



Ministry of
JUSTICE



Department
for Education

Consultation on a change to the rate of appeal to the Special Educational Needs and Disability Tribunal

This consultation begins on 14 December 2017

This consultation ends on 9 February 2018

About this consultation

To:	All persons with an interest in SEND Tribunals and appeals made to them.
Duration:	From 14 December 2017 to 9 February 2018
Enquiries (including requests for the paper in an alternative format) to:	Matthew Funnell Ministry of Justice 7th Floor 102 Petty France London SW1H 9AJ Email: cajs@justice.gsi.gov.uk
How to respond:	Please send your response by 9 February 2018 by completing the on-line survey at: https://www.surveymonkey.co.uk/r/8HZCXJS or send to: Matthew Funnell Post Point 7.02 Ministry of Justice 102 Petty France London SW1H 9AJ Or email it to: cajs@justice.gsi.gov.uk
Response paper:	A response to this consultation exercise is due to be published in March 2018 alongside the Tribunal and Gender Recognition Certificate Statistics publication on the Ministry of Justice website at www.justice.gov.uk

This consultation paper sets out proposals for changes to the Ministry of Justice's Special Educational Needs and Disability (SEND) statistics for England and Wales.

The consultation falls within the scope of the Code of Practice on Consultation and follows the seven consultation criteria set out at the end of this consultation.

This paper has been released alongside the Tribunals and Gender Recognition Certificate Statistical Bulletin to open a consultation with stakeholders.

Introduction

Existing appeal rates

The Tribunals and Gender Recognition Certificate Statistics Quarterly bulletin¹ publishes data annually in December on rates of appeal to the SEND tribunal, within the annual SEND tribunal tables. The number of appeals to the SEND tribunal is published quarterly.

There are two purposes for the publication of the rate of appeals, in addition to the number of appeals:

- It enables **comparisons over time** to consider the impact of changing population on number of appeals registered.
- It enables **comparison between Local Authorities** to allow for their different sizes.

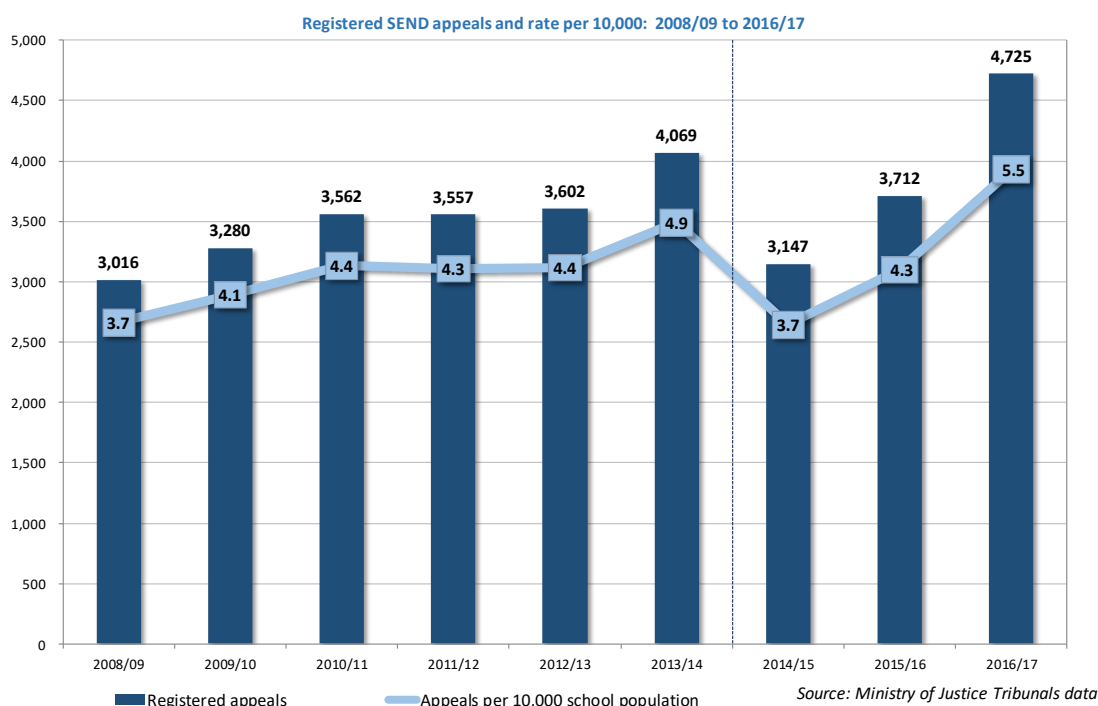
The current rate is calculated as:

$$\frac{\text{Number of appeals registered with SEND tribunal}}{\text{School population}}$$

and is presented for each Local Authority as a rate based on the overall number of children in schools, i.e. 'per 10,000 of the population in all schools based on the January school census.

In the academic year 2016/17, 4,700 appeals were registered with the SEND tribunal, and the rate of appeals was 5.5 per 10,000-school population.

Figure 1: Registered appeals to the SEND tribunal and associated rate of appeal



¹ <https://www.gov.uk/government/collections/tribunals-statistics>

Policy change and expected impact on appeal rates

The Special Educational Needs and Disability (SEND) reforms set out in the Children and Families Act 2014 (the 2014 Act), include the replacement of Statements of SEN and Learning Difficulty Assessments (LDAs) with person-centred Education, Health and Care (EHC) needs assessments and plans. This extended the coverage of support, across education, health and social care to ensure that each of the services were organised with the needs and preferences of the child and their family firmly at the centre, from birth up to the age of 25. Education, Health and Care (EHC) plans are legal documents that set out the education health and social care support a child or young person with SEND requires when their needs cannot be met by resources available to mainstream early years providers, schools and post-16 institutions. They are focused on the outcomes the child or young person wants to achieve and set out how the services will work together to support those outcomes.

