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Guidance

Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus (COVID-19)

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Annually publishing a response to comments on the SEND Local Offer



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Purpose of this guidance

Some aspects of the law on education, health and care (EHC) needs assessments and plans are changing temporarily to give local authorities, health commissioning bodies¹, education settings and other bodies who contribute to these processes more flexibility in responding to the demands placed on them by coronavirus (COVID-19).

These changes are being brought about by:

a) A notice from the Secretary of State for Education issued under the Coronavirus Act 2020 to modify section 42 of the Children and Families Act 2014 (<https://www.gov.uk/government/publications/modification-notice-ehc-plans-legislation-changes>) (duty to secure special educational provision and health care provision in accordance with EHC plan). The duty on local authorities or health commissioning bodies to secure or arrange the provision is temporarily modified to a duty to use 'reasonable endeavours' to do so.

b) The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 (the 'Amendment Regulations'). This instrument temporarily amends 4 sets of Regulations that specify timescales that apply to local authorities, health commissioning bodies and others: principally for various processes relating to EHC needs assessments and plans. Where it is not reasonably practicable or is impractical² to meet that time limit for a reason relating to the incidence or transmission of coronavirus (COVID-19), the specific time limit (such as to issue a plan to someone eligible for one within 20 weeks of the initial request) in the regulations being amended will not apply. Instead, the local authority or other body to whom that time limit applies will have to complete the process as soon as reasonably practicable or in line with any other timing requirement in any of the regulations being amended (see Annex A: details of the amendments to the existing Regulations (<https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/annex-a-details-of-the-amendments-to-the-existing-regulations>)).

This non-statutory guidance provides a summary of these legislative changes and sets out the key implications for all those who play a part in the processes relating to EHC needs assessments and plans.

The target audience for this guidance is:

- families and parent carer forums
- SEND Information, Advice and Support Services (SENDIASS)
- local authorities (both their SEND and social care services, at a strategic and operational level)
- health commissioning bodies (again, at both strategic and operational level)
- early years providers
- schools and colleges
- other education settings
- others who contribute advice and information to EHC needs assessments, such as educational psychologists and other health care professionals
- mediation advisers

This guidance also confirms which key elements of the processes over EHC needs assessments and plans are unchanged. Notably this includes that a local authority must still consider requests for a new EHC needs assessment, must still secure all of the required advice and information in order to be able to issue a plan, and must have regard to the views and wishes of a child, the child's parent³ or a young person when carrying out its SEND functions under the Children and Families Act 2014.

Given that the changes to legislation are temporary, we will not be updating the statutory guidance, the SEND code of practice: 0 to 25 years (<https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>). We recommend, therefore, that anyone referring to the SEND Code of Practice about EHC needs assessments and plans also reads this guidance. It is also important to refer to the Amendment Regulations for the full detail of the changes.

We will keep this guidance under review.

This document is part of delivering on our ongoing commitment to ensuring that children and young people with complex needs are supported effectively during this national health emergency. As such, it sits alongside a range of other guidance from the government on how to ensure the safety of vulnerable children and young people, such as:

- Supporting vulnerable children and young people during the coronavirus (COVID-19) outbreak (<https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-on-vulnerable-children-and-young-people>)
- Actions for schools during the coronavirus outbreak (<https://www.gov.uk/government/publications/covid-19-school-closures/guidance-for-schools-about-temporarily-closing>)
- Coronavirus (COVID-19): SEND risk assessment guidance (<https://www.gov.uk/government/publications/coronavirus-covid-19-send-risk-assessment-guidance>)

Introduction

The coronavirus (COVID-19) outbreak has put significant extra pressure on the ability of local authorities and health commissioning bodies to secure, or arrange, in full the provision set out in EHC plans; and to meet the statutory timescales for EHC needs assessments and plans. Coronavirus (COVID-19) has had a major impact on education settings, with the vast majority of children and young people not currently attending their early years provider, school or college. Coronavirus (COVID-19) has also affected the level of service that can be provided by those (such as educational psychologists and other health professionals) who provide advice and information as part of the process of assessing an individual's EHC needs.

In recognition of these factors, the government is legislating so as to strike the right balance during the outbreak of coronavirus (COVID-19) between:

- the needs of children and young people with SEND to be protected and receive the right support in a timely way
- managing the demands on local authorities and health bodies to respond to the outbreak.

It is only those aspects of the law relating to EHC needs assessments and plans listed above that have changed temporarily because of the coronavirus (COVID-19) outbreak: the duty to secure or arrange provision and most of the timescales for particular processes. All other aspects of SEND law remain unchanged.

