

Latest Developments in Local Government Law: Education

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*This presentation is intended for general information and
should not be relied upon in relation to any individual
case.*

Section 42 CFA 2014

- (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.

An 'absolute' duty

R (N) v North Tyneside [2010] EWCA Civ 135

17. There is no best endeavours defence in the legislation. If the situation changes there is machinery for revising the statement, but while it stands it is the duty of the LEA to implement it. In a margin of intractable cases there may be reasons why a court would not make a mandatory order, or more probably would briefly defer or qualify its operation.

Modification of the duty (‘easement’)

- The power: section 38(1) of, and paragraph 5 of Schedule 17 to, the Coronavirus Act 2020.
- The notices:
 - first notice (1 May to 31 May 2020)
 - current one (1 June to 30 June 2020)
 - new one?

The Notice (1)

Coronavirus Act 2020 Modification of section 42 of the Children and Families Act 2014 (England) Notice 2020

*The Secretary of State for Education by this notice modifies section 42...so that any duty imposed on a person by that section is to be treated as discharged if the person has used **reasonable endeavours** to discharge the duty during the period specified in this notice.*

The Notice (2)

- Appropriate and proportionate to introduce because:
 - Local authorities have reduced staff resources.
 - Many children and young people with EHC Plans educated at home.
 - Normal educational programmes disrupted.
 - Some CCGs have had to redeploy staff or reprioritise services.
- Legal challenge (to notice and Amendment Regulations).

The Notice (3)

No alternatives (e.g. remote delivery) because:

- Unlikely to be sufficient specialist staff to deliver all provision remotely (e.g. specialist teachers, TAs).
- Provision may not be possible to deliver remotely.
- “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.”

The Notice (4)

Modifications proportionate because:

(i) The modification allows local authorities and [CCGs] 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.

(ii) The modification enables local authorities and [CCGs] to arrange reasonable alternatives to the usual service during the outbreak, such as by delivering therapies remotely, or using video.

The Guidance (1)

“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.”

The Guidance (2)

The framework for 'reasonable endeavours':

- 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.*

Implications (1)

- Do nothing plainly unlawful (cannot simply cease all endeavours to implement EHCP).
- LAs should try to secure provision set out in sections F and G, whether as specified or (more likely) in modified form. Work with parents to try to find creative ways of delivering SEP (e.g. virtual working).

Implications (2)

- Will be difficult to challenge failure to exercise ‘reasonable endeavours’ in any individual case (inbuilt *Wednesbury* defence?).
- Responsibility to meet needs will likely fall back on schools – CFA 2014 s 66 (‘best endeavours’ to secure SEP).
- No change to social care duties to children (e.g. section 17, section 20, CA 1989).

Modification of timescales

- The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 (the ‘Amendment Regulations’).
- Guidance published 30 April 2020: *‘Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus (COVID-19)’*.

Main themes

- “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’” (Guidance; emphasis added).
- The modification is to **timing**. The key theme is a **significant relaxation** of the deadlines for various aspects of the EHCP process during the period in which the Amendment Regulations are in force. Putting it another way: LAs have been granted brand new and extensive grounds on which to delay doing various EHCP-related things that would in normal circumstances come with much stricter deadlines.
- As to **duration**, the Regulations are in effect from from 1 May to 25 September 2020 (inclusive) (see reg. 2(2)).
- The Secretary of State must **review** the effectiveness of the Regulations during the period for which they have effect (see reg. 2(1)).

‘The coronavirus exception’

- The Regulations amend four separate sets of Regulations which specify the timescales that apply to local authorities, health commissioning bodies and others. The crucial change is to relax the time periods applicable to the various processes relating to EHC needs assessments and EHCPs whenever the ‘**coronavirus exception**’ applies.
- Reg. 5 inserts into the Special Educational Needs and Disability Regulations 2014 a new reg. 2A, which provides:

“(1) Where the coronavirus exception applies, any requirement in any of the regulations specified in paragraph (3) for action to be taken within a specified period of time or by a certain day is to be read instead as a requirement for such action to be taken **as soon as reasonably practicable**.

(2) The coronavirus exception applies where it is not reasonably practicable for a person to meet a requirement referred to in paragraph (1) for a reason relating to the incidence or transmission of coronavirus.”
- Note the wording in reg. 2A(2): “... for a **reason relating to the incidence or transmission of coronavirus**.” This may be obvious but it is worth stating: this does not create free rein for non-compliance with legal deadlines for reasons other than those relating to COVID-19. That said, the legislative wording is broad and grants LAs significant new leeway.

Which timescales are affected?

