

Birmingham City Council

Education, Children and Young People Overview and Scrutiny Committee

Wednesday 19th July 2023



Subject: SEND Tribunal Appeals in Birmingham
Report of: Helen Ellis, Director of SEND & Inclusion
Report author: Kate Harvey, Head of SEND Resolution

1 Purpose

- 1.1 To update members on the process for SEND tribunals including data on delays and trends.

2 Recommendations

- 2.1 The Committee to agree any comments / recommendations

3 Any Finance Implications

- 3.1 No direct financial implications resulting from this report

4 Any Legal Implications

- 4.1 The Council must comply with its legal duties under Part 3 of the Children and Families Act 2014, the Special Educational Needs Regulations 2014 and the SEND Code of Practice 2015.

5 Any Equalities Implications

- 5.1 The Council has a Public Sector Equality Duty under the Equality Act (2010) to have due regard to the need to:
 - Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
 - Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

5.2 The Committee should ensure that it addresses these duties by considering them during work programme development, the scoping of work, evidence gathering and making recommendations. This should include considering: how policy issues impact on different groups within the community, particularly those that share a relevant protected characteristic; whether the impact on particular groups is fair and proportionate; whether there is equality of access to services and fair representation of all groups within Birmingham; whether any positive opportunities to advance equality of opportunity and/or good relations between people are being realised.

6 Appendices

6.1 'SEND Tribunal Appeals in Birmingham' report

Birmingham City Council

Education, Children and Young People Overview and Scrutiny Committee

19 July 2023

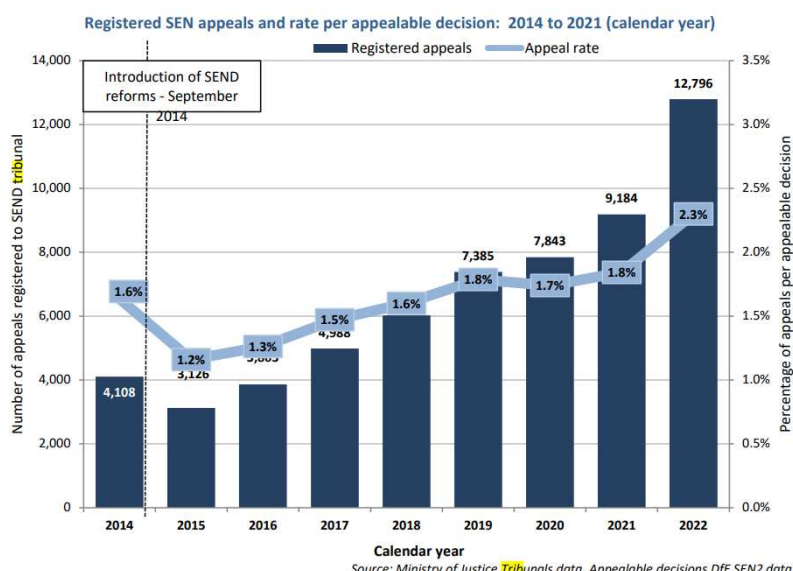


Subject: SEND Tribunal Appeals in Birmingham
Report of: Helen Ellis, Director of SEND & Inclusion
Report author: Kate Harvey, Head of SEND Resolution

1 Background and Context

- 1.1 The First-Tier Tribunal (Special Educational Needs and Disability) is an independent judicial body which hears appeals related to SEND.
- 1.2 Parents and Young People (YP) can appeal to the SEND Tribunal against the following decisions¹
 - The decision of a LA not to secure an EHCNA or a reassessment (NTA)
 - The decision of a LA not to make an Education, Health and Care Plan (NTI)
 - Sections B, F and/or I of a final Education, Health and Care Plan (EHCP)
 - The decision not to amend the EHCP following a review or reassessment
 - The decision of an LA to cease to maintain an EHCP (CTM)
- 1.3 Local Authorities must respond to and outline its position in each appeal. It must submit all documents relevant to the appeal, even if those which are not supportive of its position. Once a final decision is made, Local Authorities have a statutory duty to comply with orders of the SEND Tribunal.
- 1.4 Since the 2014 reforms, the number of SEND Tribunal appeals has risen across England, from 4,108 in 2014 (equivalent to 1.6% of appealable decisions) to 12,796 in 2022 (equivalent to 2.3% of appealable decisions).

¹ Section 51 Children and Families Act 2014



1.5 In 2021/22 there were 9,076 outcomes in relation to SEND appeals, an increase of 20% compared to 2020/21, as detailed below:

	2020/21	2021/22
Total outcomes	7,554	9,076
Withdrawn	11% (826)	11% (1,035)
Conceded	25% (1,903)	27% (2,441)
Outcomes decided by tribunal	64% (4,825)	62% (5,600)
<i>Of decided, part in favour of appellant</i>	<i>96% (4,651)</i>	<i>96% (5,393)</i>

3

1.6 Due to the increasing appeal numbers and hearings required, the SEND First Tier Tribunal (not the Birmingham resolutions team) is currently experiencing capacity issues. Apart from in limited cases, appeals were being scheduled on a 49-week timetable (from registration to final hearing) in January 2023 (compared to 16 weeks in January 2022). For appeals received in June 2023, this has reduced to 31 weeks.

