Agreeing to disagree?

Research into arrangements for avoiding disagreements and resolving disputes in the SEND system in England

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Research commissioned by the Local Government Association

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Local Government Association

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In *Support and aspiration*, the green paper that proposed reforms of the special educational needs and disability (SEND) system in England, the government at the time set out the ambition to deliver earlier, dialogue-based, non-judicial dispute resolution in a way that balanced the needs of individual young people and equity of access to support for all. Over seven years on from the introduction of the SEND reforms, it is hard to find evidence that those aspirations have been achieved. Numbers of appeals to the Tribunal – not the only, but a significant, route for raising and resolving disputes – have more than doubled, while the rate of appeals has also increased. For this reason, the Local Government Association (LGA) commissioned a team led by Isos Partnership to undertake research into approaches to avoiding disagreements and disputes. This included, but was not limited to, the trends in Tribunal appeals, but also the wider trends is disagreements and disputes in the SEND system, the factors giving rise to these trends, and what is needed at a national policy level to avoid address those challenges.

The research has involved –

- in-depth evidence gathering with leaders of SEND, health and care services, and SEND Information, Advice and Support Services (SENDIASS), in six local areas, with our sample reflecting a range in Tribunal appeal rates, proportions of young people with Education, Health and Care Plans (EHCPs), levels of deprivation, ethnic diversity and geography;
- parallel discussions with national bodies, including with the National Network of Parent Carer Forums (NNPCF), Independent Provider of Special Education Advice (IPSEA), the Department for Education (DfE), the Ministry of Justice (MoJ), members of the judiciary who preside over Tribunal appeals, and the Local Government and Social Care Ombudsman (LGSCO); and
- in-depth analysis of publicly available data on disagreements and disputes in the SEND system.

Our evidence gathering took place in November and December 2021. This report was written in January and February 2022.

Chapter 1: The current system for dealing with disagreements and resolving

There are four broad routes through which different types of disagreements and disputes are handled.

1. **Informal discussions, casework and key-working between professionals and families to head off potential disagreements** – local casework, dialogue between families and professionals, and discussions with local SENDIASS can all help to avoid disagreements and resolve disputes, as well as providing advice to families about how to navigate the appropriate route to raise a complaint.

2. **Formal complaints procedures** – local authorities (LAs) and other education settings and health bodies are required to have formal procedures for registering and processing complaints. LAs must also commission an independent dispute resolution service to deal with specific types of disagreements between families and education institutions, LAs, or clinical commissioning groups (CCGs). If a complaint is not resolved through this route, it can be escalated to the relevant Ombudsman.

3. **Appeal to the Tribunal** – having contacted an independent mediation adviser, parents / carers of children aged from birth to the end of compulsory school-age, and young people up to the age of 25, have the right to appeal to the First-tier Tribunal (Special Educational Needs and Disability) in relation to six specific LA decisions. The six include a decision not to carry out an Education, Health and Care Needs Assessment (EHCNA); a decision not to issue an EHCP; the content of an EHCP; a decision not to carry out a re-assessment of needs; a decision not to amend or replace an EHCP following an annual review; or a decision to cease to maintain an EHCP. The Tribunal has the power to dismiss an appeal, or to order the LA to carry out an EHCNA, make and maintain an EHCP, maintain an EHCP (as opposed to ceasing one), maintain an EHCP with amendments, or (since September 2021, following a three-year national trial) to issue non-binding recommendations to health and social care services concerning, respectively, the health and/or social care elements of EHCPs.

4. **Judicial review** – this can be pursued where other routes have been exhausted, and would consider the way in which LAs and other public bodies have exercised their legal duties.

All four routes of disagreement avoidance and dispute resolution come within the scope of this research. Since much of the publicly available data relate to Tribunal appeals only, our quantitative analysis (Chapter 2) focuses mainly on this route for disagreements and disputes.

Chapter 2: Trends in disputes within the SEND system

As part of this research, we have analysed the available data on disagreements and disputes in the SEND system. As noted above, much of the data relate to Tribunal appeals. While the data on Tribunal appeals reflect only part of the wider trends in disagreements and disputes, they do, in the words of the LGSCO, represent an important 'barometer of how the system is working'. We have highlighted five key trends that we have drawn from available data that, taken together, provide insights into the way disagreements and disputes have changed since the introduction of the SEND reforms.

1. **There has been an increase in both the numbers and the rate of appeals to the Tribunal** – since the reforms, the number of appeals to the Tribunal has more than doubled (rising by 111% between 2013/14 and 2020/21). This is linked to a parallel increase in demand on the statutory SEND system – between January 2014 and January 2021, the number of EHCPs increased by 82%. The more EHCPs (82% rise) there are, the more appealable decisions (80% rise during the same period). At the same time, however, the *rate* of appeal (the number of appeals as a proportion of all appealable decisions) has also risen. From 1.16% immediately after the reforms, the rate of appeal had risen consistently year-on-year reaching 1.79% in 2019, before falling back slightly to 1.74% in 2020. This suggests that the rise in the number of appeals is not being driven solely by the increase in demand in the statutory SEND. Instead, appeals are becoming more likely within the SEND system.

2. **The data tell us little about the young people and families involved in appeals, beyond young people's primary need and age** – there are no data available on the characteristics of the families who raise appeals that would allow consideration of whether this route of dispute resolution is accessed equitably. The data do indicate that the largest proportion of appeals relate to young people with autism as their primary need, and that this proportion has been growing since the SEND reforms. Furthermore, the data show that most appeals relate to school-age pupils, but that the number of appeals for young people aged 16+ has grown since the reforms.

3. **Increasingly, Tribunal appeals concern the contents of EHCPs, rather than decisions to carry out EHCNAs** – before the reforms, roughly equal proportions of appeals related to decisions about carrying out statutory assessments (40.2%) and about the content of plans (42.9%; what were then called 'statements of SEN'). By 2020/21, the proportion of appeals relating to decisions about carrying out assessments had dropped to 26.9% (although it had increased in absolute terms), while the proportion of appeals relating to the content of plans had increased to 62.2%. The proportion of mediation cases that are followed by an appeal to the Tribunal has also increased year-on-year since the introduction of the SEND reforms.

4. **Fewer appeals are being withdrawn, and more are being decided at Tribunal** – before the reforms, in 2013/14, 21% of appeals were decided by a Tribunal hearing and 79% were withdrawn by families or conceded by LAs. By 2020/21, this trend has almost been reversed – 64% of appeals were decided at Tribunal and 36% were withdrawn or conceded. Furthermore, the proportion of appeals withdrawn by families had reduced more significantly (from 33% in 2016/17, when withdrawals and concessions were first reported separately, to 11% in 2020/21) than the proportion conceded by LAs (from 31% to 25% over the same period). Appeals relating to the content of EHCPs were more likely to be decided at a Tribunal hearing (60% for appeals relating to Section I, 91% for appeals relating to Sections B, F and I), compared to appeals relating to LA decisions not to carry out an EHCNA (37%).

5. **An extremely high and rising proportion of decisions in disputes are being made in favour of families and against LAs** – in 2013/14, 83% of Tribunal appeals were decided in favour of those bringing the appeal (with the caveat that this does not mean *all* elements of an appeal were decided in their favour), while in 17% of cases the LA decision was upheld or revised against the appellant. In 2020/21, the proportion of appeals decided at Tribunal in favour of the appellant had risen to 96%, with 4% of decisions made in favour of the LA and against the appellant. Albeit on a smaller scale, similar trends have been reported in terms of the proportion of complaints made to the LGSCO that are upheld against LAs.

Taken together, these trends present a picture of a system in which, despite the aims of the SEND reforms, there is greater demand for statutory support, there are more appeals, and the likelihood of an appealable decision being appealed has increased. Furthermore, those appeals are more likely to relate to the content of EHCPs (including decisions about education placements), and are less likely to be resolved through mediation, conceded or withdrawn before a Tribunal hearing. In a system where more than nine in 10 appeals are decided in favour of families and overturn LA decision-making, one possible interpretation is that there might be widespread – indeed, near-uniform – LA decision-making that is open to legal challenge. The evidence that we have gathered does not suggest that this is the case. The alternative explanation, which our research supports, is that the trends in disagreements and disputes are symptomatic of some fundamental imbalances in the SEND system.

Chapter 3: Key factors in avoiding disagreements and disputes and key challenges causing them

Key factors in avoiding disagreements and resolving disputes at local level

Leaders within local SEND systems and national organisations identified five key factors in helping to avoid disagreements arising and resolving disputes effectively when they did arise.

1. **Effective communication and high-quality casework** – instilling a culture within local services that emphasised the importance of building relationships with families, timely responses and

communication, and high-quality, person-centred planning was identified as fundamental to avoiding disagreements and de-escalating potential disputes.

2. **A strong graduated approach, with a focus on expectations of inclusive practice and SEN support in mainstream settings, schools and colleges** – a further factor identified as important in avoiding disputes was having a clearly articulated and consistent offer of support in mainstream education for all young people with SEND. This ensured that families heard a consistent message about what support was available, and that there were routes to accessing support that did not depend on having an EHCP.

3. **Encouraging SENDIASS to play a pro-active and strategic role in resolving disputes** – leaders of local systems also spoke about the importance and value of empowering SENDIASS to play a pro-active role in identifying and helping to resolving disagreements and potential disputes. This role encompassed providing advice to individual families and helping to broker resolutions to potential disagreements, but also being involved as a strategic partner in and being kept informed about developments across the local SEND system.

4. **Strong and established arrangements for partnership working and joint decision-making between education, health and care services** – key here was having robust arrangements for joint planning and commissioning of multi-agency pathways of support, so that families could access a seamless and joined-up offer. Local SEND leaders and national bodies also highlighted the value of having a strong Designated Clinical / Medical Officer (DCO / DMO) role, and an equivalent in children's services, along with established decision-making protocols for agreeing joint packages of support.

5. **Leaders across education, health and care services with the oversight of disagreements and disputes** – the preceding four points relate to practices that can help to avoid disagreements and disputes from arising. Local SEND systems leaders argued that it was equally important to have robust arrangements, at senior leadership and strategic partnership level, for monitoring real-time trends in complaints, disagreements and disputes, and taking pro-active decisions about how to respond swiftly when disputes did arise.

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Our research found that practice varies across local SEND systems in relation to the five characteristics of effective disagreement avoidance and dispute resolution outlined above. National datasets corroborate the variability in practice around identification and dispute avoidance across local areas. There remains, therefore, work to be done at local level to improve the consistency of practice in relation to co-ordinating services, co-production with families, and communication during and about statutory decision-making processes.

Our research also suggests, however, that, while useful, these five aspects of good practice are not, in themselves, sufficient to avoid the risks of disagreements and disputes arising. Instead, our research suggests that these risks are inherent within the current SEND system, and are driving the trends in disagreements and disputes we have detailed. Our research identified ten key challenges – five relating directly to dispute resolution arrangements, and five relating to the wider SEND system – that are contributing to the trends in disagreements and disputes in the SEND system. In other words, the trends in disagreements and disputes are symptomatic of wider challenges within the SEND system and statutory framework.

Key challenges to avoiding disagreements and resolving disputes: Five challenges relating directly to disagreement avoidance and dispute resolution arrangements

1. **The growth of advocacy, the encouragement to appeal, and the cost to families** – we heard evidence from LAs and organisations working with families that the SEND system had become more adversarial in general, and that there had been a significant growth in advocacy organisations offering to support families with appeals and in families engaging legal representation. We also heard from national bodies that LAs were more likely to draw on legal representation when contesting appeals. It is, of course, families' right to seek legal representation if they wish. The issues highlighted to us were, first, the increased use of legal representation by all parties in a system that sought to avoid the need for judicial resolution of disputes and retention of legal counsel; second, the growth of unregulated organisations offering advice about appeals and how to "win" in return for a fee; and third, families getting caught up in escalating disputes that lead to them incurring significant costs.

2. **Equity of access to dispute resolution and to services** – most of the LAs that we engaged described that Tribunal appeals were more likely to come from more affluent families and less likely to come from families from more deprived backgrounds. It is, however, difficult to corroborate these reported trends with national data, since no data is collected or published on the characteristics of families making appeals to the Tribunal. The strength of feedback from local areas does suggest, however, that there is a question to be answered about the equity of access to dispute resolution in the SEND system. Furthermore, health and social care leaders argued that one unintended consequence of the extended powers of the Tribunal to issue judgements about health and care provision was that it created a tension between making provision that was *medically*-urgent and *legally*-urgent. They explained that this potentially gave young people with EHCPs a faster route of access to health and social care provision than other young people who had less complex SEN (and did not require an EHCP) but more complex health or care needs.

3. **The decreasing use of mediation** – LA and national bodies argued that the increased proportion of mediation cases going to Tribunal appeal reflected the trend of increasing proportions of appeals relating to the contents of EHCPs, specifically Section I. They argued that it was more difficult to resolve such disputes through mediation. They noted, however, that challenges resolving disputes through mediation can be a product of a lack of prior dialogue between professionals and families during the EHCNA process.

4. **The lack of clarity about what constitutes an 'efficient use of resources'** – the efficient use of resources is one of the legal tests applied when making decisions about naming an education institution in Section I of an EHCP. Our research suggests that there is a lack of clarity about what would constitute an efficient or an inefficient use of resources, and about how such calculations should be made and what should be included. Furthermore, our research also suggests that there is little join-up in policy terms between, on the one hand, the expectations on LAs to ensure public value and manage within the high needs block allocations for their local areas, and, on the other hand, consideration of the efficient use of resources to provide appropriate education / best possible outcomes in disputes and Tribunal appeals.

5. **The role of professional expertise** – LA and health service leaders argued that, in Tribunal cases, there were often two sets of professionals from the same discipline(s) putting forward different ways of meeting the needs of individual young people. They argued that there was a lack of nationally agreed guidelines about what constitutes effective practice, based on the

most up-to-date evidence in meeting the needs of children and young people with SEND, across education, health and care, and how this should inform consideration of decisions in instances of disputes.

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Throughout the research, some national bodies argued that main reason for disagreements and disputes in the SEND system, and the reason behind the increase in appeals to the Tribunal, is that LAs are not abiding by the law when making statutory decisions about carrying out EHCNAs. Our research suggests, however, that that this is not the main factor that accounts for the rise in the number and rate of appeals, nor the high and rising proportion of decisions that find in favour of the appellant. First, it is not the case that the majority of appeals relate to decisions to assess. Instead, the Tribunal data suggest that an increasing proportion of appeals relate to the contents of EHCPs, rather than decisions to carry out EHCNAs. Second, our analysis of the available data did not show a sufficiently strong correlation between Tribunal appeal rates and either the rate of refusal to carry out an EHCNA or the rate of refusal to issue an EHCP to support the conclusion that LA decision-making at these points is the main factor accounting for the trends in Tribunal appeals.

As we have described above, in a system where 96% of appeals are decided in favour of the appellant, in theory, one hypothetical explanation would be that poor quality decision-making that is open to legal challenge is widespread across LAs. For the reasons given above, our research suggests that the trends in disagreements and disputes cannot be explained by LA decision-making practice. Instead, our research suggests an alternative explanation, which is that the trends in disagreements and disputes are symptomatic of wider systemic issues within the SEND system. We highlight five specific challenges within the SEND system that our research suggests are driving disagreements and disputes.

Key challenges to avoiding disagreements and resolving disputes: Five further challenges emanating from the wider SEND system, of which disagreements and disputes are the symptoms

1. **Key parts of the SEN statutory framework, particularly in relation to when to carry out an EHCNA, are vague and circular** – LAs are required to undertake an EHCNA if a child or young person has or may have SEN to the extent where special educational provision 'in accordance with an EHCP' needs to be made. There is, however, no national definition of the level of special educational provision that would require an EHCP to be made, nor what should be provided from within resources normally available in a mainstream education setting. Furthermore, local attempts to develop a set of consistent guidelines for decision-making locally are not recognised and do not have force in law if those decisions are challenged through an appeal to the Tribunal.

2. **Expectations of inclusion and SEN support in mainstream education are not sufficiently defined nor upheld** – all LA leaders and national bodies agreed that there was a lack of clarity about what mainstream education institutions should be expected to deliver in terms of inclusive practice and SEN support from within resources normally available to them. LA leaders and national bodies also argued that there was a lack of accountability at institution level for the delivery of SEN support for pupils without EHCPs and for delivery of the content of EHCPs. The lack of consistent expectations and weaknesses in oversight and accountability drive variability in SEN support across settings and local areas, which can, in turn, undermine families' confidence and provide the potential for disputes.

3. **Growing demand for statutory SEND services reduces preventative SEN support** – local SEND system leaders and national bodies described a vicious circle in which growing demand for

statutory provision and reductions in funding had resulted in a diminution of preventative services, creating more demand for statutory services and frustration at the lack of early support, which was a potential starting-point for disagreements and disputes.

4. **Growing demand on statutory SEND services reduces capacity for high-quality casework and co-productive, person-centred planning** – similarly, LA leaders argued that rising demand had strained the capacity of statutory services, and reduced the capacity needed for high-quality casework, communication and co-production with families. Local SEND system leaders described how this had fuelled both frustration for families and turnover within statutory SEND casework teams, which then perpetuated the vicious circle. The issue here is whether it is sustainable for the SEND system as a whole – not just LA SEND casework teams, but SENDIASS and health, care, and dispute resolution services and the Tribunal itself – to see the year-on-year increases in volume in the statutory SEND system witnessed since the reforms.

5. **The SEND system remains too dependent on education, and has not yet delivered a unified education, health and care approach** – while local SEND system leaders and national bodies recognised progress in strengthening joint working between education, health and care services, they did not consider that the extension of the Tribunal's remit had addressed one of the fundamental barriers within the SEND system, namely the dependence on LA education (SEND) services and the risk of the lack of full buy-in from health and care services.

Chapter 4: What is needed to avoid disagreements and strengthen the way disputes are dealt with

While much of what we have described in this report focuses on the trends in disagreements and disputes, and broader patterns, within the SEND system since the introduction of the SEND reforms in 2014, very little of what we have heard is new. In fact, the terms of the debate about disagreement avoidance and dispute resolution we heard are nearly identical to those recorded thirty years ago, in the period following the establishment of the Tribunal. For that reason, as well as the trends described in Chapter 2, it is difficult to make the case that the SEND reforms have achieved the stated aims of resolving disagreements earlier and reducing the need for judicial resolution.

Our research has found that the causes of these trends are not reducible to poor practice by LAs and partner agencies, nor soluble through small-scale refinements of practice in disagreement avoidance and dispute resolution arrangements. Instead, the factors that are driving the trends we have described in this report are symptomatic of challenges within the wider SEND system. This point has significant implications for any further reforms of the SEND system. While there are changes that could be made to dispute resolution arrangements that would have some value – improving the availability of data on the use of Tribunal appeals, encouraging early dialogue to narrow the scope of disagreements and disputes – on their own these will not be sufficient to address the underlying causes of disagreements and disputes within the SEND system.