The number of families who can register an appeal with the SEND tribunal has increased as a result of the extension of EHC plans to those aged 0-25 (with certain additional criteria attached to the upper age group) where previously statements of SEN covered only school aged children and those in the early years; the granting of appeal rights to young people themselves and those in custody; and in the short term because the transfer process from SEN statements and Learning Difficulty Assessments (LDAs) to EHC plans has opened up new opportunities to appeal.

The SEND reforms are specifically designed to make the support system less adversarial. A review was undertaken to assess how well the disagreement resolution arrangements established under the Children and Families Act 2014 are working for children and young people with SEND and their families. The outcome of the review was published² on 29 March 2017 and suggested we amend the appeal rate.

As mentioned above, the rate of appeal currently is calculated from the number of appeals registered with the SEND tribunal per year and shown as a rate per 10,000 of the school population.

Only certain local authority decisions regarding EHC plans can be taken to the SEND Tribunal. Even with an appeal rate that includes the eligible age range for the whole population in the denominator, most of this population would not actually be able to make an appeal. One of our suggested measures takes a different approach to considering the appeal rate and looks at the rate based on the eligible opportunities to appeal, rather than the age of the cohort.

² <https://www.gov.uk/government/publications/send-disagreement-resolution-arrangements-in-england-review>

The case for change

The Ministry of Justice and Department for Education have been monitoring the increase in appeals in relation to those aged 0-5 and 16-25 to assess whether or not the expected increase in appeals has materialised.

The table below shows the percentage of registered appeals by age of appellant – this clearly demonstrates an increasing trend in the percentage of appeals made by ‘out of age’ appellants, particularly those aged post-16. In 2016/17, appeals from those aged post-16 accounted for 12% of registered appeals – this proportion has increased year on year from 1% in 2013/14. Appeals for those ‘out of age’ accounted for almost a fifth of all appeals in 2016/17.

Table 1: Percentage of registered appeals by age of appellant

Academic year	Age Range		
	0-5	5-16	Post-16
2013/14	10%	89%	1%
2014/15	10%	85%	5%
2015/16	8%	81%	11%
2016/17	7%	81%	12%

As a consequence, we are now considering how best to calculate rates of appeal to take into account a wider population and the decisions that are eligible for appeal whilst making sure these rates fit coherently alongside existing rates for previous years, thereby providing a comparable time-series of SEND tribunal appeal rates.

How to respond

The options presented within this consultation aim to achieve a significant improvement in terms of delivering:

- **Relevant, accurate and reliable** measures of appeal rates, following extension to cohort now able to appeal decisions at the tribunal and the actual opportunities to appeal;
- **Coherence:** utilising data that are from established and related sources, and fulfil other stated criteria;
- **Timely information:** producing data frequently enough to track progress, and quickly enough for the data to still be useful, ideally representing up-to-date and equivalent reporting periods as the underlying data reported each publication;
- **Comparability:** facilitating comparison over time with previous and future annual rates, and allowing for geographic comparisons (across Local Authorities); and

Consultation on SEND Tribunal Appeal statistics

- **Accessible and clear** methodology and rates that can be understood and are meaningful to stakeholders and customers.

Views are invited from all users of SEND tribunal statistics. In order to ensure we can develop these proposals and publish statistics in a timely fashion, please provide a response to this consultation **by 9 February 2018**.

Proposals for changes to the rate of appeal

Four potential options are suggested for how rates of appeal could be calculated and presented in future. Summary information for each option are presented below and further analysis of the data coverage and limitations of each option are presented at Annex A.

Option 1: No change - keep rate expressed as per 10,000 of school population

Despite the increase seen in appeals from 'out of age' appellants, the majority of appeals are lodged by those within the school population. Retaining the school population denominator as the basis for the rate calculation would continue to be appropriate for the majority of those lodging appeals. However, this doesn't reflect the wider coverage of those able to appeal following the SEND reforms.

Using population figures gives us an idea of how school population changes may affect the rate, however not all pupils in schools are eligible to appeal, only those with special educational needs who are appealing certain decisions by Local Authorities regarding EHC plans.

Impact of no change:

Not consistent with and does not reflect policy changes.

Option 2: Extend current school population figures with early years and further education figures

This option is very similar to option 1 in that it continues to use the current school population, but also captures data for early years (EY) and Further Education (FE) populations.

$$\frac{\text{Number of appeals registered with SEND tribunal}}{\text{Early Years + School + Further Education populations}}$$

However, this option has a number of limitations:

- The EY data covers a sub-section of the population that the SEND reforms extend to:
 - it covers those in funded places for 2, 3 and 4 year olds so doesn't give complete coverage of the extended age range
 - it will duplicate data for schools where early years places are in school provision – additional work would be required to take account of this overlap.
 - there is a lack of coverage of those aged under 2 years old given that the reforms covers all those from birth.
- The availability of FE data does not fit the current publication schedule for

the Tribunal and GRC statistics quarterly release e.g. the Local Authority level data for 2014/15 was published in April 2016. This option would therefore require using the previous years' cohort data as proxy for current year.