2 Statistics and analysis of trends

Appeal numbers

2.1 In the last 5 years, Birmingham have received the following number of appeals:

Year	Appeals registered	Total Appealable Decisions	SEND Tribunal Appeal Rate
2018	265	10,214	2.6%
2019	295	9,793	3.0%
2020	261	10,365	2.5%
2021	371	11,205	3.3%

² [Special educational needs and disability: an analysis and summary of data sources \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

³ [Special educational needs and disability: an analysis and summary of data sources \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

2022	612	12,503	4.9%
-------------	-----	--------	------

- 2.2 In 2022, Birmingham received its highest ever number of appeals – a 65% increase on the previous year. The rate of appeals to the Tribunal was also significantly higher than the national average (2.3%).
- 2.3 Analysis of the appeals received in the first 6 months of 2022 against 2023 shows there has been a 21% reduction in the appeals received⁴ in 2023. Based on the figures in 2023 to date, Birmingham is on course to receive around 408 appeals this year⁵, which would be a 33.3% reduction in appeals received.
- 2.4 In June 2022, SENAR established a dedicated Mediation team. The Team Manager is an experienced LA senior manager, and the Mediation officers are from a range of backgrounds (legal, education, other LAs). The team works with CYP, families, settings, and other stakeholders to resolve disputes and concerns. There has been a 3.15% increase in mediation requests in 2023.⁶
- 2.5 Of the mediation meetings held in 2023, 48.6% of LA decisions were upheld. Of these, only 9.7% proceed to an appeal.⁷

Appeal types

- 2.6 Between January 2022 and June 2023, Birmingham City Council received 836 appeals. The breakdown of the nature of these appeals was:

Appeal Type	Total	Percentage
NTA	160	19.1%
NTI	57	6.8%
Section B	1	0.1%
Section B & F	14	1.7%
Section B & I	4	0.5%
Section F	7	0.8%
Section F & I	33	3.9%
Section I	479	57.3%
Sections B, F & I	69	8.3%
CTM	12	1.4%
Total Appeals Registered	836⁸	

- 2.7 When comparing these figures to the last national figures⁹:
- The number of NTA appeals is lower than the national figure of 27.9%
 - The number of NTI appeals is higher than the national figure of 8.8%

⁴ 291 appeals received between Jan – Jun 2022, compared to 229 received between Jan – Jun 2023

⁵ Based on average monthly appeals received (34 x 12)

⁶ Comparing Jan – Jun 2022 and Jan – June 2023

⁷ Based on data from Jan – Jun 2023

⁸ Of these 16 were registered as Extended Appeals (Health & Social Care)

⁹ [Tribunals SEND 21-22 Tables.ods \(live.com\)](https://www.tribunals.gov.uk/SEND/21-22/Tables.ods)

- The number of appeals that are registered against Section B (needs) and/or Section F (provision) in Birmingham is 14.8%, significantly lower than the national figure of 37.9%
- In contrast, the number of appeals that include Section I (placement) is 70.0% in Birmingham, significantly higher than the national figure of 54.4%
- The number of CTM appeals is slightly higher than the national figure of 0.8%

2.8 It is clear from these figures that the main driver for appeals in Birmingham relates to Section I (placement). The breakdown of placement types sought in Section I appeals¹⁰ registered January 2022 and June 2023 is:

Setting type sought	Number	Percentage
Mainstream	47	8.0%
Mainstream with Resource Base provision	38	6.5%
Special	428	73.0%

2.9 The requests for specialist provision are linked to several factors including lack of confidence in mainstream settings and sufficiency of specialist placements across the City for those CYP who require them.

2.10 Analysis of the appeals received in the first 6 months of 2022 against 2023 shows:

- 45.2% reduction in the NTA appeals
- 53.6% reduction in the NTI appeals
- 10.7% reduction in appeals against EHCPs, including a 14.5% reduction in Section I appeals
- 50% reduction in CTM appeals

Outcomes of appeals

2.11 National data indicates that around 96% of appeals are determined in favour of the parents/young person (appellant). The national figures do not breakdown outcomes in more detail. For example, an appeal against Sections B, F and I could result in some amendments to Sections B and F being ordered, but the Section I aspect being determined in favour of the LA. This outcome is still recorded as being in favour of the appellant. The figures therefore do not provide a fully accurate picture of the outcomes in SEND appeals.

