

## COVID-19 changes to SEN duties

### Overview

1. In response to the COVID-19 crisis, significant changes have been made to the processes governing education, health and care (EHC) needs assessments and plans and to the duty to secure or arrange the provision they set out. EHC plans are for children and young people (up to the age of 25) with significant special educational needs (SEN). These plans set out the provision that a local authority (in relation both to education and social care needs) and health commissioning bodies (in relation to health needs) must secure or arrange for the individual to meet their needs.
2. On 1 May 2020, the following two instruments came into force: (i) the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 (“the Amendment Regulations”), and (ii) a notice issued by the Secretary of State to modify section 42 of the Children and Families Act 2014 (the duty to secure special educational provision and health care provision in accordance with EHC plan) (“the Notice”). A further notice has now been issued in relation to June 2020.
3. The Department of Education published guidance addressing these changes on 30 April 2020 (updated on 29 May 2020), which emphasises that:

*it is only some aspects of the law on EHC needs assessments and plans that have changed temporarily; and where this has happened, the law has been modified, not disapplied. The duties in law over EHC needs assessments and plans have not been ‘turned off’...*

*local authority decisions over EHC plans must continue to be made in accordance with the statutory framework; and must be based on the individual needs, provision and outcomes for the child or young person. This includes local authorities not applying blanket approaches in relation to EHC needs assessments or plan processes and decision-making.<sup>1</sup>*

4. This note summarises the changes that have implemented pursuant to the Amendment Regulations and the Notices, as well as some of the key aspects of the guidance.

### The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020

5. The Amendment Regulations<sup>2</sup> temporarily relax the timescales that apply to various processes relating to EHC needs assessments and plans. In short, where it is not reasonably practicable for a person to meet a specified timeframe for a reason relating to the incidence or transmission of coronavirus, the body instead will have to carry out

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<sup>1</sup> <https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/education-health-and-care-needs-assessments-and-plans-guidance-on-temporary-legislative-changes-relating-to-coronavirus-covid-19>.

<sup>2</sup> The 2020 Regulations are available online here: <http://www.legislation.gov.uk/uksi/2020/471/made>, and the Explanatory Notes are online here: [http://www.legislation.gov.uk/uksi/2020/471/pdfs/uksiem\\_20200471\\_en.pdf](http://www.legislation.gov.uk/uksi/2020/471/pdfs/uksiem_20200471_en.pdf).

the relevant process as ‘as soon as is reasonably practicable’ (or as otherwise specified by the Amendment Regulations).

6. In summary, the Amendment Regulations apply to timescales contained in the following four sets of regulations dealing with special educational needs and disability (“SEND”):
- a. The Special Educational Needs and Disability Regulations 2014 SI No 1530: These Regulations prescribe: (i) how requests are made for EHC needs assessments, (ii) how local authorities must make decisions over whether to conduct an assessment or issue a plan, (iii) how to keep those plans under review and (iv) the processes for making appeals against decisions. Many of these processes have statutory time limits. In general, the Amendment Regulations provides a ‘coronavirus exception’ which allows most (but not all – as addressed further below) actions to be taken ‘as soon as reasonably practicable’ where the exception applies (see para 5 above for the exception).<sup>3</sup> Reg 5 sets out the majority of the specific time periods to which the exception applies, including in relation to compliance with Tribunal orders. Notably, reg 11 of the 2020 Regulations introduces a reg 18A that provides that:
    - (1) *It is not necessary for a local authority to review an EHC plan in accordance with section 44(1) of the Act if it is impractical to do so because of a reason relating to the incidence or transmission of coronavirus.*
    - (2) *Where paragraph (1) applies, a local authority must instead conduct such reviews as soon as reasonably practicable.*
  - b. The Special Educational Needs (Personal Budgets) Regulations 2014 SI No 1652: The requirement imposed by these Regulations for the local authority to review the making and use of direct payments within the first three months of them being made is, subject to the 2020 Regulations, to be read instead as a requirement for such action to be taken as soon as reasonably practicable, where it is not reasonably practicable for the local authority to meet the requirement for a reason relating to the incidence or transmission of coronavirus.<sup>4</sup>
  - c. The Special Educational Needs and Disability (Detained Persons) Regulations 2015 SI No 62: The 2020 Regulations again apply a ‘coronavirus exception’ to a number of obligatory timescales for certain processes, replacing the deadlines of a specified period of time or by a certain day with a requirement for such action to be taken as soon as reasonably practicable.<sup>5</sup>
  - d. The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 SI No 1306: These Regulations require local authorities and health commissioning bodies to take various actions within a statutory time period when the First-tier Tribunal (SEND) makes non-binding recommendations in respect of certain types of health and social care

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<sup>3</sup> Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 5 to 14.

