Written evidence from Judge Tudur

In response to the letter of request dated 13 February 2019, I will answer the questions set out in the letter in the order in which they were asked:

1. Are there any patterns or themes from SEND Tribunal cases since 2014?

    1.1. The major change which has occurred in the SEND Tribunal since the implementation of legislative changes in 2014 is the significant rise in the number of appeals registered. In 2014 -15, the Tribunal registered 3,147 appeals; in 2017 - 2018 (the latest figures published) 5, 679 appeals were registered by the Tribunal. As of the 19 March 2019, the Tribunal is predicted to register about 6,400 appeals. for the year 2018 - 2019. Indications are that the increase in appeal numbers is continuing.

    1.2. I am not aware of any change in the pattern of cases received, the nature of appeals made or themes arising from them since the change in the legislative framework in 2014. It is relevant to mention that the legislation extended the age range to 0 – 25 years and gave the appeal rights directly to young people over statutory school age, rather than their parents, so that the Tribunal now deals with a large number of such appeals in the 16 – 25 age range.

    1.3. The largest proportion of type of appeal registered with the Tribunal is against the decisions of local authorities (LAs) not to arrange an assessment of the special educational needs of a child, however this type of appeal does not form the major part of the Tribunal's work when a case progresses to hearing. The majority of appeals which the Tribunal decides at a hearing remain those that consider the content of an EHC plan – specificity of the description of special educational needs in Section B, specificity of special educational provision in Section F (special educational provision) and the educational placement to be named in Section I.

2. How are parents represented? Has there been an increase in parents being represented by barristers?

    2.1. The Tribunal does not gather data about the representation of parents or young people at a hearing.

    2.2. The representation of parents at the Tribunal is a very mixed bag: the majority make and present their own appeals either with advice from the Information, Advice and Support Services which the LA is required to make available to them under the provisions of the Children and Families Act 2014 or parental support organisations who provide free advice and support. It remains the case that legal advice, either privately commissioned or publicly funded under Legal Help, is sought in a minority of cases by parents or young people in the preparation of an appeal.

2.3. Others will pay for representation by unqualified representatives or direct access barristers. I cannot comment on the proportion of parents represented by barristers.

3. How are local authorities represented? Has there been an increase in local authorities being represented by non-in-house counsel?

3.1. The Tribunal does not gather data about the representation of local authorities at a hearing, so again I cannot respond to the query with any specificity.

4. Has there been an increase in cases being conceded before the case goes to court?

4.1. I assume this to be a query about the number of appeals registered which are conceded by the LA or settled prior to the final tribunal hearing.

4.2. Technical meaning of "conceded":

4.3. In legal terms, and pursuant to the provisions of the Tribunal Procedure Rules 2008 (as amended), an appeal can only be 'conceded' by a local authority where the LA has not provided a response to the appeal. They can, in those early stages of the proceedings, simply write to the Tribunal confirming that they do not intend to oppose the appeal and the Special Educational Needs and Disability Regulations 2015 provide that the concession is effective on the day after the LA notified the Tribunal in writing of their having conceded the appeal.

4.4. At any later stage, after the LA has provided a response to the appeal indicating that they oppose the appeal, the appeal can only be withdrawn or settled if the Tribunal consents. It is now well established that the expectation of the Tribunal is that where appeals are settled, the appeal will only be concluded by the Tribunal issuing a consent order or approving the parent or young person withdrawing the appeal.

4.5. Historically, the Tribunal has always experienced a very high level of late withdrawals and settlements of appeals very close to the final hearing. The volume of appeals concluded without a hearing was about 75 - 85%. A significant proportion of those cancellations were within 48 hours of the final hearing.

4.6. In June 2018, the judiciary decided that in order to understand the reasons for late cancellations or withdrawals by agreement, the Tribunal would reinstate the practice of refusing to accept applications for withdrawal or consent orders in an appeal within 48 hours of the hearing. This was implemented from the 20 June 2018. The result was that applications for consent orders and approval of withdrawals arrived earlier and within a very short time, the number of appeals settled on the day before the hearing or the day of the hearing reduced.

4.7. From the 1 October 2018, the Tribunal extended its refusal to accept applications for consent orders and withdrawals to five working

days before the hearing. As a result, the parties very quickly submitted their applications six working days before the hearing. There are still a number of appeals which are concluded on the day by consent but the Tribunal is better able to use its resources to ensure that tribunal panels are deployed to hear those cases which cannot be resolved otherwise.