Themes in this guidance

Throughout this guidance we have sought to emphasise:

- 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’
- the ongoing importance of co-production with children and young people with SEND and their parents
- that the impact of coronavirus (COVID-19) may mean that the process and provision in place previously may for the time being need to change
- how important it is, in identifying the best way forward and giving the families clarity about what is happening, for there to be effective and timely communication between:
 - local authorities (SEND and social care services) and health commissioning bodies
 - families of those with SEND
 - all those others involved in the processes for EHC needs assessments and plans, such as education settings and other health professionals

The importance of co-production

At this challenging time, it is even more important that local authorities, health services, education settings and all those involved in the processes relating to EHC needs assessments and plans work with families to identify appropriate ways forward. It is a fundamental principle of the SEND system that children and young people with SEND and their parents need to be fully involved in decisions about their support. Co-production and effective communication remain key, both at the strategic level and in relation to individual cases.

Parent carer forums have an important role, working with local authorities and health commissioning bodies, to gather and feed in parents’ views on what can realistically be provided to children and young people in their area when the usual ways of working are under such strain.

Local authorities, health services and the other bodies involved in the processes relating to EHC needs assessments and plans should communicate regularly with the families of those children and young people with EHC plans, or who are being assessed for plans or who apply for an EHC needs assessment. Where the changes in the law affect what families experience, they need clarity as to:

- what provision will be secured for each child and young person and the reason for any difference from what is specified in the EHC plan
- when decisions will be made as part of the various processes relating to EHC needs assessments and plans

It is also crucial that local authorities ensure that children, young people and parents are provided with the information, advice and support necessary to enable them to participate effectively in discussions and decisions about their support. The local SENDIASS has a critical role to play at this time. It is important that local authorities ensure that these services are sufficiently resourced to support families.

Co-operation between local authorities and early years providers, schools, colleges and other education settings

The duty on early years providers, schools and colleges to co-operate with the local authority in the performance of its SEND duties remains in place. Close working and communication between all parties is a central element in ensuring that children and young people do receive appropriate provision.

The time-limited duty to use ‘reasonable endeavours’ to secure or arrange provision in an EHC plan

The notice by the Secretary of State for Education

The Coronavirus Act 2020⁴ provides for various emergency powers for the Secretary of State for Education. One is that where it is appropriate and proportionate in all the circumstances relating to the incidence or transmission of coronavirus (COVID-19), he may by notice temporarily modify any duty imposed on a person by section 42 of the Children and Families Act 2014 (duty to secure special educational provision and health care provision in accordance with EHC plan). This duty would then be treated as discharged if the person has used ‘reasonable endeavours’ to discharge the duty. The Secretary of State has issued such a notice, to be in force from 1 May to 31 May 2020 (<https://www.gov.uk/government/publications/modification-notice-ehc-plans-legislation-changes>) (inclusive). The Secretary of State can issue a further notice if need be.

The notice does not absolve local authorities (for special educational provision and social care) or health commissioning bodies (for health care provision) of their responsibilities under section 42: rather they must use their ‘reasonable endeavours’ to secure or arrange the provision. This means that local authorities and health bodies must consider for each child and young person with an EHC plan what they can reasonably provide in the circumstances during the notice period. 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.

Once the notice expires or is cancelled, local authorities and health commissioning bodies would in all cases need to secure or arrange the full range of provision, as specified in the EHC plan.

Local authorities’ and health bodies’ decision-making process

Coronavirus (COVID-19) may make it more difficult for a local authority or health commissioning body to secure or arrange all the elements of the specified special educational and health provision in an EHC plan as required by section 42 of the Children and Families Act 2014 (the ‘modified s42 duty’). The Secretary of State for Education has listed some of the reasons why this might be more difficult in the notice:

- the child or young person is not currently attending an early years provider, school, college or other setting
- the following of 'social distancing' guidelines may disrupt education settings' normal programmes for those who are still attending and make certain interventions impractical
- the resources and services to secure the provision are reduced, for example because of illness, self-isolation or the need to direct staff resource at responding to the pressures generated by coronavirus (COVID-19)

In deciding what provision must be secured or arranged in discharge of its modified s42 duty, the local authority and health commissioning body should consider:

- 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)
- the needs of and specific circumstances affecting the child or young person
- the views of the child, young person and their parents over what provision might be appropriate

The local authority or health commissioning body should keep a record of the provision it decides it must secure or arrange. It should then:

- 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
- 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

Where the needs of the child and young person may have changed, it may be necessary for the local authority to conduct an early review of the EHC plan.

The 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.

Securing or arranging provision in an EHC plan under the modified s42 duty

In some cases local authorities and health commissioning bodies may be able to secure or arrange the provision as set out in the EHC plan. Where, however, the full provision in an EHC plan cannot be delivered or delivered in the way described in the plan, local authorities, health commissioning bodies, education settings and others may find the framework below useful in exploring with parents and the child or young person what provision can reasonably be secured or arranged. There should be a focus on:

- the provision that the EHC plan describes as needed by the individual child or young person
- the availability of those who should usually deliver what is needed
- what can be done to deliver provision differently

The framework acknowledges that what constitutes reasonable endeavours will vary according to the needs of each child and young person and the specific local context. In deciding what provision would be required, it might be appropriate to consider the following:

What?

Securing something different to the provision stated in the plan, for example in relation to availability of staff, availability of technology and any significant risk that may cause harm

Where?