According to the LA leaders, partners and national bodies that took part in this research, addressing the underlying tensions in the SEND system and reversing the trends in disagreements and disputes will require three fundamental changes.

1. **Rebalance the SEND statutory framework to remove the tension between meeting the needs of an individual young person and ensuring there is provision that supports all children and young people** – we have a SEND system where resources are finite, LAs are held responsible for meeting the needs of local populations from within those finite resources, yet

there is little that can be done to avoid demand increasing. Rebalancing the SEND system is no small task, but participants in our research argued that this must start with recognition and resolution of this tension. On its own, increasing resources for local areas will not achieve this. Instead, what is needed is to revisit the statutory framework, the Code and regulations so that they provide greater clarity, either at national level or authority to determine this at local level, about the level of need that would require an EHCNA and EHCP, what constitutes an efficient use of resources, and how to balance the needs of the individual young person with the need to provide for all in a local area. There may be scope within the existing regulatory framework to provide *some* clarity about levels of provision that should be provided from within normally available resources, and thus the level of support requiring an EHCP, and how the efficient use of resources should be considered. Participants in this research argued, however, that addressing the issue fully would require a review of key provisions within the statutory framework – when it comes to disputes, it is the law, rather than the Code or policy guidance, that is the reference point. In a system with increasing numbers and proportions of disputes requiring judicial resolution, the statutory framework needs to provide clarity on these points.

2. **Strengthen expectations of, and accountability for, SEN support in mainstream education** – the current statutory framework relies on there being a definition of ordinarily available provision, but leaves it up to individual settings, schools and colleges to determine for themselves, with limited oversight, routes of complaint, or formal accountability for delivering. LAs are required to set expectations locally, but there is no formal mandate for this. LAs rely on the willingness of settings, schools and colleges to buy into such approaches, and, in instances of dispute, such local approaches have no formal status in law. Action is needed to clarify those expectations nationally (potentially through revisions or additions to the Code or regulations), or to formalise the expectation that those expectations are set locally and to strengthen their status, so that their role in helping to resolve disputes is clear. This is likely to require changes to the statutory framework. Our research suggests that there would be value in having a set of best practice guidelines for the SEND system, updated regularly, but that had some level of recognition and formal status in instances of disputes, which provided clarity about the levels of need at which provision requiring an EHCP should be provided. Our research also suggests that there needs to be proper oversight and accountability at setting and school level for its delivery. There are changes that could be made to the existing accountability system – performance measures and inspection – that would provide greater focus on inclusion and SEN support. In the long-term, consideration is needed about how definitions of ordinarily available provision could be developed at national and/or at local level. Addressing the gap in the local of oversight of SEN support in mainstream education is likely to require changes to the statutory framework.

3. **Continue to strengthen joint working between education, health and care services** – participants in this research argued that while there has been progress made since the SEND reforms, the fact that there must be an education element to an appeal for disputes relating to health or care elements of an EHCP to be appealed is indicative of a system that remains too heavily dependent on LA SEND services. The local area SEND inspection framework, as well as the extended powers of the Tribunal, have helped to encourage greater joint working, but on their own these are not sufficient to foster and maintain effective joint working between education, health and care partners without providing greater clarity about the expectations on and responsibilities of education, health and care partners.

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Introduction

Background to the research

In *Support and aspiration*, the 2011 green paper that proposed reforms of the SEND system, the government at the time stated, 'It can be better for parents and a better use of public funds if disputes about assessments and statements are resolved earlier and through non-judicial means.' In addition, the green paper emphasised the importance of striking a balance between meeting the needs of individual children and young people, and ensuring resources are used to provide support to meet the needs of all. It stated, 'Given the potential impact on the local authority budget, we would like to ensure that the Tribunal continues to give both priority to ensuring that children's SEN are met and full weight to the efficient use of resources when considering the best way to meet their needs.' At their inception, the SEND reforms aimed to foster earlier, non-judicial resolution to disputes, and for disputes that did arise to balance meeting the needs of individual young people with ensuring public resources are used efficiently and equitably to support all young people.

Considering the SEND system, and the profile of disputes, from the vantage point of late 2021 and early 2022, it is hard to find evidence that those aspirations have been achieved. Since 2013/14, the year before the reforms were introduced, the number of appeals to the First-tier Tribunal (Special Educational Needs and Disability) have more than doubled.[1] There were 8,579 appeals registered in 2020/21, compared to 4,063 appeals registered in 2013/14 – a rise of 111%. In fact, the rise has been even steeper given the fact that appeals actually dropped to 3,147 in 2014/15, the year after the Children and Families Act 2014 took effect. This means that, since the new SEND legislative framework was implemented, appeals to the Tribunal have increased by 173%.[2]

Furthermore, in an increasing majority of cases that were decided by the Tribunal (i.e., excluding those withdrawn or conceded before a hearing), the decisions of the Tribunal were decided in favour of the appellant (the parents / carers or young people bringing appeals) and against the local authority (LA). Before the SEND reforms were introduced, in 2013/14, 83% of appeals were decided in favour of the appellant, while 17% of appeals the LA's decision was upheld. By 2020/21, 96% of appeals were decided in favour of the appellant, and in only 4% was the LA's original decision was upheld.[3]

We recognise that Tribunal appeals are not the only form of disagreement, complaint or dispute within the SEND system – there are other routes through which complaints are registered and disagreements managed. Tribunal appeals – and mediations – are, however, one area where there are publicly available national and local-level datasets. Furthermore, while Tribunal appeals do not reflect the whole story about disputes and disagreements in the SEND system, they offer, in the words of the LGSCO, a good 'barometer' of the nature and areas of disagreement within the system. The trends of rising numbers of disputes, and their outcomes, raise questions about whether the SEND system is delivering on the original ambition of the green paper of earlier, dialogue-based, non-judicial dispute

[1] For brevity, throughout this report, the First-tier Tribunal (Special Educational Needs and Disability) will be referred to as the Tribunal or the SEND Tribunal.

[2] *Tribunal Statistics Quarterly: July to September 2021, SEND Tribunal tables 2020 to 2021*, https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021.

[3] We note that there are often multiple parts to an appeal, some of which may be decided in favour of the appellant and some of which may be decided in favour of the LA's original decision. The MoJ dataset makes clear that, in reporting the figures on the proportion of appeals decided in favour of the appellant, this does not necessarily mean that all aspects of an appeal were decided favour of the appellant.

resolution in a way that balances the needs of individual young people and equity of access to support for all.

Aims of the research

For this reason, we were commissioned by the LGA to undertake a research project to explore how approaches to avoiding disagreements and resolving disputes within the SEND system are working, the factors giving rise to the trends we have highlighted, and what is needed to strengthen the system to avoid disputes arising and resolve those that do in a timely and effective way. The research was commissioned in the context of the Government's SEND Review, which, at the time of writing (February 2022) remains ongoing. The LGA is represented on the SEND Review Steering Group.[4] The research has sought to answer three key questions.

1. What accounts for the rising numbers and patterns of disputes in the SEND system?
2. Where is the system working well and what are the challenges, both within policy and practice relating specifically to dispute resolution, and within the wider system, that are giving rise to disagreements and disputes?
3. What would be needed – and should be considered as part of the SEND Review – to strengthen approaches to avoiding and resolving disagreements and disputes, in terms of policy and practice relating specifically to dispute resolution and to the wider SEND system?

This research builds on previous studies, including –

- research into the role of the Tribunal, by the National Foundation for Educational Research in 1998;[5]
- research into disagreement resolution arrangements in the SEND system, by the Centre for Educational Development, Appraisal and Research (CEDAR) at the University of Warwick and London Economics in 2017;[6] and
- the evaluation of the extended powers of the SEND Tribunal in 2021.[7]

Scope of the research

The research has focused on arrangements for avoiding and resolving disagreements and disputes relating to support for children and young people, aged from birth to 25, with SEND in England. When we refer to 'disagreements and disputes', we include within this –

[4] The members of the SEND Review Steering Group can be found here: https://www.gov.uk/government/groups/send-review-steering-group.

[5] Evans, J., 1998, *Getting it right: LEAs and the Special Educational Needs Tribunal*, NFER, https://www.nfer.ac.uk/media/1330/90003.pdf.

[6] Cullen, M. A. et al, March 2017, *Review of arrangements for disagreement resolution (SEND)*, CEDAR at the University of Warwick, and London Economics, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/603487/CEDAR_review.pdf.

[7] IFF Research and Belmana, July 2021, *Evaluation of the national trial extension of Special Educational Needs and Disability (SEND) Tribunal powers*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004123/SEND_tribunal_national_trial_independent_evaluation_July_2021.pdf.

- informal discussions to resolve disagreements through person-centred planning, casework and advice from, for example, local SEND services and SENDIASS;
- disagreement resolution services;
- complaints;
- mediations; and
- appeals to the SEND Tribunal.

It has been beyond the scope of this research to consider disability discrimination claims brought against early years settings, schools or colleges.

Our approach to the research

We have approached this work in three phases.

1. **Evidence gathering** (November 2021) – in the first phase of the project, we held in-depth discussions with leaders of SEND, health and care services, and SENDIASS, in six local areas. We selected a sample of local areas within which there was a range in rates of Tribunal appeals and in the proportion of children and young people with EHCPs. We also chose local areas that reflected a range of levels of deprivation, ethnic diversity, and geography. Five of the six local areas had had their local area SEND inspection, while the sixth had their inspection partway through the research. We selected local areas that had not been asked to produce a written statement of action following a local area SEND inspection.[8] Across the local areas, we held discussions with Heads of Service for SEND, DCOs / DMOs, SEND leads in children's social care, and the Heads of SENDIASS. We also held discussions with NNPCF, IPSEA, DfE, MoJ, members of the judiciary who preside over Tribunal appeals, and LGSCO.

2. **Testing our evidence base and exploring potential solutions** (December 2021) – in the second phase of the research, we brought together leaders from the six local areas, and in parallel met with NNPCF colleagues, to hold workshops to test and refine our findings, add to our evidence base, and explore potential solutions to address the challenges giving rise to disputes within the SEND system. We triangulated our findings from the first stage of the work with in-depth analysis of available data.

3. **Reporting** (January-February 2022) – lastly, we drew together the evidence gathered during the previous two phases in this report.

Our thanks to those who have taken part in this research

We are grateful to all of the colleagues who have taken part in this research, and contributed their insights and ideas. The challenges facing the SEND system are increasingly recognised and reported on, and much is expected of the Government's SEND Review. We hope that this research helps to identify the challenges within dispute resolution arrangements and in the wider SEND system that are giving rise to disputes. Furthermore, we hope that this research contributes to efforts to reorientate the SEND system towards the original ambition of the green paper of fewer disputes, resolved locally and without recourse to judicial means, that balance the needs of some with equity for all.

* * *

[8] The six local areas were Bolton, Derbyshire, Hampshire, Islington, Leeds and Wiltshire.

Chapter 1: The current system for dealing with disagreements and resolving disputes

Routes for dealing with disagreements and disputes

In *Support and aspiration*, the green paper that set the agenda for the SEND reforms, the government at the time set out an ambition to reduce the incidence of disputes through person-centred approaches to planning and boosting early, dialogue-based, local approaches to resolving disputes, such as independent mediation. The green paper stated,

> It can be better for parents and a better use of public funds if disputes about assessments and statements are resolved earlier and through non-judicial means. The Tribunal is already taking steps to encourage the resolution of cases well before the appeal hearing where appropriate. We want to boost the role of mediation facilitated by an independent party in the appeal process.[9]

The SEND reforms overhauled the legislative framework governing support for children and young people with SEND. While the reforms aimed to reduce the incidence of disagreements and disputes, they made provisions for how disagreements and disputes should be handled. There are currently four broad routes through which different types of disagreements and disputes are handled.

First, there remains an important role for informal discussions, casework and key-working between professionals in education, health and care services, including settings, schools and colleges, and families to avoid potential disagreements. If disagreements do arise and get to a point where families and professionals cannot resolve them on their own, LAs are required to commission a local SENDIASS to provide impartial, confidential and accessible information, advice and support (Children and Families Act 2014, s.32). The SEND Code of Practice suggests that information and advice should include local policy and practice, the local offer, the SEND legislative framework, and information for registering complaints and resolving disputes.

Second, LAs (and other education settings and health bodies) must have formal procedures for registering and processing complaints. In this context, complaints will often relate to how the LA, or another institution, discharges its statutory duties in relation to SEND. In addition to having formal complaints procedures, LAs are required to commission an independent dispute resolution service to deal with four broad types of disagreements (Children and Families Act 2014, s.57) –

i. between parents / young people and the LA, schools, settings or colleges regarding how the latter carry out their SEND duties;
ii. between parents / young people and settings, schools or colleges about SEN provision;
iii. between parents / young people and LA or CCGs about health or social care provision during EHCNAs or re-assessments or when EHCPs are being drawn up or reviewed; and
iv. between LAs and health commissioning bodies during EHCNAs or the drawing up of EHCPs, relating to the description of the young person's needs or provision required (note, these disagreements do not involve parents and young people).

[9] DfE, March 2011, *Support and aspiration: A new approach to special educational needs and disability*, DfE, Cm 8027, available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/198141/Support_and_Aspiration_Green-Paper-SEN.pdf.

Where the LA's complaints procedure does not resolve an issue satisfactorily, the complaint can be escalated to the LGSCO. Similarly, if the National Health Service (NHS) complaints process has not resolved a complaint, it can be taken to the Parliamentary and Health Services Ombudsman (PHSO). The role of the Ombudsmen is to consider the process by which decisions have been made, and whether there has been maladministration, rather than judging the merits of the decision itself. In this context, 'maladministration' can include delays, failure to act, or failure to follow appropriate procedures. The LGSCO does not consider disputes that could be appealed to the Tribunal.

Third, parents / carers of children aged from birth to the end of compulsory school-age, and young people up to the age of 25, have the right to appeal to the Tribunal in relation to six specific LA decisions (Children and Families Act 2014, s.51) –

i. a decision not to carry out an EHCNA;
ii. a decision that, following an EHCNA, it is not necessary to make an EHCP (for special educational provision to be made in accordance with an EHCP);
iii. the content of an EHCP, including specifically the description of SEN (Section B), special educational provision (Section F), or the name or type of school or institution specified in the plan, including if no school or institution is specified (Section I);
iv. a decision not to carry out a re-assessment of needs if requested to do so;
v. a decision not to amend to replace an EHCP following an annual review or re-assessment; and
vi. a decision to cease to maintain an EHCP.

The Tribunal has the power to –

- dismiss an appeal;
- order the LA to carry out an EHCNA or re-assessment;
- order the LA to make and maintain an EHCP;
- order the LA to maintain an EHCP with amendments;
- order the LA to maintain an EHCP; or
- (from September 2021) to issue non-binding recommendations to health and social care services concerning the health and social care elements of EHCPs.

Parents / carers and young people can only make their appeal to the Tribunal after they have contacted an independent mediation adviser and discussed whether mediation might be a suitable way of resolving the disagreement (Children and Families Act 2014, s.55). Parents / carers and young people can then decide if they wish to enter mediation or not. The requirement to contact a mediation adviser before making an appeal to the Tribunal does not apply where the appeal relates only to the naming of a specific or type of setting, school or college in Section I of the EHCP.

In the summer of 2021, a new approach called 'judicial alternative dispute resolution' (JADR) was developed and piloted by the judiciary. JADR aims to broker agreement between the parties involved in an appeal in order to settle an appeal before it goes to full hearing, or at least to narrow the scope of disagreement in advance of the hearing. JADR focuses on appeals relating to Section I of EHCPs. It is led by a Tribunal judge who considers the case and discusses the statutory framework, strengths and challenges of the case with each party, potentially bringing the two parties together for dialogue. When we spoke to representatives of the judiciary, they estimated that between two thirds and three quarters of appeals considered through JADR had been settled without the need for a hearing. They recognised that, in some appeals there was a fundamental difference of opinion about the placement to be named in Section I, but were encouraged that the JADR process had enabled judges to identify

potential flexibility and common ground that had allowed some appeals to be settled without going to full hearing.

Health and social care services have their own complaints procedures. As noted above, from September 2021 (following a three-year national trial), the Tribunal has had power to issue non-binding recommendations to health and social care services concerning, respectively, the health and/or social care elements of EHCPs. So-called "extended appeals" can be raised about health or social care aspects of all appealable decisions, apart from the decision about whether to carry out an EHCNA. It is important to note that appeals cannot be registered with the Tribunal about health or social care aspects of an EHCNA or EHCP alone – there must be an education element to the appeal, of which the health and/or social care element is the "extended" part of the appeal. In relation to extended appeals, the Tribunal's recommendations can include specifying or amending health or social care needs or provision in the EHCP.

Fourth, where all other routes have been exhausted, a case for judicial review can brought to the Administrative Court. This would consider the way in which LAs and other public bodies have exercised their duties in relation to SEND. Like the Ombudsmen, the Administrative Court considers the way in which decisions have been reached, rather than the content of those decisions.

* * *

The SEND statutory framework and decisions that can be appealed

In this section, we summarise some of the key aspects of the SEND statutory framework, specifically those that can be the basis for disagreements, disputes and Tribunal appeals. Our focus is on what is set out in the legislation, since this forms the basis of appeals to and decisions of the Tribunal, while highlighting specific and significant points where the vision for the SEND system as set out in the Code of Practice and the legislation are not precisely aligned. As we explain in Chapter 3, the feedback we have gathered through this research has highlighted specific challenges in the way the legislation and the Code of Practice are framed that may be contributing to rising numbers and the changing pattern of disagreements and disputes.

The definition of SEN

Under the statutory framework, set out in the Children and Families Act 2014, a child or young person has SEN if they have 'a learning difficulty or disability which calls for special educational provision to be made'. The law defines that child or young person has 'learning difficulty or disability' where that child or young person –

a. has a significantly greater difficulty in learning than the majority of others of the same age, or
b. has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions. (Children and Families Act 2014, s.55).

This definition is largely the same as the definition set out in the Education Act 1981, based on the 1978 Warnock Report. What is crucial here is that the legislation defines SEN in relative terms, in relation to how the majority of a young person's peers learn or in relation to being able to access the facilities that would ordinarily be expected to be provided in mainstream schools or other mainstream educating institutions. The Code of Practice (5.36-5.51, 6.44-6.78, 7.13-7.27) talks about the importance of early years settings, schools and colleges putting in place a graduated response – a four-part cycle of assessing needs, planning support – putting this in place, and reviewing its impact.

Nevertheless, despite this being at the foundation of the definition of SEN, the legislation, regulations and the Code do not provide clarity about what should 'ordinarily be expected to be provided in mainstream schools or other mainstream educating institutions'. Furthermore, neither do the legislation, regulations or the Code determine what might constitute 'significantly greater difficulty'. Data on the identification of SEND show significant variation in the proportion of school-age pupils identified by schools as requiring SEN support.[10] The proportion is lowest in London and the South-East, including local areas such as Havering (7.7%), Redbridge (8.6%), and Southend-on-Sea (8.8%). The pattern is not uniform, however, since local areas such as Nottinghamshire (9.6%) and Cheshire East (8.7%) also report significantly lower proportions than the national average (12.2%). The proportion is highest in the North-East, West Midlands and South-West. Again, there is significant variation within regions. South Tyneside, Blackpool and Liverpool all report more than 16% of pupils identified as requiring SEN support, but high rates of identification are also reported in Southampton (15.6%) and Islington (15%).