- The FE data at LA level is available for the following age groups 'under 19' and '19+' – only the first of these could be used as the second will include *all* older age groups so wouldn't be appropriate. However, the first of these would not completely reflect the group covered by the SEND reforms, adding only those 16-18 year olds in FE colleges and sixth form colleges onto existing school populations.

Impact of change:

This option gives a close fit to the current rate based on school population – although this will be because the school population will make up the majority of the denominator and adding EY and FE has extended the range to cover 2-5 and 18-19 year olds – which make up a smaller proportion of SEND appeals.

Option 3: Use population estimates from ONS mid-year estimates

Data available from the Office for National Statistics (ONS) allows for populations to be constructed to cover the required age ranges – three options are presented which cover the extended SEND appeal cohort to varying degrees.

- **Option 3.1 ONS mid-year estimates 5-15**
- **Option 3.2 ONS mid-year estimates 0-18**
- **Option 3.3 ONS mid-year estimates 0-25**

ONS mid-year population estimates are published annually in June – the data published in June 2017 relates to mid-2016, and could be used as the denominator for the appeals registered during the 2016/17 academic year. Population estimates are also published at Local Authority level.

Table 2 shows the impact of using each option for the ONS mid-year population estimate.

Table 2: Appeal rates based on differing population definitions

	Appeals rate (per 10,000)				
	Registered appeals	Current rate: school population	Population aged 5-15	Population aged 0-18	Population aged 0-25
2008/09	3,016	3.7	4.5	2.5	1.8
2009/10	3,280	4.1	4.9	2.8	2.0
2010/11	3,562	4.4	5.3	3.0	2.1
2011/12	3,557	4.3	5.3	3.0	2.1
2012/13	3,602	4.4	5.3	3.0	2.1
2013/14	4,063	4.9	6.0	3.3	2.4
2014/15	3,147	3.7	4.6	2.6	1.8
2015/16	3,712	4.3	5.3	3.0	2.1

There are also limitations to this approach:

- Comparisons with earlier years are limited – ONS estimates are based on where an individual lives rather than where they attend school, thereby introducing inconsistencies with the previous rate calculation. However, there is an argument that this would better reflect the relevant population, as parents and young people would register an appeal in their home LA which would be responsible for their EHC plan.
- Using a population estimate to cover all those aged 0-25 include those young people in higher education and outside of education i.e. individuals not eligible to apply for SEND appeals – which will produce under reported rates.

Impact of change

All of these options have an impact on the rate as an appeal can only be made regarding certain Local Authority decisions in respect of EHC plans, and therefore only a small number of pupils are eligible. There are also limitations specific to each of the options:

Option 3.1: over reports the rate of appeals

Demonstrated by comparing 5-15 year olds with school population – this option reduces the denominator as the school population would have included those pupils in schools who are under 5 and post-16 in schools. (see Table 2 above).

Option 3.2: under reports the rate of appeals

Will include population in FE, but also those who left education post-16 and are now in employment. However, data for future years will cover all those in compulsory education following age rise to 18³.

³ <https://www.gov.uk/government/publications/2010-to-2015-government-policy-young-people/2010-to-2015-government-policy-young-people>

Option 3.3: significantly under reports the rate of appeal

Will include post-16 and still in FE, but also those in HE or employment. This option overcounts the cohort which appeals are applicable to, reducing the rate significantly.

All three options have limitations in accurately reflecting the coverage of the cohort now covered by the policy reforms. However, our preferred option of the three available for option 3 is to use 0-18 population estimates - this would extend the population to cover 0-5, retain the school population, as well as account for the extension to compulsory education to 18-year olds (raised from 16 in 2015).

This would cover the majority of the cohort eligible to lodge an appeal, but there is the potential for the appeal rate to be artificially inflated as the denominator of the calculation would fail to include those aged 19-25.

Option 4: New rate based on appealable decisions

Research carried out by the Centre for Educational Development, Appraisal and Research (CEDAR) on behalf of DfE and MoJ reviewing arrangements for SEND disagreement resolution⁴ suggested an alternative to the existing rate of appeal and presents the number of appeals as a percentage of all instances where an appeal would be possible. It uses the annual SEN2 data collected from LAs and published by DfE.

The information collected in the SEN2 return is the only source of data on all statements of special educational needs (SEN) and education, health and care (EHC) plans maintained by individual local authorities. The SEN2 return is mandatory for all local authorities and collects aggregate local authority level information on children with statements of SEN or EHC plans⁵⁶

The SEND Tribunal considers and decides appeals against LA decisions regarding EHC needs assessments and plans. This includes decisions regarding refusal to carry out an EHC needs assessment or reassessment, refusal to issue, maintain or amend an EHC plan, the description of a child or young person's SEN in an EHC plan, the special educational provision specified in the plan, the school or other institution named or that no school or other institution has been specified.