- The changes are extensive. See Annex A to the Guidance for the full list. Key timescales which have been relaxed by the Regulations are:
 - the determination of requests for EHC needs assessments, decisions whether to issue EHCPs and the preparation and issue of EHCPs;
 - annual reviews of EHCPs;
 - the processes relating to mediation; and,
 - the actions that a LA and health commissioning body must take when the Tribunal makes non-binding recommendations under the National Trial.

An example

- **The previous position:** where a LA has decided that it is necessary to issue an EHCP following an EHC needs assessment, it must do so as soon as practicable but in any event within **20 weeks** of the initial request.
- **And now:** if the incidence or transmission of COVID-19 makes it impractical for LA to meet the 20 week deadline then it must discharge its duty '**as soon as practicable**'.
- (See: regs. 9 and 10 of the Amendment Regulations 2020, which amend reg. 13 of the 2014 Regulations by extending the existing reasons in reg. 10(4) for not complying with a time limit and applying these to regulation 13(3)).

How radical is this?

- This **is** an extensive - but temporary - relaxation of the deadlines that would usually bind a LA during the stages of the statutory processes for identifying and meeting the needs of children and young people with SEN. If the Coronavirus exception is invoked frequently then the impact will be radical.
- Combined with the disruption to regular schooling created by school closures, there is significant potential for the usual timescales to slip in a massive number of cases.

This is a big change, but ...

- The **substantive requirements** of the process of assessing needs and issuing EHCPs remain unchanged. For instance: there is no relaxation of the duty on a LA to consider new requests for EHC needs assessments; and where a LA does decide to carry out a needs assessment it must still secure all of the required advice and information in order to be able to determine whether to issue an EHCP.
- The requirement that parents or the young person must be given **at least 15 days** to give their views and make representations on the content of a draft EHCP is not affected.
- Further: some of the processes relating to EHC needs assessments and EHCPs **already** contained prescribed exceptions to the timescales. For instance, in respect of the 20 week time limit for an EHCP to be finalised and issued, regs. 10 and 13 of the 2014 Regulations already provide that the LA need not comply if it is impractical for any one of a number of specified reasons (e.g. ‘exceptional personal circumstances affect the child or the child’s parent’). What the new regime provides for is an *additional ground* for allowing the timetable to slip – namely that the delay is for a reason relating to the coronavirus exception.

Lawfulness and Good Practice

- Good practice suggests that LAs must not casually invoke the exception – not only because that may very well be legally dubious but also, pragmatically, to avoid a massive logjam of EHCP-related decisions once this new regime is lifted.
- Any **blanket approach** to delaying EHC needs assessments or any other steps of the EHCP process are very likely to be unlawful and susceptible to challenge in the courts.
- Can **creative ways of working** ease the burden and help to achieve timely decisions for children with SEN and their parents? The Government's guidance seems to think so:

“New ways of working are needed in the current exceptional circumstances. Some local authorities are establishing virtual advisory panels by a secure virtual meeting platform to assist with decision-making. Many already have arrangements to share information in advance through secure electronic methods. Where sufficient recent information is not already available, professionals may be able to carry out observations of a child if he/she is still in a setting where this can be done in ways consistent with guidance on reducing the transmission of coronavirus (COVID-19). Alternatively, information could be gathered by phone or by a virtual meeting. To help manage demands on services, where services use templates for their advice and information, these might need to be adapted for use during the outbreak so that reports are more concise whilst still containing the essential information about the child or young person's needs, provision, and outcomes.”

SEND tribunal practice

- Rights of appeal to the First-tier Tribunal (SEND) remain unaffected.
- Key change: Guidance issued by the Chamber President and Deputy Chamber President of HESC (19 March 2020) has confirmed that the Tribunal has temporarily moved to **fully digital working**. In practice this means:
 - No face-to-face hearings, initially for three weeks as of 23 March 2020. This appears to be continuing.
 - All cases to be dealt with on the papers, by telephone or video-link (arrangements to be confirmed by the Tribunal two days in advance).

Practical implications for hearings

- Not holding hearings in person will limit the scope of any last-minute pre-hearing discussions on the working document. The overriding objective (2008 procedure rules) still applies, however, so parties should still attempt as best they can to hold pre-hearing discussions in order to narrow the issues in dispute. These will now need to take place well before the final hearing, either through the exchange of emails, or by teleconference or video-link.
- The standard practice of bringing hard copies of late evidence to the final hearing will obviously not be possible, but e-filing should not be affected. It remains good advice for parties to always make request for changes applications in a timely way, well in advance of the final hearing.
- The chances of adjournments are heightened because of the greater likelihood of witness non-availability because of COVID-19.
- “A little clunky but working”?