The decision to carry out an EHC needs assessment

LAs are responsible for determining whether to carry out an EHCNA. The legislation states that 'the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.' (Children and Families Act, s.36.3) The legislation sets out two tests that, if met, place the LA under a duty to carry out an EHCNA.

> The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7) [views or evidence provided by the parent or young person], the authority is of the opinion that –
>
> (a) the child or young person has or may have special educational needs, and
>
> (b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan. (Children and Families Act, s.36.8)

It is important to note that, while the second test relies on a conception of special educational provision being made 'in accordance with an EHC plan', the legislation does not provide any further clarity about what level or form of special educational provision can be made without an EHCP and what would necessitate an EHCP to be made. The Code offers more detail, implying that EHCNAs should be sought only after settings, schools and colleges have attempted to identify a child's or young person's needs, and, despite having put in place SEN support to meet those needs, the child or young person has not made expected progress.

> SEN support should be adapted or replaced depending on how effective it has been in achieving the agreed outcomes. Where, despite the school having taken relevant and purposeful action to identify, assess and meet the SEN of the child or young person, the child or young person has not made expected progress, the school or parents should consider requesting an Education, Health and Care needs assessment (see Chapter 9). To inform its decision the local authority will expect to see evidence of the action taken by the school as part of SEN support. (Code of Practice, 6.63)

The legislation makes clear that it is the role of the LA to determine whether an EHCNA is necessary, in accordance with the two legal tests. The Code goes further than the two tests stipulated in law, and

[10] See *Special educational needs in England: January 2021*, DfE: https://www.gov.uk/government/statistics/special-educational-needs-in-england-january-2021.

suggests that, to inform their decisions, LAs will need to consider a wide range of evidence. This, the Code suggests, should include the child's or young person's wider needs, attainment and progress, and action being taken by their educating institution, including 'evidence that where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided' (Code of Practice, 9.14). With the proviso that LAs do not set blanket policies, the Code goes on to say that,

> Local authorities may develop criteria as guidelines to help them decide when it is necessary to carry out an EHC needs assessment (and following assessment, to decide whether it is necessary to issue an EHC plan). (Code of Practice, 9.16)

As many colleagues who have taken part in this research have pointed out, the Code is not the law. Therefore, points where the Code expands on the legislation and describes in broader terms how the SEND system should operate are not necessarily considered as part of the resolution of disputes where they reach the point that a legal decision is required. The key points we highlight here are that –

a. the legislation makes clear that LAs have the responsibility for deciding on requests for EHCNAs;
b. this depends on determining the level of special educational provision that would require an EHCP (and, implicitly, the level that should be provided without an EHCP); and
c. while the Code implies that LAs can set criteria for guiding these decisions, including with reference to the level of SEN support and special educational provision that would usually be provided in a mainstream educating institution, that level of provision is not specified nationally, but neither does an LA's attempts to secure local agreement to what should be usually provided have any formal status in law.

The decision to make an EHCP

While the legislation sets out that an EHCNA is required if it may be necessary for special educational provision to be made in accordance with an EHCP, it does not provide further specificity about what level of provision would require an EHCP. Section 37 of the Children and Families Act simply states that LAs must prepare and maintain an EHCP if, 'in light of the EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan.'

Section 30 of the Children and Families Act 2014 places a duty on LAs to publish a 'SEN and disability local offer', setting out provision available in the local area for children and young people with SEND. The Code (4.30-4.32) expands upon this, detailing what must be included in the local offer. The Code does not specify how this should be developed, the level of detail to be included, the requirements on education institutions to abide by this, nor the monitoring arrangements and accountability for the delivery of the expectations set out in the local offer.

Naming an education institution in an EHCP

One of the central aims of reforming the SEND system, as set out in the *Support and aspiration* green paper, was to 'make the system less stressful for families' and 'to give parents more control'. This included allowing parents to 'express a preference for any state-funded school – including special schools, Academies and Free Schools – and have their preference met unless it would not meet the needs of the child, be incompatible with the efficient education of other children, or be an inefficient use of resources.' This formulation is reflected in the Children and Families Act (s.39.3-4), which states:

> The local authority must secure that the EHC plan names the school or other institution specified in the request, unless …
>
> (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
>
> (b) the attendance of the child or young person at the requested school or other institution would be incompatible with – (i) the provision of efficient education for others, or (ii) the efficient use of resources.

The green paper anticipated that this could be an area for dispute, and made clear that, in its role arbitrating disputes, the Tribunal should seek to strike a balance in the use of public funds between meeting the needs of an individual child while ensuring resources were used efficiently.

> Given the potential impact on the local authority budget, we would like to ensure that the Tribunal continues to give both priority to ensuring that children's SEN are met and full weight to the efficient use of resources when considering the best way to meet their needs.

The legislation (Children and Families Act, s.42) makes the LA responsible for securing the special educational provision specified in the EHCP. In other words, while an education institution is under a legal duty to admit the child or young person if named in the EHCP (Children and Families Act, s.43), it is the LA who has the legal responsibility for ensuring that the special educational provision set out in the EHCP is delivered. This can lead to some confusion if a parent / carer wants to make a complaint that the provision set out in the EHCP is not being delivered by a school or educating institution. Ofsted, for example, can consider complaints about early years providers and schools, 'but only where the complaint is about the early years provision or the school as a whole rather than in relation to individual children, and where the parent or other complainant has tried to resolve the complaint through the early years provider's or school's own complaints procedure.' (Code of Practice, 11.76)

Another route of complaint if a parent / carer considered that their child's EHCP was not being delivered by a school could be to the LGSCO. In these instances, the Code (11.90) states,

> The [LGSCO] can investigate complaints that the special educational provision set out in EHC plans is not being delivered and, in doing so, can investigate what part the school may have played in the provision not being delivered. (The [LGSCO] cannot, otherwise, investigate complaints about schools' SEN provision and has no powers to make recommendations to a school.)

This can mean that there are "blind-spots" in how disagreements and disputes about the delivery of SEN provision in settings and schools. There is no means of accountability for practice around identification and delivery of special educational provision for children and young people with SEN but without EHCPs. For those with EHCPs, there is no means of direct accountability for settings and schools. LAs are accountable for their decision-making through the LGSCO, and through Tribunal appeals for the delivery of the content of EHCPs, but often have limited or no direct means of influencing practice in settings and schools, especially in academies. This issue was identified in the Education Select Committee's report in 2019, which stated,

> It is now up to the Government to act. The Department should, at the earliest opportunity, bring forward legislative proposals to allow the Ombudsman to consider what takes place

> within a school, rather than – in his words – only being able to look at "everything up to the school gate".[11]

The need for more effective oversight of SEN support provision in schools and to ensure appropriate accountability for delivery of EHCPs in schools has also been reiterated in the most recent triennial report from the LGSCO.[12]

Reviews and re-assessments

Under section 44 of the Children and Families Act, LAs must review EHCPs annually – within 12 months of when the EHCP was made, and in each subsequent 12-month period following the previous review. While the Code (9.193) states that 'EHC plans are not expected to be amended on a very frequent basis', LAs must secure re-assessment of EHC needs if the request is made by parent / carer, young person, or the setting / school / college / institution the child attends, or at other times if the LA thinks re-assessment is necessary. In carrying out annual reviews, LAs should consider whether the education or training outcomes specified in an EHCP have been achieved. The decision whether to amend an EHCP following an annual review is one that, if disputed, can be appealed to the Tribunal.

Decisions to cease EHCPs

Section 45 of the Children and Families Act states that LAs can cease to maintain an EHCP if the LA is no longer responsible for the child or young person (for example, if they move to live in another LA area) or 'where the child or young person no longer requires the special education provision specified in the plan', specifically with regard to 'whether the educational or training outcomes specified in the plan have been achieved.' The Code of Practice takes this a step further, stating that, in instances of disputes about decisions to cease EHCPs, the Tribunal should consider whether the outcomes specified in the EHCP are 'sufficiently ambitious', but does not provide further guidance on what would constitute 'sufficiently ambitious'.

> In making decisions about whether the special educational provision specified in the EHC plan is appropriate, the Tribunal should take into account the education and training outcomes specified in Section E of the EHC plan and whether the special educational provision will enable the child or young person to make progress towards their education and training outcomes. The Tribunal can consider whether the education and training outcomes specified are sufficiently ambitious for the child or young person. When the Tribunal orders the local authority to reconsider the special educational provision in an EHC plan, the local authority should also review whether the outcomes remain appropriate. (Code of Practice, 11.49)

* * *

[11] UK Parliament, House of Commons Education Committee, *Special educational needs and disability: First Report of Session 2019* (October 2019), https://publications.parliament.uk/pa/cm201919/cmselect/cmeduc/20/20.pdf.

[12] LGSCO, December 2021, *Review, Refresh, Renew: Triennial Review of Local Government and Social Care Complaints and Public Accountability Arrangements*, https://www.lgo.org.uk/assets/attach/6192/Triennial-Review-2021-2024-FINAL.pdf.

Chapter 2: Trends in disputes within the SEND system

In this chapter, we have analysed the available data on disagreements and disputes in the SEND system. Triangulating the data with the qualitative feedback we gathered from local areas and national bodies, we have identified five key trends in disagreements and disputes in the SEND system. There are two important caveats to state at the outset.

First, the majority of the data that are available publicly relate to appeals to the Tribunal.[13] Of the four routes for dealing with disagreements and disputes set out in Chapter 1, the available data offer an insight into the third of those routes – appealable decisions relating to EHCNAs and EHCPs, and how these are dealt with through mediation or through the Tribunal. There are no publicly available national datasets that would allow us to build up a picture of disputes that are dealt with through local casework, disagreement resolution or complaints. The LGSCO provides summaries of complaints it has been brought and its decisions, and publishes thematic reports on SEND, which provide headline figures about the number of complaints relating to SEND and the proportion of complaints that are upheld.[14] That said, we would argue that the data on complaints, mediations and Tribunal appeals are an important source of evidence about the broader trends in disagreements and disputes within the SEND system. While they may represent the tip of the iceberg when it comes to disagreements and disputes, data on complaints, mediations and Tribunal appeals provide, in the words of the LGSCO, an important 'barometer of how the system is working'.[15]

Second, there are some significant gaps in the data on Tribunal appeals that leave important questions about dispute resolution within the SEND system unanswered. Specifically, the Tribunal data do not contain information about the profile of parents and young people making appeals to the Tribunal, and whether access to this route of redress is equitable. For example, there are no data on whether parents and young people are seeking legal representation or other forms of advocacy support when making appeals. This is important information, since there can be significant costs involved for families. Similarly, there is no information available about whether appeals are more likely to come from more affluent families and less likely from more deprived families or those in which the adults have additional needs. Prior to this year, the Tribunal dataset included details of the ethnicity of those making appeals, but no data on ethnicity have been collected for the three preceding years and, from 2020/21, this information no longer forms part of the dataset.

Trend 1: There has been an increase in both the numbers of appeals and the rate of appeals

As shown below in figure 1, the total number of appeals to the Tribunal has risen consistently year on year since the SEND reforms were introduced, following a drop of 22.5% in the first year after the reforms (2014/15). Taking 2013/14, the year before the SEND reforms, as the point of comparison, the total number of appeals has more than doubled since – from 4,063 in 2013/14 to 8,579 in 2020/21,

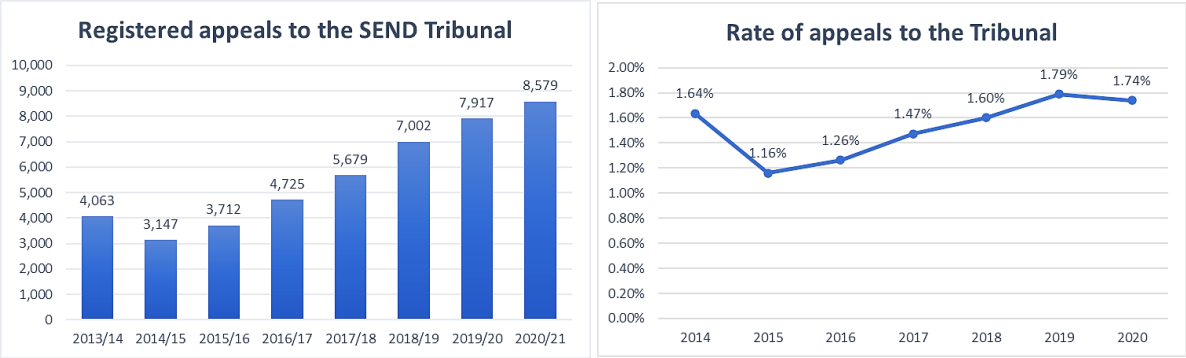
[13] The main source of data is the annual summary of appeals to the SEND Tribunal, prepared by HM Courts & Tribunal Service, within the MoJ – *Tribunal Statistics Quarterly: July to September 2021*. The most recent data relate to 2020/21, and were published on 9 December. They can be found here: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021.

[14] See the LGSCO's website for recent and archived SEND cases: https://www.lgo.org.uk/decisions/education/special-educational-needs. The most recent thematic report on SEND, *Not going to plan? Education, Health and Care plans two years on*, was published in October 2019. It can be found here: https://www.lgo.org.uk/assets/attach/5693/EHCP-2019-vfC.pdf.

[15] LGSCO, October 2019, *Not going to plan? Education, Health and Care plans two years on*, https://www.lgo.org.uk/assets/attach/5693/EHCP-2019-vfC.pdf.

representing an increase of 111%. The trend since the reforms is in stark contrast with the stated aims of *Support and aspiration* to reduce disputes overall, and to resolve an increasing number locally and without recourse to the Tribunal.

Figure 1: The total number and rate of appeals to the SEND Tribunal between 2013/14 and 2020/21



The data indicate that a key factor in the rise in Tribunal appeals is the increase in the demand on the statutory SEND system. In January 2014, there were 237,111 statements of SEN. By January 2021, there were 430,697 EHCPs. This represents an increase of 82%. While this is not absolutely a like-for-like comparison – since the total number of EHCPs will include what were previously learning difficulty assessments for post-16 students – it does indicate the scale of growth. The more EHCPs there are, the more appealable decisions there are – between 2014 and 2020, the number of appealable decisions in the calendar year has risen from 251,096 to 450,751, a rise of 80%. While the numbers are much smaller, a similar trend can be seen in the number of complaints reported to LGSCO. Between 2014/15 and 2015/16, the number of complaints to the Ombudsman relating to SEND doubled, while that figure had increased by a further 45% between 2016/17 (217 cases) and 2018/19 (315 cases).

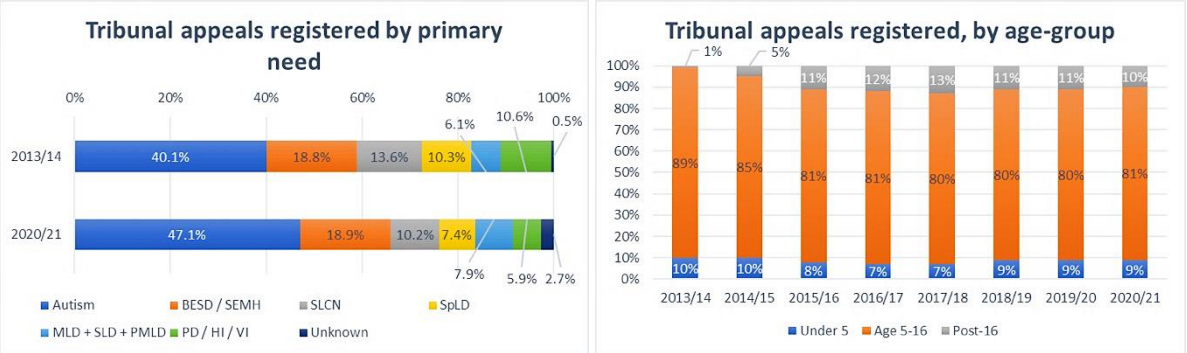
At the same time, however, the *rate* of appeal to the Tribunal has also been increasing, albeit with a small drop in the 2020 calendar year. This suggests that the trend of increasing disputes, including complaints and Tribunal appeals, is not being driven solely by the increased volume in the statutory SEND system.

Trend 2: The data tell us little about the children, young people and families involved in appeals, beyond the children's and young people's primary need and age

The Tribunal data tell us little about the children and young people, the support for whom is at the heart of appeals. In their feedback, many of the LA and SENDIASS leaders described how appeals were more often made by more affluent families, specifically those who were more confident in articulating their preferences and navigating the SEND system to assert their rights. There are, however, no available data that would allow scrutiny of whether appeals are more likely to be made by more affluent families, and less likely to come from more deprived families, those where adults have additional needs or disabilities, or those who do not speak English as a first language. What the Tribunal data do provide is information about the primary need and age of the children and young people at the centre of Tribunal appeals, as show in Figure 2, below.

In 2020/21, almost half (47.1%) of appeals related to children and young people whose primary need was autism.[16] This suggests that appeals to the Tribunal are proportionately more likely to relate to children and young people with autism than other primary needs – DfE data show that, in January 2021, 30% of all children and young people with EHCPs had autism as a primary need.[17] Furthermore, there has been a marked increase in the proportion of appeals where the child or young person has autism. In 2013/14, 40.1% of appeals related to children and young people with autism as their identified primary need, but, as noted above, this rose to 47.1% in 2020/21.

Figure 2: Tribunal appeals over time by primary need and age-group of the child or young person



The profile of the age of children and young people at the heart of appeals reflects the changes to the age-range of the SEND system, introduced by the reforms. In the two years following the introduction of the reforms, the proportion of appeals relating to young people post-16 increased from 1% in 2013/14 to 5% and then 11% in 2014/15 and 2015/16 respectively. While the proportion of appeals for post-16 young people have reduced slightly since 2017/18 (from 13% to 10% of appeals), the overall numbers have increased every year since the reforms. For children aged under 5, the proportions of appeals dropped after the reforms from 10% in 2013/14 to 7% between 2016 and 2018, before rising to 9% in each of the last three years. In absolute terms, however, the number appeals relating to children under 5 years old has increased every year since 2015/16. In 2015/16, there were 297 appeals for children aged under 5, while by 2020/21 this has increased to 773. Furthermore, children aged under 5 account for 3.8% of all children and young people with EHCPs, but 9% of all Tribunal appeals.