<sup>4</sup> The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 15 to 17.

<sup>5</sup> The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 18 to 27.

matters within an EHC plan. The authority or body must now take action in response to health or social care recommendation as soon as reasonably practicable.<sup>6</sup>

7. The amendments implemented by the 2020 Regulations will cease to have effect on 25 September 2020.<sup>7</sup>
8. The Guidance addresses how the Amendment Regulations can affect timescales for EHC needs assessments and plans processes. The Guidance explains that, as the 2020 Regulations came into force on 1 May:

*if consideration of a request for an EHC needs assessment or one of the processes that may follow is in progress on that date, then the relevant exception to the timings in the Amendment Regulations could apply if coronavirus (COVID-19) had caused delay. This would depend on the facts of the case.*

*If the final deadline (such as the end of the 20 weeks) had passed before 1 May, the relaxations to timescales for a reason relating to coronavirus (COVID-19) made by the Amendment Regulations could not apply because they were not in force then.*

#### **The modification notices: section 42 of the Children and Families Act 2014**

9. Under the Coronavirus Act 2020, the Secretary of State for Education can issue notices to temporarily remove or relax statutory requirements where this is an appropriate and proportionate action relating to the incidence or transmission of coronavirus (COVID-19).<sup>8</sup> Pursuant to that Act, the Secretary of State has issued two notices that temporarily modify any duty imposed on a person by section 42 of the Children and Families Act 2014 (“the 2014 Act”), for the months of May 2020 and June 2020. Section 42 of the 2014 Act provides (insofar as relevant):

*(1) This section applies where a local authority maintains an EHC plan for a child or young person.*

*(2) The local authority must secure the specified special educational provision for the child or young person.*

*(3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.*

*(4) “The responsible commissioning body”, in relation to any specified health care provision, means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the child or young person.*

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<sup>6</sup> The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 28 to 30.

<sup>7</sup> The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, reg 2(2). Under reg 2(1), the Secretary of State must review the effectiveness of these Regulations during the period for which they have effect.

<sup>8</sup> Coronavirus Act 2020, section 38(1) of, and paragraph 5 of Schedule 17. The Notice is available online here: <https://www.gov.uk/government/publications/modification-notice-ehc-plans-legislation-changes>.

*(5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.*

10. Pursuant to the Notices, duties imposed pursuant to section 42 are treated as discharged if the person has used 'reasonable endeavours' to discharge the duty. In other words, the duty on local authorities to secure special educational provision and on health commissioning bodies (generally clinical commissioning groups, "CCGs") to arrange health provision in accordance with EHC plans, is modified such that the duty can be discharged by using their 'reasonable endeavours' to put such provision in place. The current notice applies from 1 June 2020 to 30 June 2020, although this period may be extended.
11. The Notice itself states that consideration was given as to whether there were any alternative options to issuing the notice, such as delivering EHC plans remotely. However, it was determined that remote delivery would only be partially successful for the following reasons:
  - a. The need to redeploy specialist staff to respond to the outbreak means that there is unlikely to be sufficient specialist staff to deliver all provision remotely.
  - b. The limitations of remote working may make it impossible to deliver provision in this way for all families.
  - c. Even if a remote equivalent were to be provided for each aspect of provision specified in an EHC plan, this would not constitute securing the provision as specified.
12. The Notice further explains that the change to the section 42 duty is deemed proportionate because:
  - a. The modification allows local authorities and health commissioning bodies in England to adapt to the changing situation in their specific area, based on the nature and demands of the outbreak locally, workforce capacity and skills, and the needs of each individual with an EHC plan.
  - b. The modification enables local authorities and health commissioning bodies to arrange reasonable alternatives to the usual service during the outbreak, such as by delivering therapies remotely, or using video.
13. The Guidance stresses that the Notice does not absolve local authorities or CCGs of their responsibilities under section 42, but simply provides that they must use their 'reasonable endeavours' to secure or arrange the provision instead.
14. As such, local authorities and CCGs must consider for each child and young person with an EHC plan what they can reasonably provide in the circumstances during the notice period. The Guidance notes that:

*For some individuals, this will mean that the provision specified in their plan can continue to be delivered; but for others (because of the impact of coronavirus (COVID-19) on local authorities or health commissioning bodies) the provision may need temporarily to be different to that which is set out in their EHC plan.*

15. The Guidance also explains that when making these kinds of decisions, determining what provision must be secured or arranged in discharge of its modified section 42 duty, the local authority or CCG should consider:
  - a. the specific local circumstances (such as workforce capacity and skills and that of others whose input is needed to EHC needs assessments and plans processes, temporary closures of education settings, guidance on measures to reduce the transmission of coronavirus (COVID-19) and other demands of the outbreak)
  - b. the needs of and specific circumstances affecting the child or young person
  - c. the views of the child, young person and their parents over what provision might be appropriate
  
16. Moreover, the Guidance also states that the local authority or health commissioning body should keep a record of the provision it decides it must secure or arrange. The Guidance advises that the following steps should then be taken:
  - a. confirm to the parents or young person what it has decided to do and explain why the provision for the time being differs from that in the plan
  - b. keep under review whether the provision it is securing or arranging means that it is still complying with the reasonable endeavours duty, recognising that the needs of a child or young person may change over time (particularly in the current circumstances) as may the availability of key staff or provision
  
17. The Guidance also provides a framework to assist local authorities and health commissioning bodies determine what constitutes 'reasonable endeavours' in any given case. It acknowledges that what constitutes 'reasonable endeavours' is context and individual specific. In summary, the framework is as follows:
  - a. What?: Differences in the provision stated in the plan.
  - b. Where?: Location where provision is to be provided may be altered.
  - c. How?: Frequency and timing of provision may be altered or modified.
  - d. When?: Method of delivery may be altered, such as to employ video technology.
  - e. By whom?: Changes to the person delivering the provision.
  
18. Finally, the Guidance states that:

*[t]he modified s42 duty relates to the provision for each individual child and young person. Local authorities and health commissioning bodies must not apply blanket*

*policies about the provision to be secured or arranged.*

### **Key elements of the processes which remain unchanged**

19. Save for the changes to relaxations to the SEN duties set out above, all other requirements of the EHC needs assessments and plan processes remain unchanged. The Guidance makes clear that local authorities must still consider requests for a new EHC needs assessment or a re-assessment. Where the local authority decides to carry out an EHC needs assessment, it must still secure all of the required advice and information in order to be able to issue a plan.
20. Importantly, the Amendment Regulations do not apply to regulation 13(1) of the Special Educational Needs and Disability Regulations 2014, which prescribes the following timescale:
  - (1) *When a local authority sends a draft plan to a child's parent or young person it must—*
    - (a) *give them at least 15 days, beginning with the day on which the draft plan was served, in which to—*
      - (i) *make representations about the content of the draft plan, and to request that a particular school or other institution be named in the plan; and*
      - (ii) *require the local authority to arrange a meeting between them and an officer of the local authority at which the draft plan can be discussed; and*
    - (b) *advise them where they can find information about the schools and colleges that are available for the child or young person to attend.*
21. As such, the 15 day minimum time period for parental representations etc still applies. The Guidance notes that local authorities should be alert to the circumstances of parents and young people in the time of the outbreak and to take this into account in setting the deadline.
22. It is important to be aware that a number of key elements of the SEN duties and EHC processes have not been amended, and still apply as continuing obligations:
  - a. Annual review: The annual review requirements currently remain in place.<sup>9</sup>
  - b. The duty on education settings to admit: This is an ongoing un-altered duty (see section 43 of the 2014 Act). Even where a setting is temporarily closed, the setting must still admit. In the case of a school or college, the child or young person must be placed on the roll and treated in the same way as other pupils or students in the setting.

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<sup>9</sup> The Secretary of State has not exercised his power under the Coronavirus Act 2020 to temporarily disapply the duty to conduct annual reviews.

- c. The timescale for education settings to respond to a proposal to name them in an EHC plan: The expectation in the SEND Code of Practice that local authorities give early years providers, schools and colleges up to 15 days to respond to a proposal to name their institution in an EHC plan remains in place.
- d. Complaints and rights of appeal of parents and young persons: The complaints mechanisms described in Chapter 11 of the SEND Code of Practice are unchanged, although the Local Government and Social Care Ombudsman has temporarily suspended all casework activity.
- e. Appeals to the First-tier Tribunal (SEND): Rights of appeal to the First-tier Tribunal (SEN and Disability) remain unchanged, although the timescale for compliance with orders and responses to recommendations has been relaxed where the exception applies.