

## **HOW DOES THE CORONAVIRUS ACT AFFECT SEN PROVISION?**

Important changes to the legislation and guidance relating to provision for children with SEN during the coronavirus crisis were announced on 30<sup>th</sup> April. The headlines are:

- 1. The Secretary of State for Education has released a Notice triggering the 'relaxation' of the duty to provide SEN and health provision in EHC Plans if it is not practicable as a result of coronavirus. In that event, the duty is simply to use reasonable endeavours. This lasts till 31<sup>st</sup> May but may be renewed.**
- 2. Regulations have been put in place relaxing the time limits for the EHCP process, Annual Review process and compliance with tribunal orders: all are replaced with a requirement for the action to be taken as soon as is reasonably practical, but only if this is required due to coronavirus. This is in place until 25<sup>th</sup> September 2020.**

**NOTE:** This is not authorisation to local authorities to ignore their SEN duties or to put in place blanket policies. In each case they have to justify their action by reference to identifiable problems caused by coronavirus, and show that they have taken into account the individual child's circumstances. They also have to keep the situation under review.

More detail is set out on the following pages.

## **Modification of duty to secure special educational provision in EHC Plans**

The Secretary of State for Education has issued a formal notice which modifies the duty of local authorities under s42 Children and Families Act 2014 to secure the special educational provision in sections F and G of EHC Plans -

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882290/CV19\\_Act\\_modification\\_notice\\_SEND.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882290/CV19_Act_modification_notice_SEND.pdf)

The effect of this is as follows:

- Section 42 of the Act imposed an absolute duty on local authorities to ensure that special educational provision set out in section F of EHC Plans, and this could be enforced if necessary by way of formal complaints or through the courts by judicial review. It imposed a similar duty on Clinical Commissioning Groups in relation to the education-related health provision set out in section G.
- The Coronavirus Act 2020 gave the Secretary of State to issue notices modifying certain duties and he has done so in relation to section 42.
- This means that the duty now is simply to use reasonable endeavours to comply with the duties to secure education and health provision

The Notice applies only until **31<sup>st</sup> May 2020**, but may be renewed after that date if necessary.

Further guidance on this has now been issued. It emphasises that this modification does **not** absolve LAs or health commissioning bodies of their responsibilities under s42. The duty to use reasonable endeavours means that they must consider for **each** child or young person with an EHCP what they can reasonably provide in the circumstances during the notice period. This may mean that some or all provision in the EHCP can still be delivered, but for others it may differ.

Reasons for which it might be reasonable to change or reduce provision include:

- The child is not currently attending school etc;
- Following social distancing may disrupt normal programmes in school and make certain interventions impractical;
- The resources and services to secure the provision are reduced, e.g. due to illness, self-isolation or the need to direct staff resource at responding to the pressures generated by coronavirus.

The LA should consider:

- Specific local circumstances, e.g. workforce capacity, temporary closure of education settings, guidance on reducing the transmission of coronavirus;
- The needs and specific circumstances of the child;
- The views of the child, young person or parent about what provision might be appropriate.

The LA/CCG should confirm to the parents or young person what it has decided to do and explain this; and should keep under review whether it is complying with the

reasonable endeavours duty, recognising that factors such as the child's needs and availability of key staff or provision may change.

The guidance gives some examples of alternative arrangements that would be considered reasonable:

- Online learning, including the provision of free laptops for vulnerable and disadvantaged children in year 10;
- Alterations to frequency and timing of provision in school, e.g. a part time timetable;
- A temporary placement in another school or local hub;
- Reduced class sizes to ensure social distancing;
- Video class sessions;
- A home learning reading programme provided by a SENCO and reviewed weekly;
- Provision of printed exercises and worksheets;
- Weekly phone or video contact by schools to monitor home learning programmes;
- Schools etc providing direct education or support in the home, subject to risk assessment and appropriate health protection measures;
- Educational psychologists providing brief therapy interventions;
- Specialist SEN teachers providing advice and support to parents;
- Speech and language therapy sessions via video link;
- The parent and child travelling to receive therapy at suitable premises where this can be done consistently with coronavirus guidance;
- Occupational therapists and physiotherapists video linking and modelling exercises for parents to do with the child, and providing webinars to school staff on topics like sensory strategies, pre-writing skills etc;
- Sending home hard copy therapy programmes with additional phone support;
- Widening the use of existing personal budgets to enable equipment etc to be bought to support home learning;
- Loaning parents school equipment, e.g. specialist seating, IT equipment used at school;
- Counselling or cognitive behaviour therapy delivered over the phone.

**It is important to note that this guidance does not give local authorities the right to ignore all duties to children with EHCPs. In particular:**

- **They cannot have blanket policies in place meaning that they will stop all special educational provision, or a particular type of provision;**
- **They must consider the specific circumstances of each child;**
- **They must notify parents of what they are doing and why;**
- **They must limit any modifications as far as possible and must consider practical alternatives;**
- **They must keep provision under review**

**If they do not meet these requirements they can be challenged through judicial review or by using the complaints system.**

The Secretary of State does have power to issue other notices, e.g. disapplying the duty of schools to admit children when named in the EHCP, the duty to conduct annual reviews, and to provide full time education for children out of school due to illness, exclusion or otherwise, but has not yet done so.

### **Regulations disapplying time limits for EHC Needs Assessments and others**

The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations have amended the Special Educational Needs and Disability Regulations 2014. Details are here:

<http://www.legislation.gov.uk/ukxi/2020/471/contents/made>

The amendments apply only to the “coronavirus exception” – i.e. where it is not reasonably possible to meet a time limit for a reason related to the incidence or transmission of coronavirus.

Some provisions requiring action to be taken within a specified time period are to be read instead as a requirement to take the action as soon as is reasonable practicable. These related mainly to:

- Annual reviews and notification of decisions after annual review meetings;
- Transfers to new LAs;
- Amendment of EHC Plans following reassessment;
- Processes related to mediation, including the time limit for parents to apply for mediation;
- Compliance with tribunal orders and action following unopposed appeals

The time limits applying during the EHC needs assessment process – i.e. the decision whether to carry out an assessment, the decision not to issue an EHC Plan, and the final deadline for issuing an EHCP – add an extra exception to the circumstances where LAs may not have to comply with time limits, namely if it is impractical to comply because of a reason relating to the incidence or transmission of coronavirus. Instead the requirement is for the action to be taken as soon as is reasonably practicable.

For EHC needs assessments that were in progress on 1<sup>st</sup> May, the exceptions may still apply to delay before that date if the coronavirus exception applies. If the 20 week deadline for issuing an EHCP is already past, the exception cannot apply.

All but one of the amendments (the time limit for applying for a mediation certificate) relate to local authority duties. There is no relaxation of, for instance, the time limits for parents to respond to draft EHCPs, or for entering tribunal appeals or appeals to the Upper Tribunal despite the difficulties currently being faced by parents of children with SEN who are not in school. It is however stated that LAs “will wish to be alert to

the circumstances of parents and young people” during the outbreak and to take this into account. It remains the case that the tribunal has discretion to accept a late appeal and in general they are sympathetic to coronavirus-related reasons.

The time limit for schools to respond to consultations about being named in EHCPs has not changed, and they must still reply within 15 days.

Further guidance on this issued by the Department for Education notes that LAs must still consider requests for new EHC needs assessments, and must secure all the advice and information required under Article 6(1) of the SEND Regulations.

If LAs think the process will be delayed, LAs should inform parents.

It is noted that LAs need to use new ways of working, e.g. putting in place secure virtual meeting platforms, sharing information using secure emails etc, arranging for remote observations by professions or gathering information by phone or virtual meetings.