Trend 3: Increasingly, Tribunal appeals concern the contents of EHCPs, rather than decisions to carry out EHCNAs

As Figure 3 illustrates, since the reforms there has been an increase in the proportion of appeals that relate to the content of statements of SEN or EHCPs and a decrease in the proportion of appeals that relate to decisions about whether to carry out EHC assessments or re-assessments. It is important to highlight that figure 3 shows percentages of what has been an increasing overall number of appeals. This means that, while the proportion of appeals relating to requests for assessment or re-assessment has dropped from 40.2% in 2013/14 to 26.9% in 2020/21, in absolute terms the actual number of such

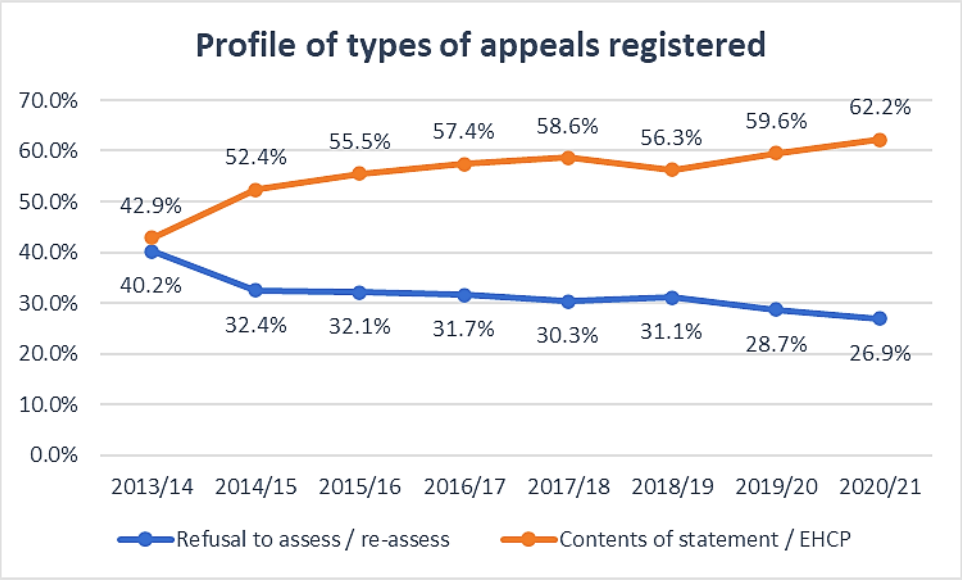
[16] In figure 2, we have used acronyms for brevity. BESD / SEMH = behaviour, emotional and social difficulties, which was replaced after 2014 in the Code of Practice as a category of need with social, emotional and mental health difficulties. SLCN = speech, language and communication needs. SpLD = specific learning difficulties. MLD + SLD + PMLD = moderate, severe or profound and multiple learning difficulties, respectively. PD = physical difficulties. HI / VI = hearing or visual impairment.

[17] See *Education, health and care plans: England 2021*, DfE: https://www.gov.uk/government/statistics/education-health-and-care-plans-england-2021.

appeals has increased. In 2013/14, before the reforms, there were 1,633 Tribunal appeals relating to decisions to assess or re-assess, yet by 2020/21 that number had increased by 42% to 2,311. For the last three years, the total number of appeals relating to decisions to assess or re-assess has been at a similar level, c.2,200-2,300. By contrast, the number of appeals relating to the contents of statements or EHCPs has increased from 1,742 to 5,388 between 2013/14 and 2020/21, an increase of 206%. In other words, since the reforms, the number of appeals to the Tribunal that relate to the content of statements and EHCPs has trebled. (By comparison, as noted earlier, the number of EHCPs has increased by 82%.)

While the numbers are much smaller, we see a similar trend in relation to decisions to issue statements and EHCPs. These accounted for 7.3% of appeals in 2013/14 and 9.2% of appeals in 2020/21. In numerical terms, there were 298 appeals relating to decisions to issue statements or EHCPs in 2013/14, but this has risen 166% to 793 by 2020/21.

Figure 3: Trend in the types of Tribunal appeals registered, specifically appeals relating to decisions to assess / re-assess and appeals relating to the contents of statements or EHCPs

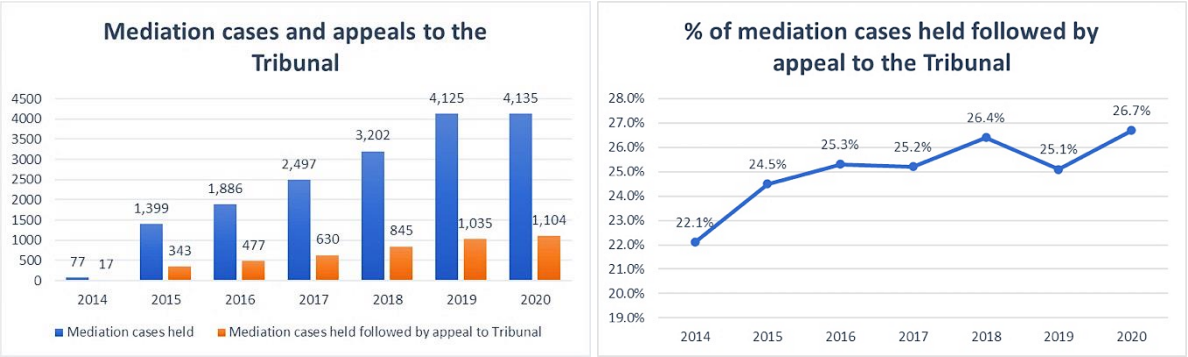


Leaders from the local areas we engaged described that the appeals about the contents of EHCPs increasingly concerned the educating institution to be named in the EHCP. They reported that appeals were often made in respect of children at key transition points (specifically, between primary and secondary school) and from parents who wanted to state a preference for specialist provision, either state-funded or in the independent and non-maintained special school sector. LA leaders argued that, where a disagreement related in part to a preference for a specific placement to be named in Section I of an EHCP, such a dispute was often less likely to be solved through mediation. (As we highlighted in Chapter 1, appeals relating exclusively to Section I of an EHCP are exempt from the requirement to consider mediation before a Tribunal appeal can be registered.)

The data appear to offer some corroboration of this. The data in figure 4 are taken from the DfE's data on EHCPs. They show the growth in the number of mediation cases held since the reforms were introduced in 2014 – up from 77 in 2014 to 4,135 in 2020. They also show, however, an increase in the proportion of mediation cases that were followed by an appeal to the Tribunal. In 2020, the data

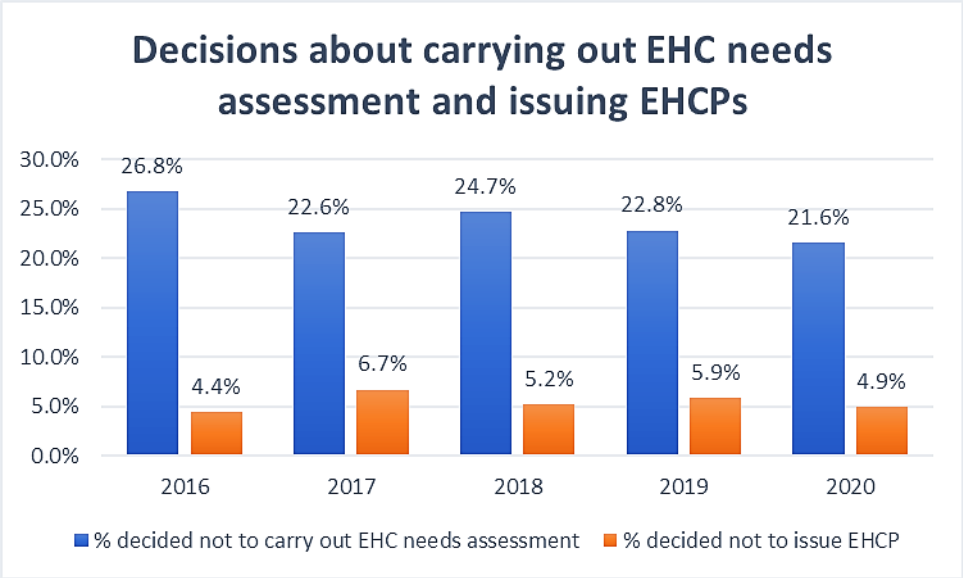
show both the highest proportion (26.7%) and number of mediation cases that were held where the dispute was not resolved and an appeal to the Tribunal was registered.[18]

Figure 4: Number and proportion of mediation followed by appeal to the Tribunal



The reduction in the proportion of appeals relating to requests to assess or re-assess is also reflected in the data showing the proportion of requests for EHCNAs that are being refused by LAs. As set out in Figure 5, below, the proportion of requests for assessment that LAs are refusing has dropped from 26.8% in the 2016 calendar year to 21.6% in the 2020 calendar year.

Figure 5: Trend in the proportion of refusals of requests for EHC assessment and issuing EHCPs



The LA leaders we engaged through this research described that the legal tests for deciding on when to undertake an EHCNA were framed in such a way that it was difficult to defend a decision to refuse to carry out an assessment, if this was challenged legally. (We note, however, that the proportion of requests for EHCNAs refused ranges from 0% to 51% across the country.) Some LAs described how they had taken an approach of agreeing to carry out EHCNAs and then seeking to take a more considered approach about whether to issue EHCPs or not. LAs that had followed this approach considered that it had been flawed. They had found that, having carried out an EHCNA, this had often raised expectations of additional support. This had meant that, unless they had a very strong offer of SEN support that could be offered without an EHCP, and unless the school or educating institution

[18] See *Education, health and care plans: England 2021*, DfE: https://www.gov.uk/government/statistics/education-health-and-care-plans-england-2021.

was fully on board with this, a decision not to issue an EHCP was more likely to be appealed by a parent / carer. This is borne out by the increase in the numbers of appeals for refusal to issue EHCPs, referred to earlier in this chapter. It is also corroborated by the data in figure 5, which shows a decrease in the proportion of cases where it has been decided not to issue an EHCP from 6.7% in 2017 to 4.9% in 2020.

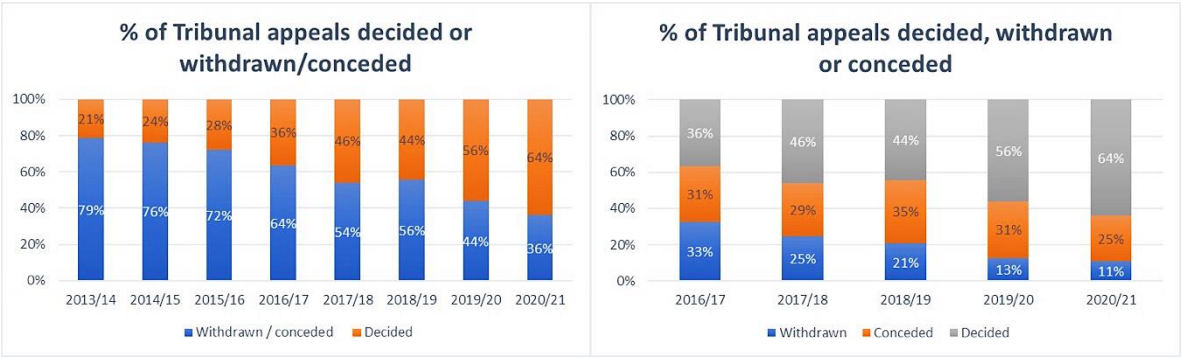
A similar pattern can also be seen in the SEND complaints being reported to the LGSCO. According to the LGSCO's most recent thematic report, complaints about SEND often concern –

- delays in aspects of the EHCNA process;
- incorrect applications of legal tests when making decisions about whether to carry out an EHCNA;
- failure to obtain the necessary advice to inform an EHCNA and plan;
- poor joint commissioning of services between the LA and CCG;
- delays in carrying out annual reviews and notifying families of decisions following annual reviews; and
- inadequate decision-making when amending or ceasing an EHCP.

Trend 4: Fewer appeals are being withdrawn, and more are being decided at Tribunal

Before the SEND reforms, 21% of appeals to the Tribunal were decided at Tribunal. In 2013/14, almost eight in 10 (79%) of appeals were withdrawn from parents / carers or conceded by LAs. Despite the aim of the reforms to reduce the need for judicial decisions in disputes, in each year since the reforms the proportion of cases decided at Tribunal has increased. By 2020/21, almost two thirds (64%) of appeals were decided at Tribunal.

Figure 6: Proportions of Tribunal appeals decided at Tribunal, withdrawn and/or conceded, between 2013/14 and 2020/21

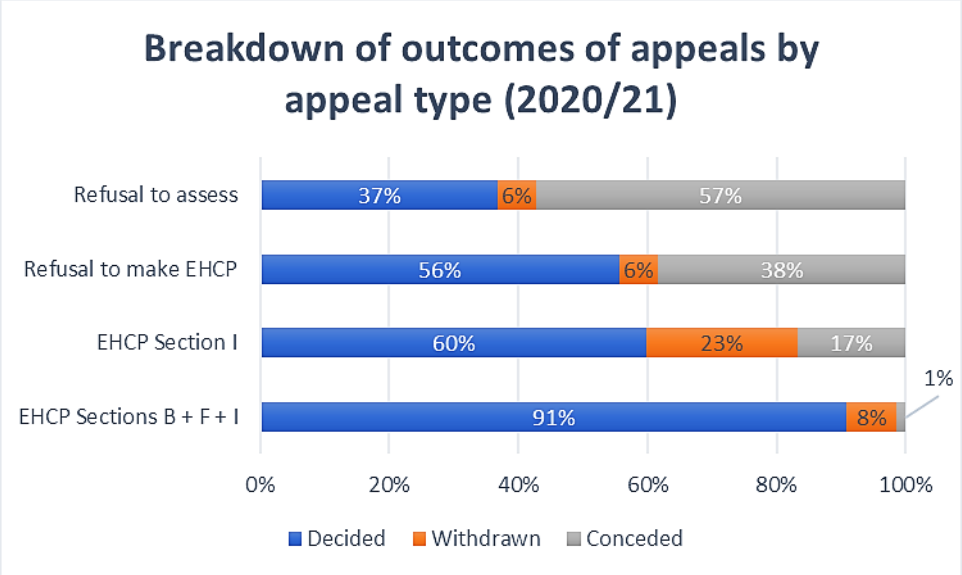


Until 2015/16, the Tribunal data reported withdrawals and concessions together, without distinguishing between the two. Since 2016/17, withdrawals and concessions have been reported separately. As the right-hand chart in figure 6 shows, in the five years since 2016/17, there has been a consistent year-on-year drop in the proportion of Tribunal appeals that are being withdrawn – from 33% in 2016/17 to 11% in 2020/21. Concessions by LAs reported in 2020/21 were lower (25%) than they were in 2016/17 (31%), but this figure has fluctuated between 25% and 35% over the same time period. The key point is that, since 2016/17, the data show a trend of more appeals being decided at Tribunal, accompanied by a significant reduction in the proportion of appeals being withdrawn by parents / carers and young people.

There are differences, however, in the proportion of appeals decided at Tribunal depending on the type of appeal that has been registered. As figure 7 shows, the most likely outcome in appeals relating

to refusals to carry out EHCNAs is LA concession (57%). This is in stark contrast with appeals relating to sections B, F and I of an EHCP, where nine in 10 (91%) of appeals are decided at Tribunal.[19]

Figure 7: Breakdown of outcomes of appeals relating to the contents of EHCPs (Sections B + F + I) and decisions to assess decided at Tribunal, withdrawn or conceded



Furthermore, as figure 8 shows, there has been a trend of increasing proportions of appeals relating to the content of EHCPs being decided at Tribunal since 2016/17.

Figure 8: Breakdown of outcomes of appeals relating to EHCP Sections B + F + I together and Section I alone decided at Tribunal, withdrawn or conceded, between 2016/17 and 2020/21

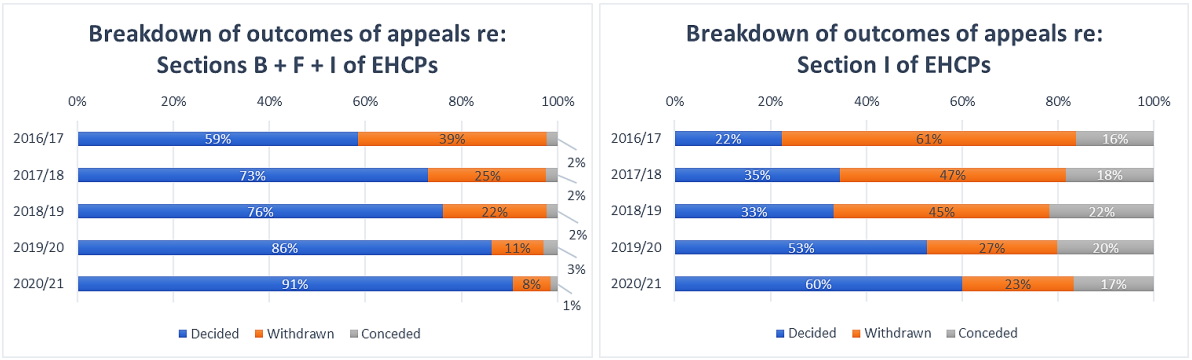
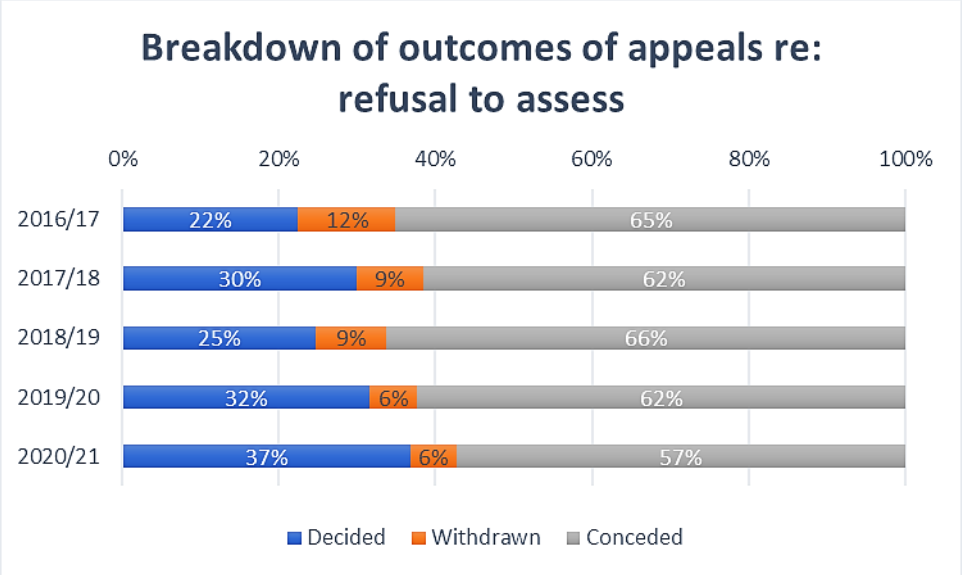


Figure 8 shows that the proportion of Tribunal appeals relating to Sections B, F and I of an EHCP decided at Tribunal has increased from 59% in 2016/17 to 91% in 2020/21. Throughout this period, concessions have ranged between 1% and 3%, but the proportion of appeals withdrawn has fallen from 39% to 8%. We see a similar trend relating to appeals for Section I of an EHCP. In 2016/17, 22% were decided at Tribunal and 61% were withdrawn, yet by 2020/21 this has been reversed, with 60% decided at Tribunal and 23% withdraw. (During this period, the proportion conceded by LAs has remained more stable, between 16% and 22%.)