⁴ SEND disagreement resolution arrangements in England: review:
<https://www.gov.uk/government/publications/send-disagreement-resolution-arrangements-in-england-review>

⁵ Further details on the SEN2 collection can be found at the SEN2 collection webpage:
<https://www.gov.uk/guidance/special-educational-needs-survey>

⁶ Latest published SEN2 data is available here: Statements of SEN and EHC plans: England, 2017 <https://www.gov.uk/government/statistics/statements-of-sen-and-ehc-plans-england-2017>

The total number of 'appealable decisions' can be calculated as:

- Number of initial requests for assessments refused (appeals against decisions regarding refusal to carry out an EHC needs assessment)
- Number of assessments completed and decision made not to issue plan (appeals against decisions regarding refusal to issue an EHC plan)
- Number of new EHC plans issued during the year (appeals against the content of plan – decisions regarding the description of a child or young person's SEN in an EHC plan, the special educational provision specified in the plan, the school or other institution named or that no school or other institution has been specified)
- Number with an EHC plan as at January each year (appeals following an annual review – decisions regarding refusal to carry out an EHC needs reassessment and refusal to amend an EHC plan)
- Number of EHC plans ceased because the special educational needs of the child or young person are being met without a statement or EHC plan (appeals against decisions regarding refusal to maintain an EHC plan)

This option is very different from the three options considered above in that it provides an alternative rate reflecting the actual opportunities to appeal, rather than adapting the existing rate calculation to better reflect the change in population. As a result, it is not possible to measure the impact of the change on existing rates – we have, however, looked at how a rate based on appealable decisions would impact on local authorities. Annex B shows how appeal rates for individual local authorities compare under each of the options proposed.

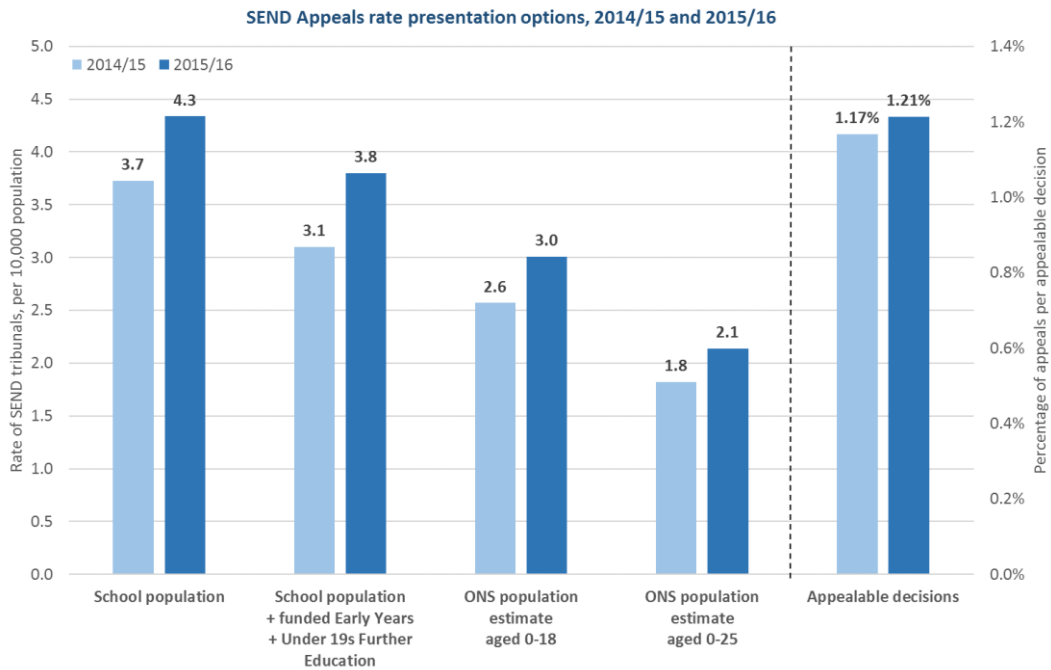
Calculation of an appeal rate based on all appealable decisions will allow us to identify the percentages of appealable decisions that are appealed and so might more accurately reflect the rate of appeal and how satisfied families are with the decisions made.

Calculation of an appeal rate based on all appealable decisions does have a drawback in that SEN2 data is not available to a timetable that would enable publication in December, alongside the existing Tribunals and GRC statistics quarterly bulletin. The appeal rate would need to be changed to a calendar year appeal rate (as SEN2 is collected on this basis) rather than an academic year appeal rate. As a result, publication of SEND rate of appeal data would need to be in June - we are asking users as part of this consultation for their views on whether or not this should impact on the publication schedule for the annual SEND tribunal statistics. Data currently published on a quarterly basis, i.e. receipts, disposals and caseload outstanding, would remain unaffected.

Summary of options and recommendation

Figure 2 below shows the rates for each option presented above for the last two academic years, since the introduction of the SEND reforms in September 2014.

Figure 2: Comparison of options considered within consultation



Based on the analyses carried out during the development of the consultation, our preference is to present **a new rate based on all appealable decisions** (option 4) subject to feedback from users in response to this consultation.

However, this has an impact on the timing of the publication of the rate of appeal – currently this is published in December each year alongside the annual SEND tribunal statistics, which are published on academic year basis. Due to the availability of SEN2 data on which the new rate will be based, we will be unable to publish the new rate until June of the following year. Users are asked specifically for their views on the impact to the publication timetable and associated data coverage, summarised in Table 3 below.

