275. Local authorities must appoint someone who is independent to help resolve a disagreement, or prevent it happening in the first place. Employees of a local authority, clinical commissioning group or the NHS Commissioning Board do not meet the criterion of being independent and cannot take on that role.
276. Local authorities must tell various people, including parents and young people, about the arrangements they have put in place to resolve disagreements.
277. This section replaces, in England, section 332B of the Education Act 1996.

### ***Section 58: Appeals and claims by children: pilot schemes***

278. This section gives the Secretary of State a power to establish pilot schemes in local authority areas to enable children to make appeals in relation to their special educational needs and to bring disability discrimination claims against schools to the First-tier Tribunal. Currently the Education Act 1996 and the Equality Act 2010 only give parents such a right.
279. The pilots will test whether the right to appeal is something that children would use, the best way to handle these appeals and the cost implications, with a view to extending the right to children across England. The section establishes the things the pilot scheme can cover. These include the age from which a child may appeal and make claims; how mediation before a child’s appeal works; and advice, information and advocacy provided to a child. The section stipulates that the power to make an order establishing pilot schemes is repealed after five years (from the date on which the Act receives Royal Assent).

***Section 59: Appeals and claims by children: follow-up provision***

280. This section provides the Secretary of State with the power to make an order enabling all children in England to bring appeals and make disability discrimination claims to the First-tier Tribunal.
281. The power would be used after pilots have been run. The Secretary of State may not use this power until pilot schemes have been in place for two years.
282. The section establishes what an order made by the Secretary of State can cover and this includes the age from which a child may bring appeals or make disability discrimination claims; about mediation; and advice, information and advocacy provided to a child (mirroring section 58(2)).

***Section 60: Equality Act 2010: claims against schools by disabled young people***

283. This section amends the Equality Act 2010 so that young people in England who are over compulsory school age and in school can make disability discrimination claims to the First-tier Tribunal themselves. Currently only the parents of disabled young people can make claims to the Tribunal. This mirrors the provision made in section 51 which allows for young people over compulsory school age to make special educational needs appeals to the Tribunal.
284. This section does not affect the rights of parents of young people in Wales to make disability discrimination claims to the Special Educational Needs Tribunal for Wales. Pilots on giving children and young people in Wales the right to make special educational needs appeals and disability discrimination claims to its Tribunal are being conducted with the right being given to all children and young people in Wales following the pilots. The necessary changes to the Equality Act 2010 and the Education Act 1996 will be achieved through an Act of the Assembly.