[19] Section B of an EHCP is where a child's or young person's special educational needs are set out, Section F is where special educational provision is described, and Section I is where an educating institution or type of institution is named.

There has also been an increase, albeit less dramatic, in the proportion of appeals relating to decisions to carry out EHCNAs decided at Tribunal, from 22% in 2016/17 to 37% in 2020/21. In such appeals, the most likely outcome remains that the LA concedes, although this figure dropped to 57% in 2020/21, having fluctuated at a rate of around two thirds (62-66%) between 2016/17 and 2019/20. It will be important to see if this trend continues in future years. The proportion of appeals relating to decisions to carry out EHCNAs withdrawn by parents / carers or young people represented a small proportion to begin with, but has dropped from 12% in 2016/17 to 6% in both 2019/20 and 2020/21.

Figure 9: Breakdown of outcomes of appeals relating to refusal to carry out EHCNAs decided at Tribunal, withdrawn or conceded, between 2016/17 and 2020/21

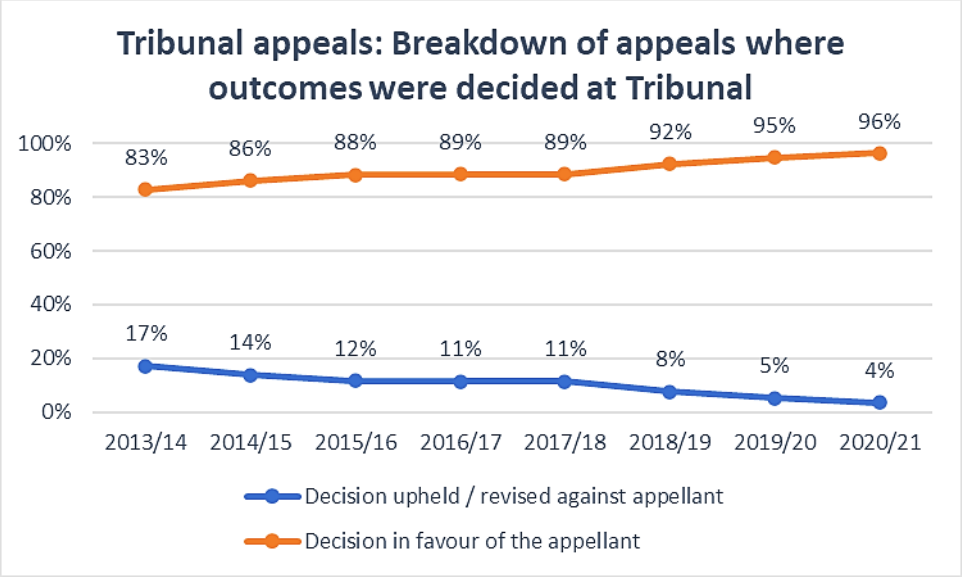


Trend 5: An extremely high and increasing proportion of decisions in disputes are being made in favour of families and against LAs

The Tribunal dataset includes a breakdown of the outcomes of appeals that were decided at Tribunal. This shows the proportion that were decided in favour of the appellant (i.e., where the appeal from the parent / carer or young person against a LA decision was successful), and the proportion where the original LA decision was upheld, or where the decision was revised against the appellant. The data are accompanied by the caveat that there are often several aspects to a Tribunal appeal, and that, when a case is recorded as being decided in favour of the appellant, not all aspects of the Tribunal's decision have necessarily been decided in favour of the appellant. Nevertheless, as shown in figure 10, below, it is striking, both that over nine in ten (96%) of appeals are decided in favour of the appellant, and that this proportion has been rising since the reforms (83% in 2013/14).

Although the numbers are smaller, we see a similar pattern in the proportion of SEND complaints to the LGSCO that have been upheld (i.e., where the complaint brought by a parent / carer is upheld against the LA). In their 2017 report, *Education, Health and Care Plans: Our first 100 investigations*, the LGSCO reported that 80% of complaints relating to SEND were upheld, compared to an average of 53% in all other areas within the jurisdiction of the LGSCO. Two years later, the LGSCO reported that the proportion of complaints upheld has risen to 87%, compared to 57% in complaints excluding SEND. Data shared with us by the LGSCO for this research suggest that this trend has continued, with the proportion of complaints relating to SEND upheld in 2020-21 reaching 89%. In their 2019 report, the LGSCO described the proportion of SEND complaints upheld as 'exceptional and unprecedented'.

Figure 10: Proportion of appeals decided at Tribunal where the decision was made in favour of the appellant or where the original LA decision was upheld / revised against the appellant



* * *

Overall, the data presented in this chapter describes a system where, despite the aims of the SEND reforms, the numbers and rates of appeals have continued to rise since 2014. It is not the case that the number of appeals is solely a reflection of increase demand on the statutory SEND system: the data suggest that the rate of appeals has also increased as well. If we had seen 2015's post-reforms appeal rate of 1.16% in 2020, there would have been 2,616 fewer appeals that were actually registered. The data also indicate the disputes in the SEND system are less likely to be resolved through mediation, less likely to be withdrawn, and more likely to be decided at Tribunal. Most significantly, we have seen a significant shift in the focus of disputes, with an increasing proportion of appeals relating to the content of EHCPs (including Section I). To illustrate this point, appeals about the content of EHCPs and statements represented 0.69% of all appealable decisions in 2014, but that had risen to 1.05% in 2020.

In the following chapter, we describe some of the factors that our research suggests sit behind these trends. What we would emphasise here, however, is that any system in which the proportion of complaints and disputes decided in one direction or another approaches 90% is a system that is fundamentally imbalanced and where something very significant is not working as it should.

* * *

Chapter 3: Key factors in avoiding disagreements and disputes and key challenges causing them

In this chapter, we set out the feedback we gathered from local SEND system leaders and national bodies about the factors that account for the trends presented in Chapter 2. The chapter is divided into two parts. First, we summarise five key factors and characteristics of good practice in avoiding disagreements and resolving disputes that were identified by participants in the research. Second, we focus on the challenges that are causing disagreements and disputes, including those that relate directly to dispute resolution arrangements and those driven by tensions within the wider SEND system.

Key factors in avoiding disagreements and resolving disputes at local level

Leaders within local SEND systems and national organisations identified five key factors in helping to avoid disagreements arising and resolving disputes effectively when they did arise. These are summarised in the graphic below, with then explained in detail.

Figure 11: Summary of the five key factors in avoiding disagreements and resolving disputes at local level

Effective communications and high-quality casework

Leaders of local SEND systems, especially professionals working within local SENDIASS, and national organisations reported that the majority of disagreements and disputes arise when the relationship between a family and a school, setting, college or local service has broken down. Local leaders cited delays in reaching decisions about access to a form of support or a failure to explain clearly why a decision had been reached. They argued that it was essential, therefore, to instil a culture within local SEND services that emphasised the importance of –

- building relationships between practitioners and families;

- timely responses to all contacts; and
- having high-quality conversations founded on dialogue, person-centred planning and solving problems.

Instilling such a culture requires that professionals and managers of local SEND services are pro-active in working with families to explain process of seeking support and to keep families informed throughout that process. It also requires that professionals working directly with families maintain an ongoing dialogue with families to explain decisions and what support can be accessed, especially if the decision has been to say no to a request for a form of support or a statutory assessment. Another important aspect of this highlighted to us was the effective commissioning of a clear and effective offer of independent advice and support, disagreement resolution and mediation services that families can access.

> *'As long as you tell them [parents / carers], it's fine; if you don't tell them, anxiety and frustration go up. … If people communicated better, and if schools did what they were supposed to, we would not get so many complaints.'* (Local area SENDIASS)
>
> *'We place an emphasis in our work on acknowledgement (of every contact), on quality (of our conversations), and on continuity (the same workers speaking to parents and carers). We feel this has worked: nobody gets overlooked or ignored, and the conversations we have are quality conversations.'* (Local area SENDIASS)

A strong graduated approach, with a focus on expectations of inclusive practice and SEN support in mainstream settings, schools and colleges

Leaders of local systems and national bodies identified a further factor in avoiding disagreements and disputes as local areas having a clear "graduated approach" of support for children and young people with SEND. Given that the majority of children and young people with SEND are supported at the level of SEN Support in mainstream settings, it is vital that there is a clearly articulated and embedded set of expectations of "ordinarily available provision" in terms of inclusive practice in identifying and meeting the needs of children and young people with SEND in mainstream settings. In many local areas, the articulation, implementation and adaptation of the graduated approach and the definition of ordinarily available provision is an ongoing process, involving co-production with school leaders, special educational needs co-ordinator (SENCOs) and families.

Leaders of local systems argued that there were two important benefits to such an approach. First, the process of co-producing and embedding expectations of mainstream practice fosters strong relationships between settings / schools / colleges, LA officers and families, underpinned by shared expectations of inclusive practice and SEN support in mainstream institutions. This in turn can reinforce parents' and carers' confidence, and avoid situations where families feel that they are being told one thing by a school and another by an LA officer. This will mean families are hearing consistent messages from settings, schools, colleges and the LA about what support can and should be provided.

The second benefit is that that local SEND systems have support that they can offer to families that is not dependent on an EHCP. This means that, if an LA has decided it would not be appropriate to carry out an EHCNA or issue an EHCP, they are able to continue a dialogue with the family about what support can be made available. Several LAs that took part in this process described having developed a formal process for offering families a "next steps" discussion if their decision was not to carry out an

EHCNA or issue an EHCP. In one local area, these meetings are chaired by the local SENDIASS and attended by the LA, the child's school or setting, and the family.

Encouraging SENDIASS to play a pro-active and strategic role in resolving disputes and act as a key strategic partner in the local system

Leaders of local systems also spoke about the importance and value of empowering SENDIASS to play a pro-active role in identifying and helping to resolving disagreements and potential disputes. As one senior LA leader responsible for SEND, in a local area that has seen a reduction in Tribunal appeals, put it, 'I cannot put into words how crucial SENDIASS are in [our local area] to resolving disputes.' In that local area, SENDIASS have a pro-active role in raising with the LA any potential disputes that are reported to them and helping to engage the families and LA, mediating between them to reach a resolution and avoiding the dispute from escalating. This process is based on acknowledging that neither the LA, nor SENDIASS, nor the family can solve a dispute on their own, but between them there is the scope to offer insight into a child's needs, independent advice and the authority to take decisions on the most appropriate form of support. Leaders in that local area also described the importance of ensuring that SENDIASS officers were well-trained and informed about the SEND statutory framework, in order to inform families of their rights and enable them to understand the strengths of their case relative to the statutory framework. (The need for this was part of the reason that members of the judiciary had developed the JADR process, described in Chapter 1.)

Furthermore, leaders of local systems also described the importance of seeing SENDIASS as a strategic partner in the local system. They spoke of the value of SENDIASS being represented on key partnership bodies and having regular dialogue with leaders of the local SEND system so that SENDIASS officers are fully informed about strategic developments and able to reflect up-to-date information about the SEND system and forthcoming initiatives when advising families and in combatting myths and misinformation in their wider communications to families.

Strong and established arrangements for partnership working and joint decision-making between education, health and care services

Joint working between education, health and care services is another perennial issue that the SEND reforms sought to address. Leaders from the local SEND systems that participated in this research highlighted three important ways in which joint working between education, health and care services can help to avoid disagreements and resolve disputes –

1. planning and maintaining a strong multi-agency set of pathways of support for children, young people and families, that draw together the contributions from education, health and care services in a seamless way;

2. having the DCO / DMO and an equivalent designated lead for children's services with the capacity to act as the key point-of-contact in matters relating to SEND for health and children's services respectively, with a specific focus on supporting decisions on the EHC process and quality-assuring advice for EHCNAs and contributions to EHCPs to ensure these inputs are of a high standard, but potentially also having the capacity to get involved in direct work with families to help to resolve disagreements and de-escalate concerns; and

3. establishing formal protocols and decision-making processes for deciding on specific placements (specifically where joint funding is required) and for being notified of and responding to potential disputes when they arise.

Leaders across education, health and care services with oversight of disagreements and disputes

The preceding four points relate to practices that can help to avoid disagreements and disputes from arising. Local SEND systems leaders argued that it was equally important to have a robust process for agreeing how to respond to disputes when they do arise. Local SEND system leaders described two elements to this. First, they described the importance of having an established and regular process whereby key SEND service leaders (from education, health and care) and legal advisers came together to consider disputes that had arisen, complaints that had been received, or appeals that had been registered. They argued that this enabled LAs and partners to make early, collective decisions about how to respond to dispute – whether the grounds for the complaint or appeal were correct and thus how to respond (or, in the case of a Tribunal appeal, to concede), whether to revisit their original decision, or whether the original decision should be upheld. They also argued that this approach enabled more effective and timely preparation of paperwork before Tribunal hearings. Conversely, the lack of effective preparation and provision of paperwork in a timely fashion was a criticism of LAs and partners made by some of the national bodies that took part in this research.

The second element to maintaining oversight of disagreements and disputes is to ensure that data and information on disputes, complaints and appeals are routinely reported to the local SEND Partnership Board. This should allow senior leaders and partners to remain informed about local trends – given that, for many local SEND partnerships, avoiding disputes and resolving disagreements before they escalate will be a key aim and indicator of success – and to take collective action to address the causes of disputes and complaints.

Key challenges to avoiding disagreements and resolving disputes: Challenges relating directly to disagreement avoidance and dispute resolution arrangements

Our research suggests that there is variable practice between local areas – and, as national bodies and judicial colleagues noted, between individuals within the same LA. It is by no means the case that the five characteristics of effective practice described above are uniformly adhered to in local areas across the country. National datasets suggest significant variation, for example, in practice around completing EHCNAs within timescales and in rates of appeals to the Tribunal. It was not disputed by participants in this research that there remains work to be done at local level to improve the consistency of practice in relation to the co-ordination of services, co-production with families, and communication during and about statutory decision-making processes.

Our research also suggests, however, that, while useful, these five aspects of good practice are not sufficient to avoid the risks of disagreements and disputes arising. Instead, our research suggests that these risks are inherent within the current SEND system, and are driving the trends in disagreements and disputes described in Chapter 2. In other words, the trends in disagreements and disputes are symptomatic of wider challenges within the SEND system and statutory framework.

In the remainder of this chapter, we set out the ten key challenges identified by the leaders of local SEND system and national bodies that took part in this research. As shown in the graphic below, five of these challenges relate directly to arrangements for avoiding disagreements and resolving disputes, and five relate to the wider SEND system.

Figure 12: Summary of the key challenges to avoiding disagreements and resolving disputes

Challenges within the disagreement avoidance and dispute resolution arrangements	Challenges within the wider SEND system that cause disputes
1. **Advocacy, encouragement to appeal, costs to families** – growth of industry of advocates; costs to families for support in appeals.	1. **Key parts of the SEND statutory framework are vague and circular** – especially the test for deciding whether to carry out EHCNAs.
2. **Equity** – of access to dispute resolution, and of access to services (assessed needs vs legally required).	2. **Expectations of inclusion and SEN support are not sufficiently defined or upheld** – lack of clarity and accountability for inclusion and SEN support.
3. **Mediation** – mediation increasingly circumvented, rather than encouraging early dialogue to resolve issues.	3. **Strain on resources, reduced preventative support** – vicious circle at local area and setting / school level, leading to frustration and disputes.
4. **Lack of clarity re: "efficient use of resources"** – inconsistency of decisions relating to content of EHCPs, especially around efficient use of resources.	4. **Growing demand, less capacity for casework** and person-centred practice, leading to frustration (families), staff turnover (services), and disputes.
5. **Value of expert opinion** – challenges when faced with two sets of expert opinion arguing for different ways of meeting needs.	5. **The SEND system remains too education-dependent** – despite progress, joint working across education, health and care remains patchy.

1. The growth of advocacy, the encouragement to appeal, and the cost to families

The Tribunal system aims to provide an accessible, swift and efficient means of resolving disputes within the SEND system in an informal setting, rather than families feeling like they are in a formal court hearing. As the Deputy Chamber President, Judge Meleri Tudur, wrote in a written submission to the Education Select Committee in March 2019:

> The Tribunal prides itself on the relative informality of its approach to proceedings; its use of informal hearing rooms (rather than formal court rooms) where parties and witnesses are present throughout the hearing, for its ability to hear evidence from multiple experts on diverse issues within a comparatively short hearing and for enabling the participation of unrepresented parties within the appeals process. … Special Educational Needs appeals in the tribunal are conducted in such a way as to minimise the formality and the conflict caused by adversarial party and party (i.e., not individual and state) proceedings in the courts.[20]

Nevertheless, through our research, we heard evidence from both LAs and organisations working with families that the SEND system had become more adversarial in general, and that there had been a significant growth in advocacy organisations offering to support families with appeals and in families engaging legal representation. For example, one local SENDIASS reported that they saw a pattern whereby disputes where families were supported by SENDIASS were more likely to be resolved before a hearing, while disputes where legal counsel had been engaged were more likely to be decided at a hearing. We also heard from national bodies that LAs were more likely to draw on legal representation when contesting appeals. There is, however, very little in terms of data to corroborate this. The evaluation of the extended appeals trial provided some evidence, finding that 52% of appellants paid

[20] The written submission can be accessed here: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/education-committee/special-educational-needs-and-disabilities/written/98819.html.

for some form of support, and the most common form of support was legal advice – this was paid for by 33% of all appellants. Data on families' use of legal representation in appeals to the Tribunal have not been collected for over a decade. There are no data held on the use of advocacy organisations that may offer to support families in their appeals.

It is, of course, the right of families to seek legal representation if they wish. Furthermore, since many LAs will engage legal counsel in preparing their response to Tribunal appeals, families may feel that they too need legal advice. The challenges raised here were threefold. First, feedback gathered from research participants suggested that the use of legal representation by both LAs and families is becoming more widespread, despite the aim of the Tribunal to resolve disputes in an informal setting without some of the formality of court proceedings.

Second, LA leaders and national bodies related to us concerns about the growth of purported "advocacy organisations". Local leaders and national bodies described seeing a growth in organisations offering families advice about appeals, which could include encouraging appeals, discouraging mediation, and making claims about how they could help families "win" Tribunal appeals, in return for payment. Since such organisations are not regulated, there is no way to know whether those offering advice are trained and are operating in accordance with professional standards, or indeed how widespread such organisations and practices have become. LA leaders and national bodies described such organisations as an "industry", whose growth had been both recent (since the SEND reforms) and rapid.