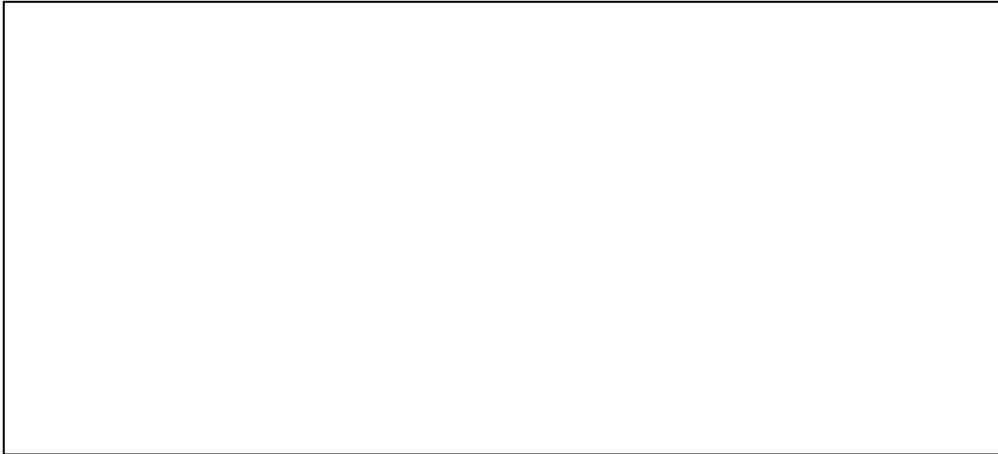
Table 3: Timing and data coverage of proposed options

Option	Reporting basis	Data available	Timing
Option 1: current rate - school population	Academic year 2017/18	June 2018	December 2018
Option 2: school population + EY + FE	Academic year 2017/18	June 2018 (school + EY) January 2019 (FE)	March 2019
Option 3: ONS mid-year population estimates	Academic year 2017/18	June 2018	December 2018
Option 4: new rate based on all appealable decisions	Calendar year 2017	May 2018	June 2018

Questionnaire

We would welcome responses to the following questions:

Q1: Do users agree that there is need to change and/or augment existing appeal rates to the SEND tribunal due to recent policy changes?



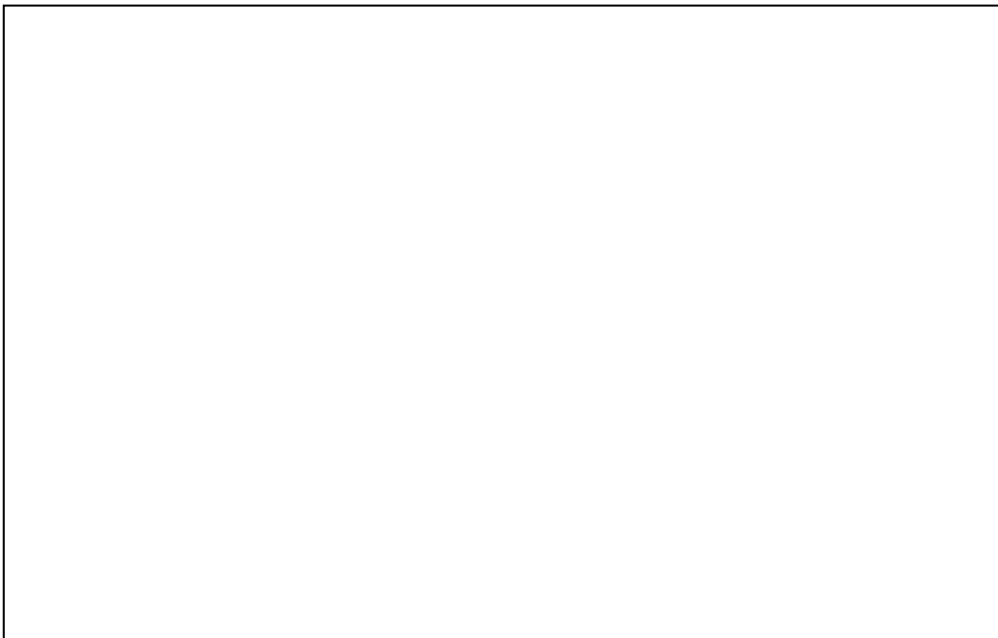
Q2: Do users agree with the recommendation that we discontinue the existing rates and publish a new rate based on all appealable decisions (Option 4)?



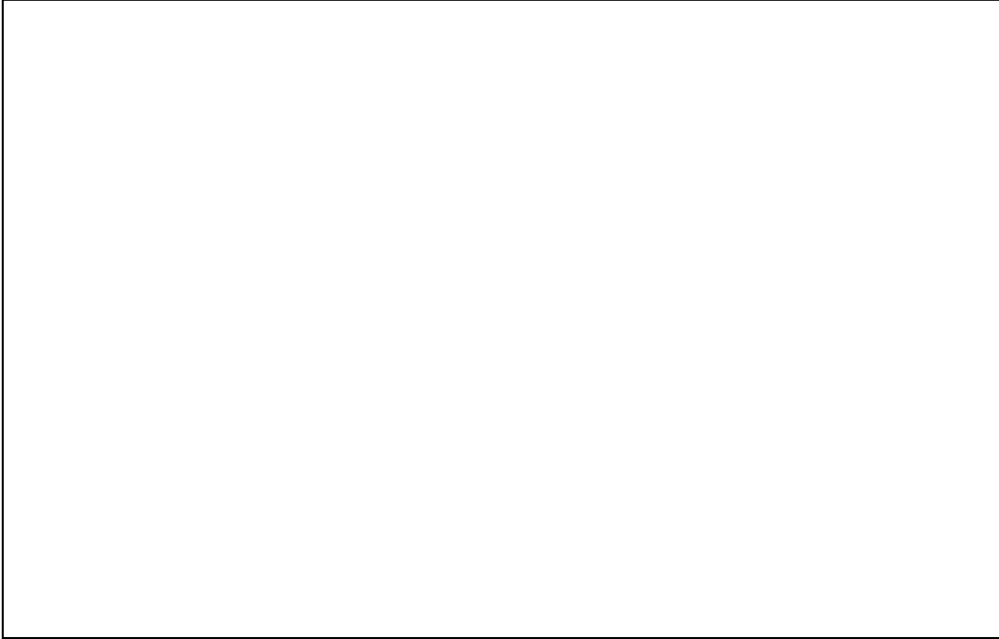
Q3: Moving to a new rate based on all appealable decisions will impact on the coverage of and publication timetable for rates of appeal. Do you have any feedback on the required changes to reporting i.e. moving to calendar year basis and publishing in June each year, rather than the preceding December?