2.12 In recording outcomes in appeals, the Birmingham Tribunal Team record how the appeal was resolved and then who the appeal was determined in favour of based on the overall outcome. This provides more accurate reporting of the outcomes in appeals.

¹⁰ 586 appeals

2.13 The table below outlines a breakdown of the outcomes of concluded appeals from January 2022 to June 2023 in Birmingham:

Outcome of Appeal	Total	Percentage
Appeal struck out ¹¹	8	1.3%
LA barred	0	0.0%
Conceded ¹²	126	19.9%
Withdrawn by appellant	57	9.0%
Consent Order:	301	47.6%
Upheld in full	31	10.3%
Upheld in part - Compromise	85	28.2%
Upheld in part - Mostly LA	31	10.3%
Upheld in part - Mostly parents/YP	154	51.2%
Decision after final hearing:	140	22.2%
Dismissed	23	16.4%
Upheld in full	79	56.4%
Upheld in part - Compromise	5	3.6%
Upheld in part - Mostly LA	8	5.7%
Upheld in part - Mostly parents/YP	25	17.9%
Total Concluded Appeals	632	

2.14 These figures show that in Birmingham:

- Most appeals are resolved without the need for a determination by the Tribunal (67.6%) ensuring prompt resolutions for the CYP and their families.
- Overall, 65.7% of appeals were resolved in favour of the parent/YP, 9.8% were resolved in favour of the LA and 14.2% of outcomes equally in favour of parents/YP and the LA (compromise).
- Whilst Birmingham appeals are predominantly resolved in favour of the parents/YP, these figures are significantly lower than the national figure of 96%.
- 22.1% that proceed to a final hearing were determined in favour of the LA and 74.3% were determined in favour of parents/YP

Representation in appeals

2.15 Appeals to the SEND Tribunal can be registered and managed by parents/YP without any support or representation. Many families do not have representation

¹¹ Usually due to failure of the appellant to comply with Tribunal directions

¹² LA did not oppose the appeal

in appeals and the Tribunal service is experienced in supporting parents and carers representing themselves through the process.

- 2.16 There are various sources of support parents/YP can access if they wish. Free support can be obtained through SENDIASS or charitable agencies (e.g. IPSEA, SOS SEN!). Parents/YP who are eligible for legal aid can seek free legal assistance from a legal aid Education Solicitor. Alternatively, parents/YP could pay privately for legal representation or advocacy services.
- 2.17 The table below outlines a breakdown of the recorded representatives in appeals from January 2022 to June 2023 in Birmingham:

Representative	Total	Percentage
Unrepresented	236	28.2%
SENDIASS	488	58.4%
Legal representation	42	5.0%
Non-legal representation ¹³	62	7.4%
Other ¹⁴	9	1.1%

- 2.18 Further analysis of the figures is required to provide a current picture of representation in SEND appeals due to the changes in Birmingham's SENDIASS service to realign to National Standards. The table below compares the recorded representatives in 2022 against 2023 (up to June 2023):

Representative	2022 Jan – Dec		2023 Jan – Jun	
	Total	%	Total	%
Unrepresented	76	12.5%	160	69.9%
SENDIASS	464	76.6%	24	10.5%
Legal representation	26	4.3%	16	7.0%
Non-legal representation	35	5.8%	27	11.8%
Other	4	0.7%	5	2.2%

- 2.19 The figures show that more parents are not supported or represented in appeals than are in appeals registered in 2023.
- 2.20 Analysing the outcomes of appeals registered in 2023, 73.6% were resolved without the need for a determination by the Tribunal and 68.2% of appeals were resolved in favour of parents/YP. This data shows that there has not been a

¹³ Advocacy services

¹⁴ SENCO/ family/friends

negative impact on the resolution or outcomes of appeals due to changes in the support provided by SENDIASS.

3 Conclusion

- 3.1 2022 was a record year in Birmingham for numbers of appeals received, a trend mirrored across England. The figures for 2023 to date indicate a reduction in appeal numbers.
- 3.2 The benefits of having a dedicated and specialist Tribunal team in Birmingham are shown in the analysis above. More appeals are resolved without the need for a final hearing ensuring prompt outcomes for CYP and their families.
- 3.3 Educational placements continue to be the primary reason for appeals, with requests for specialist provision remaining the main provision sought. Improvements in mainstream inclusion and support and robust sufficiency planning are key to managing the demand for specialist provision across the City.
- 3.4 A draft strategy to ensure there are sufficient specialist places for the needs of our children, in the right locations in city, has been developed. Commissioning and pupil place planning teams are working proactively with SENAR to create as many specialist places as possible to meet the needs of pupils who currently need them. We are working in partnership with our existing providers to develop solutions for immediate need for places.
- 3.5 Tribunals are not just a SENAR issue. They require an overarching, partnership approach with sustained commitment from all partners to ensure CYP receive the support they require to thrive.