Third, LA leaders and some national bodies described how some families had found the process of raising an appeal far more complex and costly than they had been expecting. As one LA leader put it, 'We have families who are very bruised by their Tribunal experience. They tell us, "We didn't realise it would be like that, we only wanted what was best for our child." It can spin out of control for families.' Examples were described to us of parents incurring significant costs to pay for advocate support and/or legal representation. Again, the data that could corroborate these views are limited. The extended appeals trial evaluation did find, however, that 74% of appellants incurred costs associated with their appeal, at an average of £3,880 per family.[21]

The issue here is not that families are seeking legal representation, if they feel that they need it to get what they believe they or their child needs. Similarly, the challenge is not that the growth in legal representation is making the system more adversarial (albeit LA leaders and national bodies argued that advocacy organisations *were* encouraging families to appeal decisions). Instead, the issue is the growing mismatch between the aims of the SEND Tribunal – informal and accessible for families – and a potential trend of families being encouraged to seek the resolution of appeals through judicial means, with all parties making increasing use of legal counsel. Ultimately, however, one part of the challenge here is the lack of data around the growth of advocacy organisations and families' and LAs' use of legal representation.

2. Equity of access to dispute resolution and to services

LAs and partners in local SEND systems have responsibilities both to identifying the needs and offering provision to meet the needs of all young people with SEND (for example, section 27 of the Children and Families Act 2014), as well as individual young people with SEND. Since LAs and their partners

[21] A recent media story reported stories similar to those described to us during the research. See Samantha's Booth's article in *Schools Week*, 'The wasted millions: Parents use life insurance and savings to fight for SEND support', 12 February 2022, link here: https://schoolsweek.co.uk/the-wasted-millions-parents-use-life-insurance-and-savings-to-fight-for-send-support/.

work within a finite allocation of resource from central government, this requires balancing decisions in individual cases to avoid allocating disproportionate resources that reduce what is available for other young people who need support. The green paper recognised the implications of a decision taken by the Tribunal about the support needed for an individual young person for the LA's high needs budget, and made the balancing of these considerations one of the aims of the reforms. If the Tribunal offers a way for families of individual young people to ensure their rights are upheld, but does so in a way that has implications for the resources available for other young people with SEND, then this places a premium on ensuring that access to dispute resolution, including appeals to the Tribunal, is equitable. If appeals to the Tribunal were made disproportionately by families from one sector of the local community, this would call into question both the equity of access to dispute resolution and to the resources and support of the local SEND system.

In terms of access to dispute resolution, most LAs described, how, in the words of one LA leader put it, 'Most of our appeals come from articulate, middle-class parents.' In another LA, leaders argued that appeals predominantly came from the most affluent parts of the local area, and rarely if at all came from the more deprived areas. Another LA leader argued that, in the interests of equity and transparency, it was vital that there was information about the extent to which the profile of appeals matched the make-up of local communities, including families with disabilities, those who spoke English as an additional language, and those from disadvantaged and deprived backgrounds. The LA leader asked, 'If [the dispute resolution system] is set up to allow the white middle-class population to challenge LA decisions, what is the point?' It is, however, difficult to corroborate these reported trends with national data, since no data are collected or published on the characteristics of families making appeals to the Tribunal. Data on deprivation are not captured. Data on ethnic status ceased to be captured this year, after the ethnic status of the child involved in the appeal was not captured in between 94% and 100% of cases in previous years. The strength of feedback from local areas does suggest, however, that there is a question to be answered about the equity of access to dispute resolution in the SEND system.

In terms of access to services, SEND leaders in local systems, particularly those in health and care, argued that one implication of the extended appeals powers of the Tribunal was that it created a tension between professional assessment of need and legal judgements recommending provision to be made. Local health and social care leaders raised the question about whether they should prioritise access to services to young people whose needs had been triaged and assessed as being urgent by health or care practitioners, or those for whom the Tribunal had issued a judgement requiring a certain form of provision to be made. As one DCO put it, 'Clinicians are placed in a difficult position, in terms of deciding which children they see – the *medically*-urgent cases or the *legally*-urgent cases?' Local health and social care leaders argued that this could have the unintended consequence of giving young people with EHCPs a faster route of access to health and social care provision than other young people who had less complex SEN (and not require an EHCP) but more complex health or care needs.

3. The decreasing use of mediation

Another aim of the SEND reforms was to encourage the use of mediation to resolve disputes locally and without recourse to the Tribunal. Despite the aims of the reforms, we heard from LA leaders and national bodies that increasing numbers of families are bypassing mediation and moving to appeal to the Tribunal – contacting a mediation adviser, but deciding not to enter mediation and gaining a certificate to allow the family to register their appeal. We presented data in Chapter 2, showing that, since the reforms, there had been an increase in the rate of mediation cases going to Tribunal from 22.1% in 2014 to 26.7% in 2020.

LA leaders and national bodies argued that this reflected a trend in the reasons for appeal overall. They argued that it was more difficult to mediate where a dispute concerned Section I of an EHCP (the education placement), compared to disputes about Sections B (needs) or F (special educational provision). As we have shown in Chapter 2, an increasing proportion of appeals registered with the Tribunal relate to Section I of EHCPs. Some national bodies also argued that the trend of increasing mediation cases proceeding to appeal to the Tribunal also reflected a lack of engagement, dialogue and co-production between LAs and families during the statutory assessment process. They noted, however, that families were likely to see little point in engaging in mediation if there had been no dialogue with the LA leading up to that point.

4. The lack of clarity around what constitutes an 'efficient use of resources'

Given the growing proportion of appeals (and wider disputes) that relate to Section I of EHCPs, it is unsurprising that one of the challenges described to us related to the interpretation of the statutory framework relating to the naming of institutions in Section I in line with the preference of the parent or young person. Section 39 of the Children and Families Act states that the LA must ensure that Section I of an EHCP names the school or institution specified by the parent or young person unless one of three tests are met. The three tests are (i) that the school or institution is unsuitable for the young person (age, ability, SEN), (ii) that the young person's attendance would be inconsistent with the efficient education of others, or (iii) that the young person's attendance would be inconsistent with the efficient use of resources. We have referred back to the line in the green paper that acknowledged the potential implications of Tribunal decisions on the resources available for SEN support and provision in a local area and the need to balance meeting the needs of one young person with providing for the needs of all young people with SEND in a local area. As such, the question arises as to how decisions are made about what constitutes an inefficient use of resources where there is a dispute about a placement.

The LA leaders we engaged through this research made two points here. First, they argued that within the SEND system the remains a potential tension between meeting the needs of one young person and providing equitably for all young people with SEND. LA leaders argued that they have important duties around ensuring that the local SEND system meets the needs of all young people, both those with and without EHCPs. Furthermore, they are expected to achieve this within a finite budget (the high needs block of the Dedicated Schools Grant), which they are responsible for ensuring is used efficiently. Where there is an overspend on the high needs block, LAs are held accountable by central government for the development and delivery of a deficit recovery plan. LA officers argued that this was not helped by the fact that the Code of Practice talks about both the entitlement for young people to 'an appropriate education' and support that enables the achievement of their 'best possible outcomes'. Furthermore, LA officers and some national organisations argued that this idea of balance, equity and the efficient use of resources to cover a wider population was not well established or understood in the SEND system in the way it was in, for example, health services. More specifically in relation to resolving disputes, LA leaders argued that there was a lack of clarity about what constituted an efficient use of resources.

'The system is built on interest of one child versus the interests of all children. Parents think about their own child, LAs are making decisions in the context of interest of all children. It is a flaw in the system.' (Local area SENDIASS)

'As soon as we raise [money], people say "you only care about money". We have a duty around ensuring public value, ensuring the efficient use of resources. This is a key part of being a LA officer.

In the NHS, people can talk about money and people get the idea of resources being used efficiently.' (LA leader)

'Nobody asks where the money comes from and who misses out.' (National body)

'… we are faced with trying to balance things for the best interests of the child, for all children, and the use of the high needs block. If we overspend, the DfE will ask us to produce a deficit recovery plan.' (LA leader)

Second, LA leaders argued that, as a result of the lack of clarity about how to manage this tension, and specifically, what would constitute an efficient use of resources, there was a lack of consistency in judgements made by the Tribunal in relation to appeals concerning Section I of EHCPs. Leaders from all of the LAs that took part in this argued that decision-making in Tribunal appeals around the efficient use of resources was inconsistent, that interpretation of what constituted the efficient use of resources varied in terms of what was included and whether this was cumulative year-on-year expenditure or not.

'You can go to appeal with the same appeal on 10 occasions and get 10 different outcomes. … There is always an element of dependency on people, but this is overly subjective.' (LA leader)

'Interpretation on the effective use of the public purse is very inconsistent … it is not consistent on what is unreasonable public spend.' (LA leader)

The view from colleagues involved in the Tribunal was somewhat different. In her written submission to the Education Select Committee in 2019, Judge Meleri Tudur explained the 'comparative costs exercise' Tribunal Judges undertook when faced with two education placements that are suitable and can meet a young person's needs.

> … the Tribunal must be satisfied that the alternative educational placement proposed by the LA is suitable and can make appropriate provision that the child or young person requires. If both the parent or young person's requested placement and the LA's proposed placement are suitable, the Tribunal will test the validity of the costs evidence provided before conducting a comparative costs exercise to identify whether the placement requested by parents or a young person is an inefficient use of resources.

The Tribunal must first consider if the placements put forward by the family and by the LA are suitable and can meet the needs of the young person. If that is the case, there can then be a consideration of the resource implications of the two placements. Caselaw provides some guidance as to what the Tribunal should consider when undertaking a comparative costs exercise.[22] Furthermore, judicial colleagues argued that, in some instances when contesting appeals, LAs would rely on a generic argument about the inefficient use of resources with limited evidence provided that showed the comparison of the costs of one placement against another.

Overall, our research suggests that, in policy terms, there is not a clear definition of what would constitute an efficient or an inefficient use of resources, and about such calculations should be made

[22] See for example, the Court of Appeal case in 2014 involving Warrington Borough Council – Haining v Warrington Borough Council [2014] EWCA Civ 398 (02 April 2014) – which can be accessed here: http://www.bailii.org/ew/cases/EWCA/Civ/2014/398.html.

and what should be included. Furthermore, our research also suggests that there is little join-up in policy terms between the expectations on LAs to ensure public value and manage within their high needs block allocations on the one hand, and, on the other, consideration of the efficient use of resources to provide appropriate education / best possible outcomes in disputes and Tribunal appeals. This matters in a context within which LAs are expected to keep provision for children and young people with SEND under review, and balance meeting the needs of individual young people with ensuring provision for all within a finite allocation of resource.

5. The role of professional expertise

The final challenge relating to arrangements within the dispute resolution system itself related to the role of professional expertise in Tribunal appeals. LA and health service leaders argued that, in Tribunal cases, there were often two sets of professionals from the same disciplines putting forward different ways of meeting the needs of individual young people. LA and health leaders considered that, for example, often the evidence put forward by public sector educational psychologists and NHS speech & language therapists was not given due weight in Tribunal appeals, and was viewed as being driven by the need to ration resources, when compared to private psychologists or therapists engaged by families. On the other hand, those involved in Tribunal cases for the judiciary argued that considering competing expert opinion and evidence was a fundamental function of the judiciary.

Nevertheless, LA and health service leaders described examples of Tribunal cases where provision had been recommended by private professionals and decisions made that did not reflected established best practice (in the use of 1-to-1 adult time in education, or in the assessment of clinical need) or indeed were poorly aligned with LA duties in relation to children's social care. Again, the issue here is one of a lack of clarity about what constitutes effective practice in meeting the needs of children and young people with SEND, and how this should inform consideration of decisions in instances of disputes. DCOs from the local areas we engaged described a lack of clarity about how Tribunal decisions that overturned assessments of need by health professionals were reached. LA and health service leaders argued that the SEND system lacked the equivalent of the NICE (National Institute of Clinical Excellence) guidelines – regularly-updated guidance on established best practice based on the latest evidence – that could help to guide decisions, including in instances of dispute, concerning different professional opinion about how to meet a young person's needs.

* * *

Throughout the research, some national bodies argued that main reason for disagreements and disputes in the SEND system, and the reason behind the increase in appeals to the Tribunal, is that LAs are not abiding by the law when making statutory decisions about carrying out EHCNAs. Some of the LA leaders agreed that there is variable and poor practice around decision-making in some areas. Some LA leaders went so far as to agree that there are instances where aspects of SEND law is in tension with other LA responsibilities, specifically the efficient use of resources, and that some decisions made by LA SEND teams could be challengeable legally.

Our research suggests, however, that this is not the main factor that accounts for the rise in the number and rate of appeals, nor the high and rising proportion of decisions that find in favour of the appellant. There are two reasons for this. First, as we have shown in Chapter 2, it is not the case that the majority of appeals relate to decisions to assess. Instead, the Tribunal data suggest that an increasing proportion of requests relate to the contents of EHCPs, rather than decisions to carry out EHCNAs. At the same time as there has been a rise in rates of appeals to the Tribunal, there has also been a decrease in the rate of refusal to carry out EHCNAs. In addition, a high proportion of appeals

relating to refusal to assess are settled by LAs before reaching a Tribunal hearing. Second, our analysis of the available data did not show a sufficiently strong correlation between Tribunal appeal rates and either the rate of refusal to carry out an EHCNA or the rate of refusal to issue an EHCP to support the conclusion that LA decision-making at these points is the main factor accounting for the trends in Tribunal appeals.

In the table below, we show our analysis of the correlation between seven variables and the rate of appeal to the Tribunal for LAs in England.[23] The key overall finding here is that this does not suggest that there is a single variable or factor that correlates strongly with the Tribunal appeal rate. In itself, this indicates that the factors that account for the trends in disagreements and disputes are complex and multi-faceted.

Variables	**Tribunal rate by appealable decision**	
	Basic correlation	**R squared value**
Deprivation – Income Deprivation Affecting Children Index (IDACI)	-0.27	0.07
Pupil population	0.28	0.08
Percentage of EHCPs completed within 20 weeks	0.08	0.01
Proportion of children and young people with EHCPs	-0.11	0.01
Percentage of children and young people with EHCPs placed in independent and non-maintained special schools	0.12	0.01
Percentage of EHCNAs refused	0.38	0.15
Percentage of EHCNAs where the decision was not to issue an EHCP	0.25	0.06

We found that there were four factors that showed some degree of correlation with the rate of Tribunal appeals.

i. **Refusal to carry out an EHCNA** – higher rates of refusal to assess were weakly correlated with higher rates of appeals to the Tribunal.

[23] The data in this table is taken from the following sources. The rate of Tribunal appeals is from *Tribunal Statistics Quarterly: January to March 2021: SEND Tribunal tables: statistics on the appeal rate to the SEND Tribunal*, *https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2021*. Indicators of deprivation are taken from *The English Indices of Deprivation, 2015 – Upper Tier local authority summaries*, https://data.gov.uk/dataset/1014339c-de8f-43c6-955e-d45d0a96afb1/english-indices-of-deprivation-2015-summaries-at-local-authority-level. Data on the proportion of EHCPs refused, EHCPs completed within 20 weeks (without exceptions), and on the proportion of children and young people in INMSSs are taken from *Education, health and care plans 2021*, https://explore-education-statistics.service.gov.uk/find-statistics/education-health-and-care-plans. Data on pupil population and the proportion of school-age pupils with EHCPs are taken from *Special Educational Needs in England, 2020/21, https://explore-education-statistics.service.gov.uk/find-statistics/special-educational-needs-in-england*.

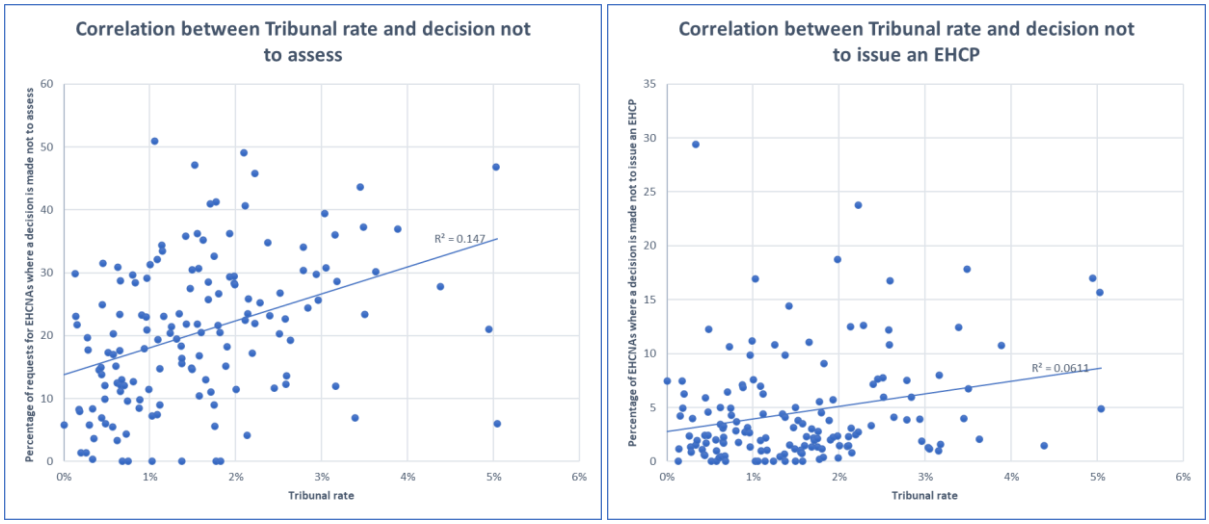
ii. **Refusal to issue EHCPs** – again, there was a weak positive correlation between higher rates of refusal to issue EHCPs and higher rates of Tribunal appeals. Leaders from some LAs described how they had taken an approach of agreeing to most or all requests for EHCNAs, but trying to hold a consistent position about when to issue an EHCP. Those that had taken such an approach argued that it had failed to avoid disputes and Tribunal appeals.

iii. **Deprivation** – rates of deprivation showed a weak negative correlation with Tribunal appeal rates (local areas with higher rates of deprivation were more likely to see lower rates of appeals to the Tribunal). This chimes with the feedback we received from LA leaders and national bodies, namely that families from more deprived local areas and localities were less likely to seek redress for disputes through formal channels such as Tribunal appeals.

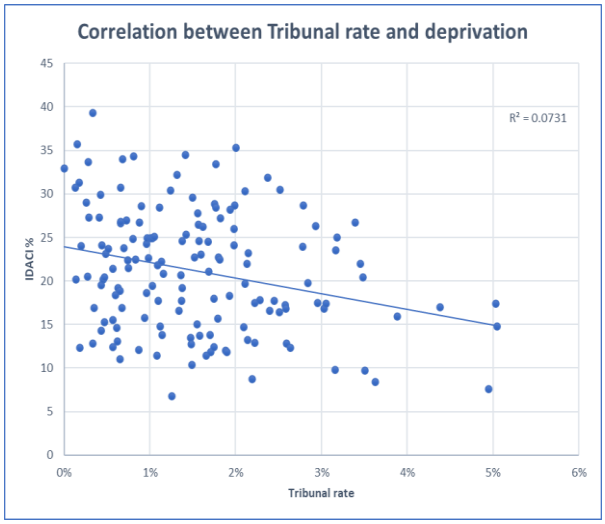
iv. **Population size** – there was a weak positive correlation between population size and Tribunal appeals rates (local areas with larger populations were more likely to see higher rates of Tribunal appeals). This also echoes feedback from LA leaders, who argued that it was more difficult to ensure consistency of practice and a collective ethos within LA SEND teams, and to ensure consistent practices in SEN support in settings, schools, colleges and wider services, in larger, sparser local areas.