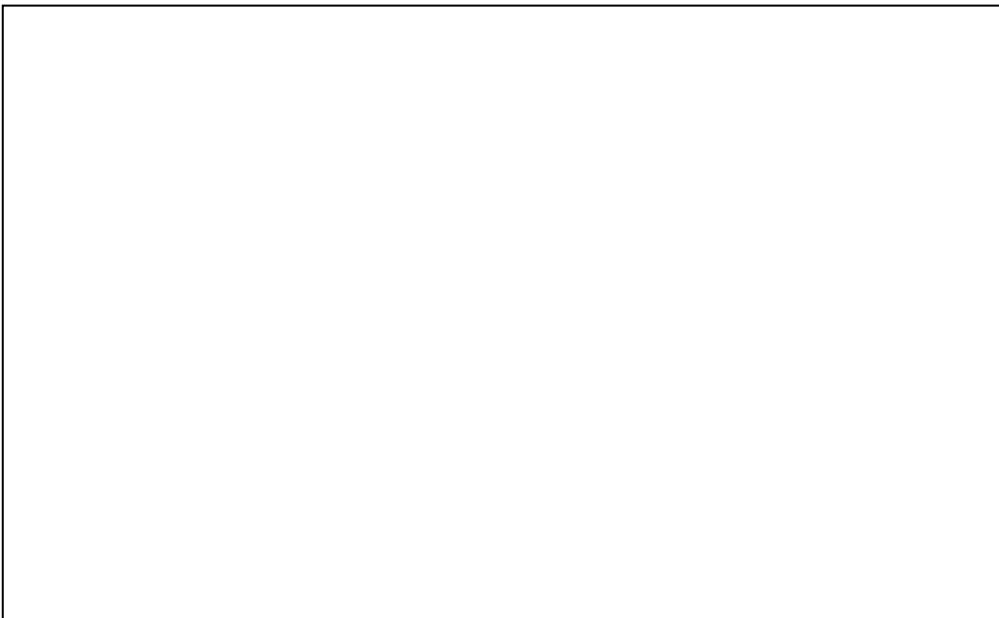
Q4: Do you think that this change to reporting should also be applied to the annual SEND tribunals statistics or should we continue to publish these in December each year as currently listed with the statistical release calendar to ensure timely and orderly release?



Q5: Do users have an alternative option not covered by this consultation?



Q6: Are there any additional comments you would like to make in relation to this consultation or on the SEND Tribunal publication chapter in general?



About you

Please use this section to tell us about yourself	
Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	(please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Thank you for taking part in this consultation.

Annex A: Data availability/timing and limitations

Data coverage	Availability/ timing	Limitations
School population (current denominator)		
School population only – includes Post-16 learners and under 5s in schools.	Pupil numbers published annually in June for that academic year i.e. January 2017 school population published June 2017.	<ul style="list-style-type: none"> • Does not cover full eligible population for SEND tribunals. The impact of this is not expected to be consistent across LAs as some LAs have smaller numbers Post-16 in schools. • LA level data here is based on school LA rather than home LA which is where the appeal is more likely to be registered. • The rate is based on population rather than appealable decisions so most of the population would not be eligible to appeal.
School population + Funded early years population + Funded further education participants		
This option expands the school population to cover: 2, 3 and 4 year olds in funded provision, and under 19s in further education in funded provision.	<p>Pupil numbers and early years' population numbers published in June for that academic year i.e. January 2017 numbers published June 2017.</p> <p>Latest FE data at LA level based on 15/16 academic year was published in January 2017 but next update not confirmed.</p>	<ul style="list-style-type: none"> • Data available from different sources at different times and FE data timings irregular. • Different data sources have different reference points – school and early years data based on numbers at census date in January, FE data based on participants during academic year. • FE data published based on 'under 19s' or 'over 19s'. Ideally, we would want numbers of funded learners participating in FE under 25. • These sources cover those in funded provision only, which wouldn't completely cover the eligible population for tribunals. • We would need to ensure early years data doesn't overlap with school data – figures for schools should not be included twice.