Although there is still a duty to conduct annual reviews, these may be postponed where it is impractical for the LA to complete an AR due to coronavirus. Again, they must complete the review as soon as is reasonably practical. LAs should identify priorities for review, notably:

- Children whose needs or circumstances have changed significantly
- Looked after children
- Those in residential provision
- Those in out of area provision, especially independent and non-maintained provision

LAs are reminded that they should already have completed reviews for those moving between key phases of education, and that the time limits for completing those (15<sup>th</sup> February for all but post 16 transfers, for which the date was 31<sup>st</sup> March) have not changed. If completion has been delayed these reviews should be finalised as a priority.

It is noted that meetings may have to be in a different form, but all concerned must continue to ensure that the child is at the centre of the process and can engage meaningfully. Professionals contributing to the review should use already existing information and consider a discussion with the family and child to update.

## **Closing schools and other educational institutions**

The Secretary of State for Education has power to close down schools and other educational institutions, but also to order them to remain open (including during school holiday periods) for specified groups of people and specified purposes. As we are all well aware, that power has been exercised on the basis that schools are also required to remain open for children of key workers and vulnerable children, which includes those with EHC Plans. Note:

- Powers relate to all educational institutions and does not exclude, for instance, private schools;
- It is not expected that every child with an EHC Plan must be in school. All children with EHCPs must be risk-assessed by the school in consultation with local authorities and parents to decide whether they need to stay in school in order to meet their needs, or whether they can be safely met at home. This could include people like carers, therapists etc visiting the home to provide essential services.
- Schools only need to stay open if it is possible. If it is not, e.g. due to staffing difficulties, then arrangements should be made for attendance elsewhere.
- The Department for Education has expressed concern about the relatively small numbers of vulnerable children who are attending school, and it may well be that further steps to encourage their return will be put in place both formally and informally.
- Related duties such as enforcing attendance, providing home/school transport for children who are not expected to be in school, etc are unsurprisingly suspended.
- The duty to arrange education for children out of school is suspended, but only where that is happening as a result of school closures. If children are out of school primarily due to exclusion, illness or related reasons (particularly if that was the case before schools closed) the duty remains in place, but this may be modified if the Secretary of State issues a notice to that effect (see below). This will however be subject to practicalities – for example, if children out of school were previously attending Pupil Referral Units that have closed down, or if home tutors are unable to visit due to illness. Given that the legislation and guidance envisage that it may be acceptable for carers and therapists to visit children's homes, it may well be the case that, with appropriate safeguards in place, home tutors may also visit at least to a limited extent and/or use facilities such as video conferencing.

### **Note:**

- **EHC Plans still exist and remain very important as a means of recording and providing for SEN.**
- We understand some LAs are telling educational institutions not to submit new applications for EHCPs. This is unlawful. The simplest way of dealing with this, however, is simply for parents to lodge their own requests.

- There is additionally under the SEND Regulations 2014 provision for extending the EHCP assessment timetable where the LA needs advice from the school/college during a period when the school is closed for a continuous period of at least four weeks. If the LA will exceed time limits for this reason it should specifically notify parents/young people. However, in most cases this exception should not apply currently as most schools are still open and their staff are contactable by the LA.
- Duties may be enforced by way of complaint (but note that the Local Government and Social Care Ombudsman is not currently accepting new complaints) or by judicial review in the child's name (for which legal aid is likely to be available). It will however be more difficult to establish that LAs are in breach of duties given the relaxation of duties now in force.

**This guidance does however have to be viewed in the context that the overriding need is to keep people safe and do everything possible to limit the spread of Coronavirus** and that schools and local authorities are acting under unprecedented strain, including the fact that their own staffing may be severely affected by illness and self-isolation requirements.

Therefore we would strongly advise on the use of a co-operative, pragmatic and constructive approach. Other considerations apart, the courts also are under considerable stress and legal action to enforce rights will not be easy – although the courts have given indications in other contexts that they will be scrutinising carefully the removal of important rights on the basis of coronavirus precautions.