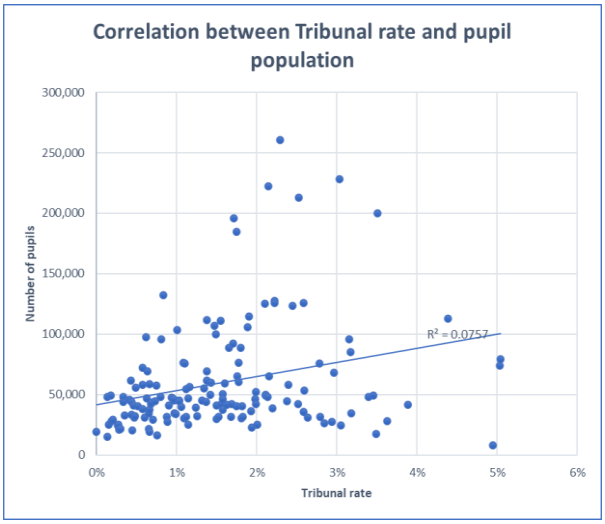
While the strongest correlation with Tribunal appeal rates was with the rate of refusal to carry out EHCNAs, in statistical terms this does not constitute a strong correlation – the correlation coefficient is between 0.25 and 0.5. Similarly, while there is some correlation with the rate of refusal to issue EHCPs, following an EHCNA, the correlation here is weaker still, and of similar strength to two other contextual factors – the level of deprivation and the population size of a local area. This suggests that, in itself, LA practice in statutory decision-making should not be considered the main factor that accounts for trends in appeals to the Tribunal.[24] The charts below, and specifically the variation from the trend line, illustrate and underscore this point.

Figure 13: Four charts showing the correlations between Tribunal rates and (i) decision not to assess, (ii) decision not to issue an EHCP, (iii) deprivation, and (iv) pupil population



[24] Added to this, we found that the average rate of Tribunal appeals among local areas that had not been required to produce a written statement of action in their local area SEND inspections (an indicator of better practice) was slightly higher (1.63%) than those required to produce a written statement of action (1.50%).





Furthermore, our analysis also showed that there were some significant factors that did not show any correlation with rates of Tribunal appeals. Chief among these is the rate of completion of EHCPs within 20 weeks. Despite suggestions from some national bodies that the completion of EHCPs within 20 weeks would be a key indicator of getting "the basics" right and therefore would be associated with lower rates of Tribunal appeals, our analysis suggests that there is very little correlation between the two. In fact, we found that the average rate of completion of EHCPs within 20 weeks for the 10 LAs with the highest Tribunal appeal rates was almost identical to the average for the 10 LAs with the lowest Tribunal appeal rates. We also found very little evidence of correlation with Tribunal appeal rates for either the proportion of children and young people with EHCPs overall or with those placed in independent and non-maintained special schools.

In a system where 96% of appeals are decided in favour of the appellant, in theory, one hypothetical explanation would be that the quality of decision-making that is open to legal challenge is widespread across LAs. For the reasons given above, our research suggests that the trends in disagreements and disputes cannot be explained by LA decision-making practice. Instead, our research suggests an alternative explanation, which is that the trends in disagreements and disputes are symptomatic of wider systemic issues within the SEND system. We highlight five specific challenges within the SEND system that our research suggests are driving disagreements and disputes.

'It is hard to de-couple dispute resolution from the wider system. The Tribunal is a symptom of wider issues, not a cause of wider issues. The focus needs to be on preventing disputes.' (National body)

'Anything that finds in favour of the appellant in the proportion of cases of the SEND Tribunal, it tells you that the system is not working.' (LA leader)

'The building blocks of the [SEND] system are not aligned.' (LA leader)

Key challenges to avoiding disagreements and resolving disputes: Challenges emanating from the wider SEND system, of which disagreements and disputes are the symptoms

1. Key parts of the SEN statutory framework, particularly in relation to when to carry out an EHCNA, are vague and circular

As we described in Chapter 1, the SEN statutory framework sets two tests for when an EHCNA should be carried out. The first test is whether a child or young person *has or may have* SEN. LA leaders and some national bodies commented that this formulation was too broad in its scope. The possibility of a young person having SEN and the implied need to assess to see if they did was considered by LA leaders to be too a weak statutory test for whether to carry out an assessment. That said, the first test is supplemented by a second test. Taken together, the tests suggest that LAs should undertake EHCNAs where a child or young person has or may have SEN to the extent where special educational provision 'in accordance with an EHCP' needs to be made. The second test thus places some limits on the first – it is not that LAs should assess all children and young people on the basis all *may* have SEN, but rather than LAs should assess children and young people where there is evidence that they have or might have a level of need that would require a level of provision necessitating an EHCP.

Participants in this research argued, however, that the second test introduced a wider set of difficulties, namely what constituted 'special educational provision to be made … in accordance with an EHCP'. As we described in Chapter 1, this is not described in the legislation. The Code provides some guidance about when an EHCNA should be sought (following purposeful action to identify and meet needs, a young person is not making expecting progress). The Code also indicates that LAs may develop local criteria (albeit not a blanket policy) to act as guidance when considering whether to assess. The Code, however, is not the law. Some national bodies that took part in this research suggested that locally-agreed guidelines on when EHCNAs should be carried out do not have any force in law. Judicial colleagues described how decisions about where an EHCNA and/or EHCP might be required would be taken with regard to the provision that was deemed necessary over and above the resources normally available to mainstream early years providers, schools or post-16 institutions – a reference to Chapter 9 of the Code of Practice. We described in Chapter 1 that there is no clarity nationally about what this should include. Caselaw from the Upper Tribunal and the Court of Appeal suggest that judicial colleagues determined that what is necessary 'may involve a value judgement' and 'is a matter to be deduced rather than defined'.[25]

The question remains: on what grounds could an LA decide not to carry out an EHCNA and be sure that their decision-making was sound and would not run the risk of legal challenge? The SEND statutory framework makes clear that there is an *active* decision to be made and that LAs have the responsibility for making that decision. The Children and Families Act 2014 does not suggest that all requests for EHCNAs should be accepted, but that they should be considered on their merits and tests applied. Under the current statutory framework, those tests depend on there being a definition of special educational provision beyond that which would ordinarily be provided from the resources normally available in mainstream education. This, however, is not defined nationally, and yet local

[25] See, for example, Upper Tribunal cases involving Manchester City Council (Manchester City Council v JW (Special educational needs: Failure to make a statement) [2014] UKUT 168 (AAC) (11 April 2014), http://www.bailii.org/uk/cases/UKUT/AAC/2014/168.html) and Hertfordshire County Council (Hertfordshire County Council v MC and KC (SEN) (Special educational needs: Failure to make a statement) [2016] UKUT 385 (AAC) (24 August 2016), http://www.bailii.org/uk/cases/UKUT/AAC/2016/385.html). See also the Court of Appeal case involving Nottinghamshire County Council (Nottinghamshire County Council v SF And GD (Rev 1) [2020] EWCA Civ 226 (03 March 2020), http://www.bailii.org/ew/cases/EWCA/Civ/2020/226.html).

attempts to develop a set of consistent guidelines for decision-making do not have any formal status in law if those decisions are challenged through an appeal to the Tribunal.

> *'It's so wishy-washy. The legal threshold for appeal [against a refusal to assess] is set too low.'* (National body)
>
> *'The legal threshold [for carrying out an EHCNA] is hardly a threshold.'* (LA leader)
>
> *'Nationally, LAs <u>are</u> making unlawful decisions, but not because they are doing something wrong, but because thresholds for EHCNAs are so low. We are not doing this deliberately, but the issue is that the legal framework is not fit for the world we are in.'* (LA leader)

2. Expectations of inclusion and SEN support in mainstream education are not sufficiently defined nor upheld

All LA leaders and national bodies agreed that there was a lack of clarity about what mainstream education institutions should be expected to deliver from within resources normally available in terms of inclusive practice and SEN support. They argued that, in addition, accountability and oversight of inclusive practice and support for young people with SEN, including those without EHCPs, in mainstream education was weak. LA leaders and national bodies argued that insufficient focus was paid to the outcomes of children and young people with SEND in national performance measures, and that there was little meaningful way of measuring the long-term outcomes of support for young people with SEND as they moved into adulthood. Furthermore, they argued that there was not sufficient focus on support for pupils with SEND and non-inclusive practices that affected pupils with SEND within the accountability framework for mainstream education institutions.

As a result, LA leaders and national bodies argued, there was significant variation in approaches to supporting young people with SEND in mainstream education institutions. Local areas, particularly local SENDIASS, could identify specific settings, schools and colleges with excellent practice, where there were rarely disagreements, disputes or Tribunal appeals, as well as those where practice was poor and disputes more frequent. This feedback chimes with recent reports from Ofsted and the Education Policy Institute. The Ofsted report underscored the lack of consistency about the definition of what good inclusive practice and mainstream support for pupils with SEND looked like, and the consequent variation in experiences of pupils with SEND.

> This highlights broader issues for debate about what 'success' looks like in supporting pupils with SEND in mainstream schools. The variation in support experienced by pupils in this study, even when they had a similar identified need, suggests that the SEND system relies on particular individuals performing important roles well and working together effectively. This means that two pupils with similar needs, attending different schools, can have very different experiences. Absolute uniformity is unlikely when individual schools have autonomy to make provision for their pupils. However, despite individuals working hard and with care, significant variability in provision is not an indicator of a system working effectively for children with SEND.[26]

The Education Policy Institute's report concluded,

[26] Ofsted, May 2021, *Supporting SEND*, https://www.gov.uk/government/publications/supporting-send/supporting-send.

> The research, which is the first study to fully quantify how SEND support varies nationally, shows that access to support is decided by a "postcode lottery" – with the chances of receiving SEND support from the school or from the local authority largely dictated by the school that a child attends, rather than their individual circumstances.[27]

Furthermore, routes through which families may seek redress in instances of poor practice are complex, weak and misaligned. While the crux of a disagreement may be how an individual setting, school or college is providing for a young person with SEND, most routes of redress and complaint are to the LA, rather than offering a way of holding the individual setting to account. LAs are held responsible, including for the delivery of the contents of an EHCP, but often have limited powers to influence the quality of provision in schools, particularly those that are part of academy trusts. For example, if a disagreement cannot be resolved with the education institution in question, families can raise concerns with the LA (for maintained schools) or the academy trust or Regional Schools Commissioner (for academies). Complaints about individual cases cannot, however, be reported to Ofsted. The LGSCO no longer has the remit to consider poor practice in education institutions. Notwithstanding the scope to bring disability discrimination claims against settings, LA leaders and national bodies agreed that the means for addressing poor support for young people with SEND, particularly those requiring SEN support but also accountability for delivery of the content of EHCPs, in mainstream education were limited and weak.

If support for pupils with SEND is seen as an add-on, without clarity about what is necessary and what good practice looks like, and if this is not backed by the accountability system, the risk highlighted by participants in the research is that families will lose confidence in SEN support in mainstream education. This, they argued, will drive increased demand for EHCNAs and EHCPs, since families will view this as the means to ensure provision and some degree of accountability are in place.[28] This, however, can create the starting-point for disagreements between families, education institutions and LAs, and the potential for disputes.

'We have very little contact with special school children and young people. Most of our work are children and young people with high needs in mainstream schools. Some schools are great at managing this, but some are very poor.' (Local area SENDIASS)

'Levels of inclusion are reducing. There has not been the same focus on inclusion since the new Code.' (LA leader)

'As an LA, we have had to outsource so much of our delivery to schools. It is breaking down somewhere at school level.' (LA leader)

'Decisions taken by individual schools make a big impact on the system, but this is outside of LA control.' (Local area SENDIASS)

[27] Education Policy Institute, March 2021, *Identifying pupils with special educational needs and disabilities*, https://epi.org.uk/publications-and-research/identifying-send/.

[28] See, for example, *Local area SEND inspections: One year on*, Ofsted and the Care Quality Commission, October 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652694/local_area_SEND_inspections_one_year_on.pdf. This stated that 'parents reported that getting an EHC plan was like a 'golden ticket' to better outcomes, even though an EHC plan was rightly not issued because the complexity of the child's need did not require it.'

'The SEND framework does not encourage inclusive approach and that SEND is everyone's business – school are becoming more "ableist". The view from parents is "SEND equals an EHCP; if your child has SEND, get an EHCP". We should be doing better at school level, including more children.' (DCO)

3. Growing demand for statutory SEND services reduces preventative SEN support

The number of children and young people with EHCPs (and, until 2018, when conversion to EHCPs was completed, statements of SEN) has almost doubled since the reforms. As we described in Chapter 1, there has been an 82% increase between January 2014 and January 2021. Over the last five years (2017-2021), the total number of children and young people with EHCPs nationally has increased 10-12% each year. This has created significant additional demand on statutory services, and for more specialist forms of provision, including special school places. This, in turn, has put pressure on the budgets for support and services in LAs, CCGs, settings, schools and colleges. One consequence of the rising demand for support from statutory services has been the reduction in resources available for preventative support services and early intervention. This has been exacerbated by funding cuts and by resourcing for local government, settings, schools, colleges and health services failing to keep pace with rising demand.

LA and health service leaders and national bodies that took part in this research described how this had created a vicious circle. Support services that would previously have dealt with lower-level SEN or other additional needs and barriers to learning have been cut back or no longer exist. These include pastoral support within schools, targeted therapy services, LA support for whole-school school improvement, education welfare, and behaviour and attendance services. The lack of preventative support can mean that young people's and families' needs can escalate to the point where statutory services are required. It also means that needs that previously would not have been seen as a SEND matter are now coming into the SEND system. For example, LA leaders described how changes to education welfare services has meant that, in some areas, poor attendance is now being interpreted as evidence of a child having SEN and requiring support through the SEND system. There is also ongoing confusion about responsibilities for providing / commissioning mental health support between LAs and CCGs. As with the lack of consistent access to SEN support in mainstream education, the lack of access to preventative services from education, health or care services can often be the starting-point for a disagreement or a dispute.

'Mainstream school and funding are the first contact families have with the education and SEND world. It affects everything.' (LA leader)

'Parental confidence in mainstream schools and inclusion is low.' (LA leader)

'Often disputes arise where the provision to the level parents are seeking is not in the EHCP. We see this issue in occupational therapy, similar issues around speech and language therapy services. We also see this in mental health, often the transition between CAMHS [child and adolescent mental health services] and adult mental health services.' (DCO)

'The capacity of health services remains a significant challenge. Health services have had to re-design their offers to meet increased demand – more episodes of care, shorter timescales. There is a mismatch here, because children with SEND often need greater oversight from health professionals over a longer period of time. There is also a lack of early support – we want to deal with things upstream, rather than waiting for an EHCNA or EHCP We want specialists providing advice and support earlier.' (DCO)

4. Growing demand on statutory SEND services reduces capacity for high-quality casework and co-productive, person-centred planning

At the same time that rising demand is reducing the capacity for preventative support, it is also stretching the capacity of statutory SEND services to deliver high-quality casework, communication and co-productive working with families. LA leaders and national bodies considered that this was creating another vicious circle. As the number of EHCNAs, EHCPs and annual reviews in the system increases, the work of officers within local SEND services becomes more administrative, more paper-based, more transactional, and less person-centred and co-productive. While the SEND reforms emphasised the importance of services working together in a person-centred, co-productive way to support families, and while participants in this research highlighted the importance of communication and high-quality casework as one of the key means of avoiding disagreements and disputes, the increased demand for statutory assessments and plans seen since the reforms has made it harder for local areas to maintain the capacity for these practices.

For example, leaders from one LA that took part in this research described how, at the start of the SEND reforms, the number of requests for EHCNAs was manageable enough that, where they refused to carry out an EHCNA or issue an EHCP, they could do in-depth, multi-agency work to build an alternative package of support around those families. They argued that the current level of demand for EHCNAs was such that they had had to cease this practice.

LA and particularly local SENDIASS leaders recognised the frustration that this caused to families – not being able to contact the officers working on their assessments or responsible for their children's plans, emails and phone-calls going unanswered, a lack of continuity of support from the same professionals. They also saw a negative impact on the quality of plans, and the capacity to undertake annual reviews in a meaningful way. They acknowledged the irony of the EHCP being something that families saw as the "golden ticket" to support, but that often those plans were of variable quality or, if not reviewed effectively, very rapidly out-of-date. They described how these issues only served to increase frustration, and to create the breeding ground for disagreements and disputes. Frustration caused by a lack of communication from settings, schools, colleges and services, including statutory casework services, was highlighted by SENDIASS leaders as the most common ingredient in cases raised with them by families.

LA leaders also reported that being at the centre of a system about which families were frustrated, with stretched capacity for high-quality casework and increasing demand and disagreements was leading to a high turnover of staff in LA SEND casework teams. As one LA leader put it, 'The impact on LA staff is significant. The job is becoming impossible, with a high turnover of staff in many LAs as people are not prepared to stay and put up with abuse and threats.' This can only perpetuate the vicious circle. Local SEND system leaders argued that ongoing staff turnover in SEND casework teams will lead to vacancies or regular changes of caseworkers for families, which will only add to the sense of a lack of communication, continuity of support, and person-centred planning.

The issue here is less to do with how disagreements and disputes are managed, and more with whether it is sustainable for the SEND system to see increases in the overall volume of demand of 10% each year. The implications of this are not only for LA SEND casework teams: there are implications for all other bodies involved in the SEND system and in avoiding disagreements and resolving disputes, including the Tribunal. Judge Tudur's written evidence to the Education Select Committee in 2019,

stated that, 'At present, the Tribunal does not have sufficient capacity to cover all of the appeals which require a final hearing'.

5. The SEND system remains too dependent on education, and has not yet delivered a unified education, health and care approach

LA and health service leaders and national bodies were keen to ensure recognition of some areas of progress since the SEND reforms in bringing together education, health and care services to support children and young people with SEND. They argued that the creation of the DCO / DMO role had been pivotal in creating a structure for bringing health services' contributions to support for children and young people with SEND into the SEND system. Many also highlighted the value of creating an equivalent role within children's social care services. Furthermore, LA and health service leaders and national bodies drew attention to the development of formal partnership governance and decision-making structures that had enabled joint planning and commissioning of support at the level of local services and of packages of support for individual young people.