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Data coverage	Availability/ timing	Limitations
		<ul style="list-style-type: none"> • LA level data here is based on school LA rather than home LA which is where the appeal is more likely to be registered. • The rate is based on population rather than appealable decisions so most of the population would not be eligible to appeal.
ONS population estimates		
<p>Data available for individual ages so can define coverage to suit: we could use 0-25s age group to match definition of SEND reforms however, 0-18s age group may be better as Higher Education not included in SEND reforms, which affects LA comparisons.</p>	<p>Mid-year population estimates published each June for previous year i.e. Mid-2016 population estimate published June 2017.</p>	<ul style="list-style-type: none"> • This option means more of a change compared to the current denominator. This has more of an impact on some LAs e.g. City of London. • Timing of data availability may mean change in timing of annual release. • A decision would need to be made about which age range to use and all would have limitations. Although 0-25 age range would cover all population under SEND reforms, at LA level there would be an impact of HE migration on numbers, which would be an issue as HE not included in SEND reforms (only FE). The 0-18 age group would not suffer from impact of HE migration but wouldn't cover full eligible population (although numbers 19+ are a lot smaller – currently 3% of the total with a statement or EHCP). • The rate is based on population rather than appealable decisions so most of the population would not be eligible to appeal.
'Appealable decision' using SEN2 data		
<p>This rate was suggested in research carried out by CEDAR on behalf of DfE and MoJ on disagreement</p>	<p>Data is published annually in May based on the previous calendar year</p>	<ul style="list-style-type: none"> • This option is very different to the other options considered, whereas the others sought to amend the denominator to become a better fit with the new eligible

Consultation on SEND Tribunal Appeal statistics

Data coverage	Availability/ timing	Limitations
<p>resolution⁷ and presents the number of appeals as a percentage of all instances where an appeal would be possible. It uses the annual SEN2 data collected from LAs and published by DfE. The total number of ‘appealable decisions’ is calculated as:</p> <p>Number of initial requests for assessment refused + Number of assessments completed and decision made not to issue EHC plan + Number of new EHC plans issued during the year + Number of EHC plans ceased because the special educational needs of the child or young person are being met without a statement or EHC plan + Total number of statements or EHC plans in the system (minus newly issued to avoid double counting) to take into account opportunities to appeal following annual reviews</p>		<p>population, this option changes the interpretation of the appeals rate and considers, at national and LA level, the percentage of appeals per appealable decision.</p> <ul style="list-style-type: none"> • Due to the availability of the SEN2 data, if we were to use this option there would be an impact on the timing of the annual release and we would need to move from presenting the rate based on an academic year to a calendar year to align with the data collection period for the SEN2 return.

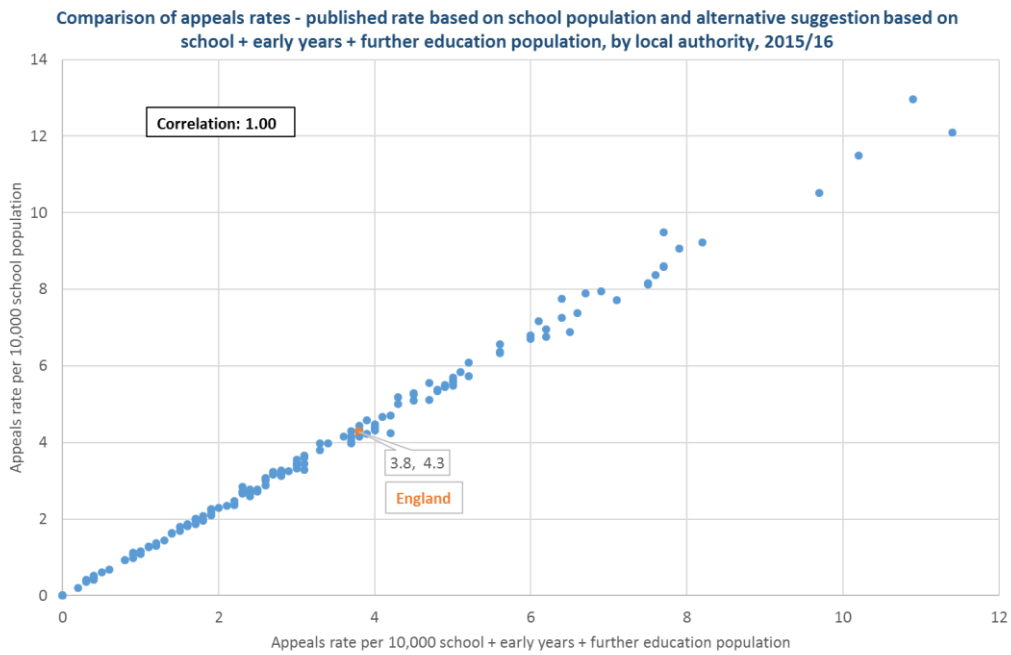
⁷ SEND disagreement resolution arrangements in England: review: <https://www.gov.uk/government/publications/send-disagreement-resolution-arrangements-in-england-review>

Annex B: Comparison of Local Authority appeal rates

Tribunals rates are presented at national and local authority (LA) level, and LA level figures enable comparisons across LAs. However, the impact of changing the method for calculating the appeal rate varies by LA, either because their composition of schools is different or because their SEN provision is set up in a different way.

Figure B1 compares the appeals rate based on the current presentation and the alternative which also includes funded early years and further education, because this calculation is dominated by the school population it is very similar to the existing rate and there are no outlier LAs.

Figure B1 – option 1 vs option 2



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Figure B2 presents the comparison with the appeals rate based on ONS population estimates (aged 0-18); there is still a very close relationship here, although there is one outlier in City of London LA, which may be due to the change from looking at where the pupil lives rather than where the pupil goes to school.