4.8. Since 2014, the number of appeals which are successfully resolved prior to the final hearing has fallen. Analysis of the number of appeals which have been settled without a hearing indicates that as a percentage of appeals registered, the number is lower now than at any time in the history of the Tribunal. For the year 2017 – 18, the number of appeals concluded without a hearing was about 65%. This compares with about 75% of appeals concluded without a hearing in the year 2014 -15 and about 80% in 2013 -14. As a result, the Tribunal has been required to cover a far greater number of hearings than previously.

5. Does the judiciary have the capacity to deal with the number of cases and provide access to justice for all who take a case to Tribunal?

5.1. At present, the Tribunal does not have sufficient capacity to cover all of the appeals which require a final hearing, however, the Tribunal continues to meet its target of disposing of over 75% of its appeals within 22 weeks from registration. In fact, the target was met in 91% of cases in 2017-18 and the year to date figure to February 2019 is 90%.

5.2. The significant increase in the number of appeals registered, without a commensurate increase in the workforce, administrative or judicial, has meant that the Tribunal is no longer able to cover all the hearings required. In the past, this had happened very rarely and at peak times, when the Tribunal was dealing with a bulge in appeal numbers during the year, for instance, in June and July, as a result of appeals against decisions concerning a child or young person's transition between phases of education (such as primary to secondary school) and in January because the Tribunal does not list hearings during school holidays, leading to a "bunching" of hearings in January, after the Christmas break. In those situations, the Tribunal was required to postpone and relist the final hearing.

5.3. Since September 2018, the number of appeals which have had to be postponed has increased dramatically, not just because of the increase in the number of appeal registered but also the increase in the number of appeals requiring a hearing. As a result, judges consider daily, the list of hearings scheduled to take place in coming weeks, to make decisions about which appeals must be prioritised and heard and which can be postponed. Hearings which do not have a tribunal panel (a judge and at least one, if not two specialist members) are "stood down" and notice is given to the parties at least five working days ahead of the scheduled hearing that it will not go ahead. Work continues to try to ensure as many hearings are covered as possible.

5.4. Those hearings which are stood down are relisted with a new hearing date as soon as possible and identified as a "Priority Hearing" to

be heard with priority over any appeals not previously postponed by the Tribunal. The position has now escalated to a situation where on some days, only appeals which have previously being stood down are being listed. Every attempt is made to ensure that appeals are not being stood down twice for want of a tribunal panel, but it has happened.

5.5. On a positive note, the Tribunal has regularly supplemented its judicial complement by the assignment of existing judges from other jurisdictions into the SEND jurisdiction and held an induction course for 21 new judges during the first week in March 2019 and. The vast majority of new judges are not currently sitting in any other jurisdiction and it is hoped that they will be able to offer significant availability as soon as their induction process has been completed, which will help to alleviate the current shortage.

5.6. After the 15 February every year, however, the Tribunal's workload increases because that is the date by which all LAs must identify the next placement in the EHC Plans of pupils who are facing a phase transfer e.g. a move from primary to secondary school or the 31 March for secondary school to post-16 education. This is relevant because although the present appointments will make a difference, they are unlikely to be sufficient to solve the shortage whilst appeal numbers continue to rise.

5.7. A request has been made for a further 30 new fee paid judges to join the First-tier Tribunal SEND from the next generic Judicial Appointments Commission competition, which is due to be launched in March 2019 and likely to conclude in recommendations in January 2020 and additional assignments will be undertaken in the meantime.

5.8. The short answer is that the Tribunal does not have sufficient judges at present to cover all of the hearings required. Even if there was no further increase in the number of appeals registered by the Tribunal and requiring a hearing, this situation will not be fully remedied for at least a year, if not longer. Current indications are that the number of appeals received is still increasing, and that further appointments or assignments will be necessary. It is worth reflecting, however, that the administration secured a significantly higher allocation of sitting days in 2017 -18 and again in 2018 -19 which has enabled a much higher number of hearings to proceed than previously.

6. The Committee has heard that the system has become more adversarial – in your view could this be because the legislation has been drafted in such a way as to create such a system?

6.1. Nothing in the drafting of the Children and Families Act 2014 has created a system which is more adversarial than under previous legislation. The legislation sets out a safety net of rights for children and young people with SEND to ensure that their needs are identified and that they receive appropriate education to meet those needs. The Tribunal's role is to ensure that at particular stages in the process, local authorities comply with their statutory duties under the legislation.

6.2. In fact, the drafting of the Children and Families Act requires local authorities to arrange for parents and young people to receive free information and advice about their rights under the Act, requires LAs to enter into mediation if that is requested and places an obligation on parents and young people to receive information about mediation prior to making their appeal. It may be that it is the success of the legislation in raising awareness and disseminating information to families and young people about their rights which has led to the increase in the number of appeals. All of these things should lead to the system being less adversarial than previously.