In relation to dispute resolution specifically, some LA and health service leaders welcomed the extension of the role of the Tribunal to hear appeals relating to health and social care. They argued that, just as the local area SEND inspection framework had created a powerful incentive for education, health and care services to work together – or risk a negative inspection outcome – so too had the extended appeals powers of the Tribunal had aided the development of joint working in potentially complex cases to avoid disagreements and disputes arising. As one local SENDIASS leader put, 'People can now say to health and social care services, "Are you aware that you could be included in a Tribunal case?".' Local leaders and national bodies argued that this had had a galvanising effect on leaders and had helped services work together around potentially complex cases. This chimes with the findings of the evaluation of the extended appeals pilot, which found that health and social care needs were better described in EHCPs and that LAs and CCGs reported a positive impact on joint working in terms of quality-assuring EHCPs, engagement with families and multi-agency processes to avoid and resolve disputes. At the same time, however, most of the LA SEND, children's services and health service leaders that took part in this research recognised that arrangements for dealing with disagreements and disputes across education, health and care in local areas were in the early stages and were not yet fully formed or mature.

Overall, the LA and health service leaders and national bodies that took part in this research did not consider that the extension of the Tribunal's remit had addressed one of the fundamental barriers within the SEND system, namely the dependence on LA education (SEND) services and the lack of full buy-in from health and care services. They argued that the lack of join-up between education and children's services, and specifically a lack of early help for families, could result in young people's needs escalating and demand being pushed into the statutory SEND system. Similarly, they argued that the pressure on local health services was leading to an increase in demand for EHCNAs and EHCPs as a means of securing health provision for young people. As one LA leader put it, 'We have whacky things we [the LA SEND team] have to do because we lack routes to access health and social care without an EHCP. Everything sits with the LA's SEND services, even when the needs are mainly health or social care.'

LA leaders argued that this lack of join-up was highlighted by the fact that parents or young people could not lodge appeals with the Tribunal where there were concerns about health or care assessments or provision unless there was an education (SEND) element present. They considered that this created a perverse incentive to seek EHCPs for medical or care-related reasons, and, where disputes did arise, to find an education element to appeal in order to be able to appeal a health or

care matter. From this perspective, it is unsurprising that LA SEND, children's services and health service leaders considered that processes for dealing with disagreements and disputes were largely led by LA SEND services, and multi-agency oversight of dispute avoidance and resolution was still in its formative stages in many local areas. One LA leader described how they had sought to instil a culture within local SEND services whereby a family lodging an appeal to the Tribunal was seen as a collective failure – the aim was for the system to work as one to avoid disputes reaching this stage. Without a strong commitment from education, health and care service leaders, it is difficult to foster this sort of approach.

We recognise that the challenge here is partly about the lack of join-up at local level, both between LAs and local health services, but also between the education and children's services departments within LAs. LA leaders and national bodies recognised that practice in this area was variable. Nevertheless, they argued that part of the challenge was also the mismatch between, on the one hand, the aim of the reforms to create an integrated education, health and care system for supporting young people with SEND and, on the other hand, the lack of alignment between the incentives and priorities for those services at national level. Colleagues who took part in this research argued that, despite the SEND reforms, the SEND system remained one where the bulk of responsibility rested on LA education (SEND) departments, where there was too great a risk that health and care services would struggle to balance their own priorities with fulfilling the aims of the SEND reforms. They argued that, despite some benefits of the extended appeals powers, dispute resolution arrangements underscored the imbalance in the responsibilities of education, health and care.

* * *

Chapter 4: What is needed to avoid disagreements and strengthen the way disputes are dealt with

'I see a lot of the same problems that I saw under the old regime.' (National body)

While much of what we have described in this report focuses on the trends in disagreements and disputes, and broader patterns, within the SEND system since the introduction of the SEND reforms in 2014, very little of what we have heard is new. In fact, the terms of the debate about disagreement avoidance and dispute resolution we heard are nearly identical to those recorded thirty years ago, in the period following the establishment of the Tribunal. In the figure below, we have set side-by-side, one the left-hand side, quotes drawn from the annual report of the Tribunal President in 1997, a report of the Education Select Committee in 1996, and a research report from the National Foundation for Educational Research (NFER) published in 1998, and, on the right-hand side, quotes from participants in the present research project in 2021-22.[29]

Figure 14: Comparison of the views from reports published shortly after the establishment of the Tribunal and comparing those to views expressed by participants in the present research project

	Views from reports published shortly after the establishment of the Tribunal (1996-8)	Views from participants in the current research (2021-22)
Increased rates of appeals to the Tribunal	*'The rise may result from a wider knowledge of the Tribunal's role, from a greater dissatisfaction with [LA] decisions or from a continuing pressure on the resources available for making provision in this area.'* (Annual report from the SEN Tribunal President, 1997)	*'LAs are applying their own criteria rather than law in terms of requests for assessments.'* (National body) *'As soon as we raise [money], people say "you only care about money". We have a duty around ensuring public value.'* (LA leader)
Definition of SEN	*'The relativity and circularity of this definition … has resulted in numerous disputes between [LAs], professionals and parents, some of which have been subject to appeals.'* (NFER research report, 1998)	*'Nationally, LAs are making unlawful decisions – not because they are doing something wrong, but thresholds for EHCNAs are so low. … The issue is that the legal framework is not fit for the world we are in.'* (LA leader)
Tension between individual child and all children	*'There is a continuing tension between a Tribunal's decision, which is made 'in the interests of the child', and an [LA's] allocation of resources to meet the needs of all children with special educational needs for whom it is responsible.'* (Select Committee report, 1996)	*'The system is built on interest of one child versus the interests of all children. Parents think about their own child versus LAs making decisions in the context of interest of all children. It is a flaw of the system.'* (Local SENDIASS leader)
Disjoin between LA and school responsibilities	*'Difficulties may arise because the Tribunal is holding the [LA] to account for spending decisions which are the responsibility of school governors.'* (Select Committee report, 1996)	*'Decisions taken by individual schools make a big impact on the system, but this is outside of LA control.'* (Local SENDIASS leader)

Key themes that were prominent in the debates in the late 1990s and remain at the heart of the present debate include –

- challenges relating to the relativity and circularity of the definition of SEN, and the levels of need that should be met from within resources normally available in mainstream education;

[29] The first two reports are not available online, but are quoted in the third: Evans, J., 1998, *Getting it right: LEAs and the Special Educational Needs Tribunal*, NFER, which is available here: https://www.nfer.ac.uk/media/1330/90003.pdf.

- the tension between, on the one hand, decisions made about provision to meet individual children and young people's needs and, on the other, the responsibility to use public resources to ensure that there is provision to meet the needs of all children and young people; and
- the mismatch between LA and school responsibilities, meaning that within the SEND system LAs are held to account for disputes that may arise because of decisions taken by individual settings, schools or colleges (over which LAs have less direct control now than in the 1990s).

For that reason, as well as the trends described in Chapter 2, it is difficult to make the case that the SEND reforms have achieved the stated aims of resolving disagreements earlier and reducing the need for judicial resolution. The period since the introduction of the SEND reforms has seen changes that have placed increased demand and strain on the SEND system and dispute resolution arrangements. Crucially, in this period, not only have the absolute *number* of appeals increased, so too has the *rate* of appeal.

The latter point is an important one, but is often overlooked in debates about disputes and appeals in the SEND system. For example, it has been reported to us during the present research project that, while the *numbers* of appeals to the Tribunal have increased, the *rate* has remained steady. This point is used to make the case that the SEND system has not become more adversarial since the SEND reforms, but that the increase in disputes is simply a consequence of the increase in demand the wider system is handling. For example, in March 2020, Jonathan Slater, then DfE Permanent Secretary told the Public Accounts Committee,

> This is not a new problem; it is not a 2014 problem. The proportion of appealable cases going to the tribunal is exactly the same, to the nearest tenth of a percentage point, as it was before the 2014 reforms. It is in the nature of a system of this sort that there is going to be a dispute between parties from time to time, and the proportion remains at about 1.5%.[30]

Our research suggests that this is not the case. We would illustrate this in two ways.

1. **Tribunal appeals** – the rate of appeal to the Tribunal immediately before the reforms was 1.64%. At the time Jonathan Slater gave evidence to the Public Accounts Committee, the data available (from the 2018 calendar year) showed a rate of 1.6%, meaning that, at the time the evidence was given, his claim that the rate was the same 'to the nearest tenth of a percentage point' was accurate. What this misses, however, is the wider trend in appeal rates since the reforms. Following the reforms, the appeal rate dropped to 1.16% in 2015, and then rose in consecutive years reaching 1.79% in 2019, before dropping slightly to 1.74% in 2020. To illustrate this point more starkly, if we had seen 2015's post-reforms appeal rate of 1.16% in 2020, there would have been 2,616 fewer appeals – 5,227 appeals would have been registered, rather than 7,843. In other words, because the *rate* of appeal has increased, there are 50% more appeals than there would have been had the rate remained steady. Even if the rate had remained steady at 1.6%, there would be 9% fewer appeals in 2020 than were registered.

2. **Ombudsman cases** – as we described in Chapter 2, while LGSCO has seen an increase in complaints relating to SEND, they have also seen an increase in the proportion of cases that they have upheld (from 80% in 2017 to 89% in 2020-21). If the rise in complaints was solely a

[30] UK Parliament, Public Accounts Committee, *Support for children with special educational needs and disabilities*, May 2020, oral transcript here: https://committees.parliament.uk/work/35/support-for-children-with-special-educational-needs-and-disabilities/publications/oral-evidence/.

symptom of increased demand in the system, the "upheld rate" would not have shifted. The fact that it has suggests that there are other factors involved.

In addition, the period since the SEND reforms has also seen a significant shift in both the content of Tribunal appeals (an increase in the proportion of appeals relating to the content of EHCPs, including those relating to Section I, and a decrease in those relating to decisions not to assess), and in the way appeals are settled (a lower proportion withdrawn, and a higher proportion decided at hearing).

As we described in the previous chapter, our research has found that, in the same way that disputes are not reducible to poor practice by LAs and partner agencies, so too these trends are not inherent to current dispute resolution arrangements.[31] Instead, the factors that are driving the trends we have described in this report are symptomatic of challenges within the wider SEND system. This point has significant implications for future reforms of the SEND system. There are changes that could be made to strengthen disagreement avoidance and dispute resolution on their own, such as improving the availability of data on legal representation and the characteristics of families lodging complaints and appeals is important for transparency purposes. Similarly, the early feedback on the JADR process suggests that policies that encourage dialogue to narrow the scope of disagreements and disputes would also be beneficial. At a more fundamental level, it would be possible to consider whether alternative models of dispute resolution might be developed. During this research, we asked colleagues how disputes in other, similar areas of public policy were handled. Specifically, we explored the NHS's Individual Funding Request process, which takes a different approach to decisions about provision to meet needs beyond that which is normally available.[32] On their own, however, changes to disagreement avoidance and dispute resolution arrangements will not be sufficient to address the underlying causes of increased disagreements and disputes.

According to the LA leaders, partners and national bodies that took part in this research, addressing the underlying tensions in the SEND system and reversing the trends in disagreements and disputes will require three fundamental changes.

1. **Rebalance the SEND statutory framework to remove the tension between meeting the needs of an individual young person and ensuring there is provision that supports all children and young people** – some participants in this research argued that balancing demand and available resources is not only a constant in public service, but a fact of life. That is true up to a point, but being able to balance demand and resources, need and budget, requires that the person or service responsible has the ability to control one or the other – to increase resources to meet demand, or to reduce demand to fit available resources. A tension at the heart of the SEND system – and a longstanding one, judging by the fact it was noted by the Education Select Committee in 1996 and in the annual report of the Tribunal in 1997 – is that

[31] The former point is another theme that echoes the debates in the 1990s. As NFER's 1998 report found, 'there is an extremely complex relationship between structural factors and LEA policies and procedures which might influence the levels of appeal to the SEN Tribunal.'

[32] Details about the Individual Funding Request process can be found here: https://www.england.nhs.uk/publication/individual-funding-requests-for-specialised-services-a-guide-for-patients/. Under the Individual Funding Request process, there is the scope for requests to be submitted for funding in instances where patients have rare conditions that are outside the NICE guidelines. In these cases, only clinicals can make requests on behalf of their patients (rather than patients making requests themselves). Decisions, based on clinical exceptionality of need, likely clinical effectiveness of treatment, and the appropriate use of NHS resources, are taken by a panel of NHS clinicians, independent of the patient's day-to-day care. The decision can be appealed, but only if there are grounds for considering that the proper process was not followed in reaching a decision.

LAs operate within a finite budget provided by central government (and have limited scope to increase resources if demand increases), but also have few levers to shape demand for statutory SEND services to avoid this outstripping available resources. For the reasons we have described in Chapter 3, disputes can arise in settings, schools and colleges, over which LAs have little direct control or influence. The result of these disagreements can be that families seek an EHCNA and EHCP to ensure their child receives provision to meet their needs. At the same time, there is little clarity nationally about the level of need at which an EHCNA should be initiated or the level of provision that would require an EHCP to be issued. LA decisions are subject to appeal, which, when made, result in their decisions being overturned in 96% of cases.

In other words, we have a SEND system where resources are finite, LAs are held responsible for meeting the needs of local populations from within those finite resources, yet there is little that can be done to avoid demand increasing. Rebalancing the SEND system is no small task, but participants in our research argued that this needed to start with recognition and resolution of this tension. While increasing resources may have some effect in the short-term, increasing resources *alone* will not address the underlying causes of increased demand. Participants in this research argued that addressing those underlying causes would require revisiting the SEND statutory framework and providing greater clarity about the level of need that would require an EHCNA and EHCP at national level, or giving greater weight to the need for and content of local agreements about those levels. Participants in this research also argued that greater national clarity was required about what constitutes an unreasonable use of public resources, and how considerations about the efficient use of resources should be weighed to balance the needs of the individual young person with the need to provide for all young people with SEND in a local area.

There may be scope within the existing regulatory framework to provide some clarity about levels of provision that should be provided from within normally available resources, and thus the level of support requiring an EHCP, and how the efficient use of resources should be considered. Participants in this research argued, however, that addressing the issue fully would require a review of key provisions within the statutory framework. When it comes to disputes, it is the law, rather than the Code or policy guidance, that is the reference point. In a system with increasing numbers and proportions of disputes requiring judicial resolution, the statutory framework needs to provide clarity on these points.

2. **Strengthen expectations of, and accountability for, SEN support in mainstream education** – participants in this research argued many disagreements and disputes started due to families' dissatisfaction with the support offered in mainstream education, which, in the absence of national expectations and accountability, varied between settings, schools and colleges. The definition of SEN and the level of provision that would require an EHCP rest on a conception of what mainstream education should provide from within resources that are normally available. LA leaders argued that the conception of normally available resources had become less clear since the introduction of the 2014 Code of Practice, specifically the replacement of the definition of 'School Action' and 'School Action Plus' with 'SEN Support'. The current statutory framework relies on there being a definition of ordinarily available provision, but leaves it up to individual settings, schools and colleges to determine for themselves, with limited oversight, routes of complaint, or formal accountability for delivering.

   LAs are required to set expectations locally, but there is no formal mandate for this. LAs rely on the willingness of settings, schools and colleges to buy into such approaches, and, in

instances of dispute, such local approaches have no formal status in law. In the SEND system, there is no equivalent of the NICE guidelines that draw together evidence-informed practice for practitioners and transparency for families using their services. Action is needed to clarify those expectations nationally (potentially through revisions or additions to the Code or regulations), or to formalise the expectation that those expectations are set locally and to strengthen their status, so that their role in helping to resolve disputes is clear (which is likely to require changes to the statutory framework). This is likely to require changes to the statutory framework. Our research suggests that there would be value in having a set of best practice guidelines for the SEND system, updated regularly, but that had a formal status in law that provided clarity about the levels of needs at which provision requiring an EHCP should be provided.

Our research also suggests that there needs to be proper oversight and accountability at setting and school level for its delivery. There are changes that could be made to the existing accountability system – performance measures and inspection – that would provide greater focus on inclusion and SEN support. In the long-term, consideration is needed about how definitions of ordinarily available provision could be developed at national and/or at local level. Addressing the gap in the local of oversight of SEN support in mainstream education is likely to require changes to the statutory framework.

3. **Continue to strengthen joint working between education, health and care services** – this remains a longstanding challenge within the SEND system, and another of the aims of the 2014 reforms. Participants in the research highlighted areas of progress, including the development of the DCO / DMO role, the Local Area SEND Inspection Framework, and the extended appeals powers of the Tribunal. Local SEND system leaders and national bodies saw these as positive steps that had sought to bring roles, responsibilities and accountabilities for education, health and care partners into alignment, and create incentives for stronger joint working at local level. Nevertheless, the fact that there must be an education element to an appeal for disputes relating to health or care elements of an EHCP to be appealed appears to be indicative of a system that remains too heavily dependent on LA SEND services. The local area SEND inspection framework, as well as the extended powers of the Tribunal, have helped to encourage greater joint working. These are not, however, sufficient to foster and maintain effective joint working between education, health and care partners without providing greater clarity about the expectations on and responsibilities of education, health and care partners.

While there are actions that could be taken quickly and without legislative change, not least strengthening accountability for SEND at the level of educating institutions, resolving disputes and addressing their causes will require reforms of the statutory framework. As noted above, in a system in which growing numbers and proportions of disputes require judicial resolution, the statutory framework needs to provide clarity on these essential points. The extent of change and how it is to be achieved is a matter for the SEND Review, which is due to conclude shortly. From the perspective of this research, we would argue that the three sets of changes above would help to restore a degree of balance to the SEND system. Specifically, they would help to –

- halt the vicious circle of increasing demand for statutory provision depleting capacity for preventative services and high-quality, person-centred casework;
- provide concrete expectations of, oversight of, and accountability for SEN support and inclusion in mainstream education, that would in turn improve transparency to families and the confidence of parents / carers that their child's needs would be met; and

- encourage a genuine, multi-agency education, health and care system, with appropriate routes for resolving disagreements and disputes relating to health, care or education needs, or a combination thereof.

* * *

List of acronyms used in this report

BESD – behaviour, emotional and social difficulties

CCG – clinical commissioning group

CAMHS – child and adolescent mental health services

DCO / DMO – Designated Clinical / Medical Officer

DfE – Department for Education

EHCNA – education, health and care needs assessments

EHCP – education, health and care plan

HI – hearing impairment

IDACI – Income Deprivation Affecting Children Index

JADR – judicial alternative dispute resolution

LA – local authority

LD – learning difficulties (SpLD, MLD, SLD, PMLD – specific, moderate, severe or profound and multiple learning difficulties)

LGA – Local Government Association

LGSCO – Local Government and Social Care Ombudsman

MoJ – Ministry of Justice

NFER – National Foundation for Educational Research

NHS – National Health Service

NICE – National Institute of Clinical Excellence

PD – physical difficulties

SEMH – social, emotional and mental health needs

SENCO – special educational needs co-ordinator

SEND – special educational needs and disability

SENDIASS – special educational Needs and disability information, advice and support service

SLCN – speech, language and communication needs

VI – visual impairment