Figure B2 – option 1 vs option 3

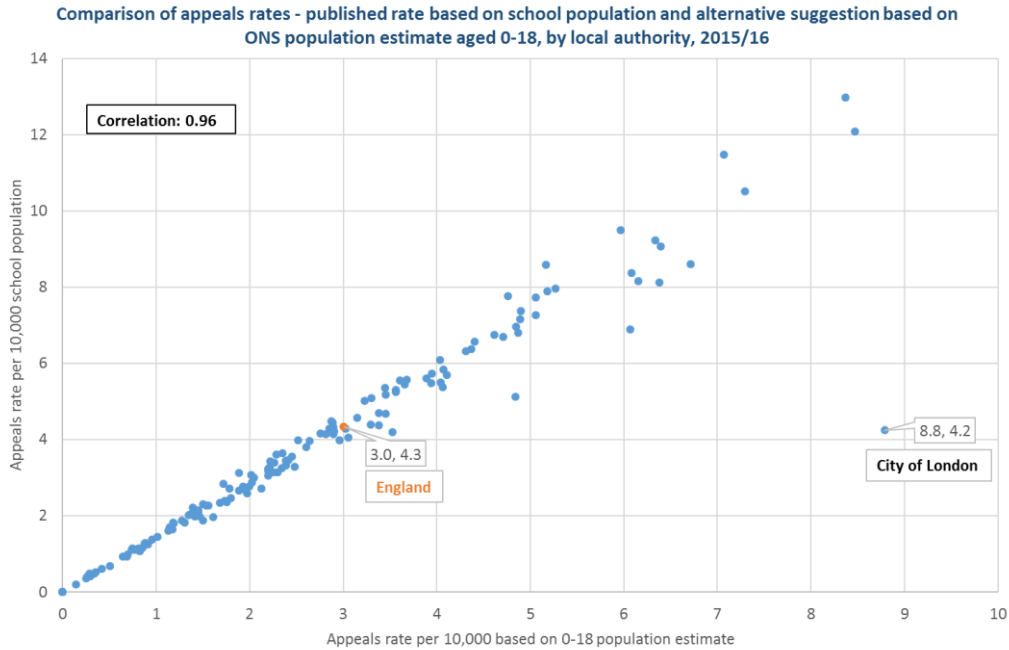
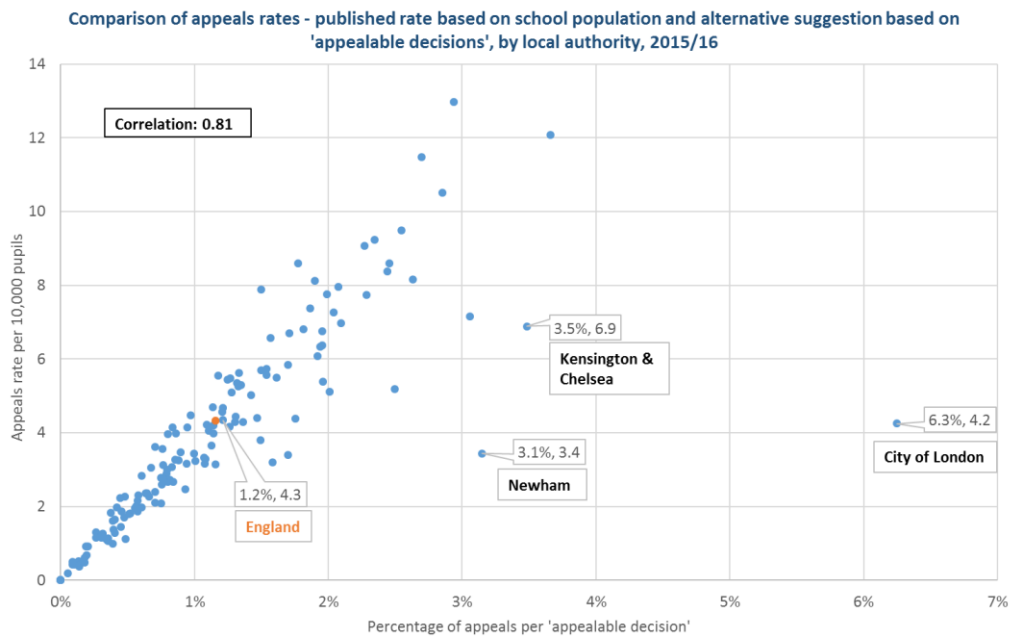


Figure B3 presents the rate based on 'appealable decisions' compared with the existing appeal rate based on the school population. Here the relationship between the rates is not as strong and there are a few outliers; City of London, Newham and Kensington and Chelsea, which may be due to the set-up of their SEN provision, and again the change from looking at where the pupil lives rather than goes to school.

Figure B3: Option 1 vs option 4



Source: Maj Tribunals statistics and DfE SEN2 data from LAs

Annex C: Data Sources

- **Tribunals statistics:** <https://www.gov.uk/government/collections/tribunals-statistics>
- **Schools, pupils and their characteristics: January 2016:**
<https://www.gov.uk/government/statistics/schools-pupils-and-their-characteristics-january-2016>
- **Education provision: children under 5 years of age, January 2016:**
<https://www.gov.uk/government/statistics/education-provision-children-under-5-years-of-age-january-2016>
- **FE data library: further education and skills:**
<https://www.gov.uk/government/statistical-data-sets/fe-data-library-further-education-and-skills>
- **Population Estimates for UK, England and Wales, Scotland and Northern Ireland: mid-2015:**
<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2015>
- **SEN2 publication: 'Statements of SEN and EHC plans: England, 2017':**
<https://www.gov.uk/government/statistics/statements-of-sen-and-ehc-plans-england-2017>

Consultation co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Ministry of Justice Consultation Co-ordinator Legal Policy Team, Legal Directorate 6.37, 6th Floor 102 Petty France London SW1H 9AJ