

## **IS YOUR COUNCIL USING THE CORONAVIRUS 'RELAXATION' EXCEPTION?**

### **POINTS TO LOOK OUT FOR, QUESTIONS TO ASK**

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.**

The reason for this is of course, in some cases, it is very difficult to arrange special educational provision that requires support in schools if schools are closed or simply offering a childminding facility, that problems like staff illness and isolation will cause difficulty, some support requiring face to face contact may not be possible, that councils have to had to redeploy some staff to cover urgent services, and some aspects of assessment and support are very difficult to arrange under social distancing measures.

Some LAs seem to be taking this as the green light to take a very relaxed attitude indeed to all their duties, but that is **not** what the notice and regulations say. The very important restriction on this is that the relaxation **ONLY** applies if the delay or problems in securing provision is due to coronavirus – whether because of difficulties such as staff illness or isolation, problems in providing support or carrying out assessments due to social distancing requirements, school closures, or steps that have to be taken to reduce coronavirus transmission. Further, although duties are relaxed, there is still a duty to do the maximum possible and, in the case of time limits, to perform whatever action is required at the earliest practicable opportunity.

Therefore, whilst recognising guidance issued by the DfE emphasising the importance of co-operation and co-production and that some difficulties simply are impossible to overcome, it also has to be recognised that this has the potential to cause harm to children with SEN and disabilities. We therefore suggest that parents and carers be prepared to question the use of the coronavirus exception robustly

## **NOTICE**

When relying on the coronavirus exception, LAs must tell parents that they are doing so and why. **If they don't you are entitled to assume that the normal law applies**, i.e. that they must keep to the statutory time limits and/or must provide all the support in section F of the Plan. The same applies to Clinical Commissioning Groups in respect of Section G.

If they have failed to comply with an SEN duty or time limit and produce this excuse after the event, at the very least they need to be able to explain why and justify themselves.

Further, although LAs are entitled to prioritise urgent functions, nevertheless that does not mean that SEN work can be put on the back burner and all their staff deployed elsewhere. Education is still regarded as an essential service, as is the justice system including the operation of the Special Educational Needs and Disability Tribunal.

## **BLANKET POLICIES**

Even under normal circumstances, these are unlawful in the SEN context as the priority is always the needs of the individual child rather than what is convenient to the council or school.

Coronavirus-related blanket policies such as the following are therefore very likely to be unlawful and can be challenged through the courts, probably with the assistance of legal aid in the name of the child:

- No EHCP assessments will be accepted or processed
- Schools being told not to submit EHC requests
- No decisions on EHCP assessments until lockdown is finished or any other arbitrary dates
- No panel meetings and therefore no decisions on whether to issue EHCPs
- EHCP drafts to be put on hold and not processed
- No annual reviews
- No participation in tribunal appeals
- No participation in mediation
- No assessments for EHC purposes
- No therapies specified in EHCPs

## QUESTIONS

Therefore, if your local authority/school is late in respect of any time limit or failing to secure provision in an EHC Plan, consider asking questions such as the following where they are relevant to your situation:

### ➤ Why can you not meet the time limit?

- If it is due to short staffing, please state:
  - What is the normal staffing level of your SEN department?
  - What is it now?
  - If it is low, is due to be illness, self-isolation, or redeployment of staff?
  - If staff have been redeployed elsewhere, which departments have they been transferred to, and why?
  - If problems are due to illness/self- isolation, are you anticipating that this will change? If so when?
- If it is due to problems with assessments, why can these not be done remotely?
- If it is due to others failing to provide advice and information, have you checked why?
- As you say you cannot arrange your own assessments, why not use our reports?
- As you say you cannot arrange your own assessments and do not want to use our reports, why not give your experts the test results given in our reports and ask them to advise based on those and the other documents available?
- Have you kept the situation under review, and if so, when was it last reviewed?
- If it is due to lack of NHS staff, what have you done to source the necessary reports independently?
- Why can you not contact the school I have chosen, given that it is open?
- Have you tried to contact schools? If so, please forward copies of your letters/emails.
- Why can you not consult schools, even if they are closed? Why have you not made arrangements to be provided with contact details for heads and SENCOs?
- Why can you not contact the school given that it has contact details on its website?
- If delay is because you need a panel meeting, why can this not be done online?
- When do you envisage being able to take the required action? Why can this not be done earlier?
- You should have issued the change of phase EHCP by 15<sup>th</sup> February (31<sup>st</sup> March for post 16 placements) before the law changed. You are not therefore entitled to rely on the coronavirus exception. Please finalise the EHCP immediately.

### ➤ Why can you not arrange the provision in section F of my child's EHCP?

- Why can you not hold multi-disciplinary team meetings online?
- If it is because the school is short staffed, can you call in staff who are furloughed or agency staff?

- If it is because the school is closed, can my child go to another school temporarily?
- If it is due to non-availability of NHS therapists etc, why can you not source independent therapists?
- What do you propose to do about online learning and therapies?
- Why can you not increase current online learning that my child is using?
- Why do you have to consult with experts before agreeing to increased online learning? If you do, why can you not do so by telephone, email or online?
- School staff are willing to come to our home with appropriate social distancing measures for some tuition/therapy. Please confirm that this will be arranged.
- Can we have home tuition with appropriate social distancing measures in place?
- Can you arrange for specialist equipment in school to be sent home for us to use here?
- Although my child has an EHCP, the head won't allow him to be in school. Please provide a copy of the risk assessment that has led to this decision.
- Can I have a personal budget so that I can arrange provision?
- Are you keeping the situation under review? When was the last review?
- When do you anticipate being able to restore the necessary support?
- Why is not possible to comply with the requirement for differentiation in my child's EHCP, whether in work sent home or at school?
- What precisely is the reason for delay in operating your checking process for final EHCPs?
- Will you be arranging to make up for therapy/specialist support missed once restrictions are relaxed?