6.3. In any case, the legislation is only the statutory framework against which the Tribunal's decisions are made: it does not set out the process for deciding appeals. The Tribunal's procedures are governed by the Tribunal Procedure Rules 2008 (as amended) and by any Practice Directions issued by the Senior President of Tribunals.

6.4. 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. It arranges local hearings when requested to do so, telephone hearings for dealing with more complex interlocutory issues which the parties can access from home or work and has an inquisitorial approach which means that the Tribunal sets out the issues to discuss at the start of the hearing, has read all of the papers in advance and knows what further information and evidence it requires from the parties in order to enable it to make a decision. All of these strategies militate against an adversarial approach.

6.5. 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. Parties are required to provide their evidence and submissions in advance so that the hearing is used to elicit additional information from the witnesses and parties, to enable the tribunal to make well informed decisions. Judges are trained to ensure that parties are enabled to participate fully in the proceedings, the views of the child, where they are not a party, must be provided and are taken into consideration by the Tribunal, children and young people also attend hearings or meet the tribunal panel to express their views on the issues in the appeal so that cases are considered fairly and justly, in compliance with the overriding objective of the Tribunal Procedure Rules.

6.6. If it is true that the system has become more adversarial, other factors aside from the drafting of legalisation should be considered.

7. Are all cases about special educational needs and disability taken to Tribunal about Education Health and Care Plans? If not, what else comes before the Tribunal?

7.1. Appeals are not only about Education Health and Care Plans.

7.2. There are six rights of appeal to the Tribunal arising from the Children and Families Act 2014: appeal against a refusal to arrange an education, health and care assessment or reassessment; appeal against the refusal of an LA to make an EHC Plan; appeal against the contents of the EHC Plan and an appeal against the decision to cease to maintain an EHC Plan, either in its current form or with amendments.

7.3. Currently, the Tribunal is half way through a government pilot extending the jurisdiction of the Tribunal to include the power to make non-binding recommendations in respect of health and social care issues. This is a time limited pilot which started on the 3 April 2018 which will run for two years to trial the extension of the Tribunal's jurisdiction.

7.4. A separate part of the Tribunal's jurisdiction is to consider disability discrimination claims against schools under the Equality Act 2010. The claims relate to children and young people with disabilities who will be "disabled persons" for the purposes of the Equality Act 2010 who may or may not have EHC Plans.

8. To what extent is consideration given to the efficient use of resources in judgements.

8.1. The statutory framework provides that the decision maker (the LA initially and the tribunal on appeal) considers the efficient use of resources in the allocation of all educational placements in accordance with the parents' or young person's wishes pursuant to Section 38 of the Children and Families Act 2014. Under a separate statutory provision under Section 9 of the Education Act 1996 which applies when considering all educational provision or school placements in compliance with parental wishes, there is a further obligation to apply the general principle that such provision or placement should be compatible with the avoidance of unreasonable public expenditure. Section 9 does not apply to young people who are not pupils in a school placement.

8.2. Where parents or young person are requesting that a specific educational placement, which is a maintained school or nursery school, academy, FE institution, a non-maintained special school or s41 approved institution, is named in Section I of an EHC plan a local authority must name that placement unless they can rely on one of the exceptions for doing so under Children and Families Act 2014 s.39(4). The LA MUST name that educational placement unless it is not suitable, a placement there would be incompatible with the efficient use of resources or the efficient education of others. In the vast majority of Section I disputes considered by the Tribunal, the LA seek to argue that the parent or young person's requested placement would be an inefficient use of resources.

8.3. In such a case, 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.

8.4. Where the parents seek an independent school placement for their child, which does not fall under the Children and Families Act 2014 s.38, the only consideration of resources that the tribunal must apply is under section 9 of the Education Act 1996. This provides a general principle rather than an absolute obligation, that children are to be educated in accordance with the wishes of their parents so far as that is compatible with the avoidance of unreasonable public expenditure and the provision of efficient instruction and training. Once again, when applying the provision of section 9 (which is also applied as a secondary consideration in relation to all appeals concerning educational placement) the resources taken into consideration must be those of the broader public purse. Once again, the Tribunal will scrutinise the evidence of costs provided and will conduct a balancing exercise to determine whether there are additional benefits which would accrue to the child or young person if placed at the school of parental preference which redress the balance to the extent that any additional expenditure would not be unreasonable.

March 2019