Location where provision is to be provided may be altered, for example early years provider, school, college, community setting, home or clinic

How?

Frequency and timing of provision may be altered or modified in the light of available staff and risks that may cause harm

When?

Method of delivery may be altered, for example virtual rather than face-to-face and smaller rather than larger groups for teaching (where this can be done following the guidance on reducing transmission of coronavirus (COVID-19))

By whom?

Changes to the person delivering the provision, for example a learning assistant under virtual supervision rather than a specialist therapist or teacher

Examples of alternative arrangements

The types of arrangements that might be reasonable for local authorities and health commissioning bodies, working with education providers and other partners, to put in place will be dependent on the needs of the child or young person, the provision that is specified in a plan, and the specific local circumstances. Delivery is dependent on a range of factors, for example, the capacity of specialist staff to deliver particular interventions, the extent of the arrangements schools can make to provide home learning programmes and the availability of suitable IT equipment in the home.

To make remote education accessible for all pupils staying at home during the outbreak, the government has announced a major new package of support for online learning (<https://www.gov.uk/government/news/new-major-package-to-support-online-learning>) that it is to provide free laptops for vulnerable and disadvantaged children who do not have access to a laptop or tablet and are preparing for exams (in year 10); receive support from a social worker; or are a care leaver. For those in 16 to 19 education, providers including schools can already use their 16 to 19 Bursary Fund allocation to provide devices and connectivity for disadvantaged and vulnerable young people, where this is identified as a barrier to a student participating in education.

The following examples of alternative arrangements are based on existing good practice. The list is intended to be illustrative and is not a comprehensive list of possible arrangements.

Examples of alternative arrangements:

- alterations to the frequency and timing of the delivery of provision in school, for example, moving to a part-time timetable
- a temporary placement in another school - mainstream or special. This will need to be with the agreement of the parent or young person and full account should be taken of the needs of the child or young person
- attendance at a local hub
- adjustments to home-to-school transport arrangements to support a modified school attendance timetable
- class sizes being significantly reduced to ensure social distancing can be applied in classrooms
- video class sessions for children to keep in touch with classmates and teaching staff
- a home learning reading programme, provided by a Special Educational Needs Co-ordinator (SENCo) and reviewed weekly
- provision of printed exercises or worksheets
- weekly phone or video contact from school staff to monitor home learning programmes, to provide feedback, and to make adjustments as necessary
- a school or college delivering direct education or support in the home where a young person is not able to attend school or college (subject to risk assessment and appropriate health protection measures)
- educational psychologists providing brief therapy interventions
- specialist SEN Teachers providing advice and support to parents in relation to autism, visual or hearing impairment or literacy programmes
- enlarged materials being provided in the home where a child or young person has a visual impairment.
- a speech and language therapist delivering sessions via video link
- a health visitor or school nurse providing health advice or developmental reviews via teleconferencing
- the parent and child travelling to receive the therapy at suitable premises, where this can be done in ways consistent with guidance on reducing the transmission of coronavirus (COVID-19)
- an occupational therapist or a physiotherapist video linking to a child's home and modelling exercises that the parents could do with their child
- occupational therapists providing webinars for school staff on topics such as sensory strategies or pre-writing skills, or a teletherapy service
- sending home accessible hard copy therapy programmes with additional phone support for parents and young persons to help them work through them
- where an EHC plan already includes a personal budget or a direct payment, widening its use to enable the purchase of equipment or other relevant material to support home learning
- exercise sessions by video

- provision of alternatives to short breaks by providing online resources and activities for young people
- loaning parents school equipment, such as specialist support equipment (seating equipment, IT equipment used at school etc) to be used at home to support learning
- counselling, or cognitive behaviour therapy, delivered over the phone once a week for 6 weeks by a mental health worker

Timescales for EHC needs assessments and plans

Description of the changes to the Regulations

In addition to the changes to the law about securing or arranging provision in EHC plans, from 1 May to 25 September 2020 (inclusive) the Regulations which provide most of the statutory timescales for the EHC needs assessments and plans processes will be modified. This modification is different to that delivered by the notice in a number of ways, notably:

- the law is only changed where in a particular case it is not reasonably practicable or impractical⁵ for a local authority, health commissioning body or other body to discharge its duties for a reason relating to the incidence or transmission of coronavirus (COVID-19)
- the modification is to the timing. Where it is not reasonably practicable or impractical to conclude an action within the statutory timescale – for example, 6 weeks for a decision whether to make an EHC needs assessment – because of the incidence or transmission of coronavirus (COVID-19), the local authority or other body to whom that deadline applies will instead have to complete the process either as soon as reasonably practicable or in line with any other timing requirement in the regulations being amended. Further details are set out in Annex A: details of the amendments to the existing Regulations (<https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/annex-a-details-of-the-amendments-to-the-existing-regulations>). Some of the processes relating to EHC needs assessments and plans already have allowable exceptions to the timescales. The changes in the law provide for an additional exception to these processes where delay is because of coronavirus (COVID-19)
- the Secretary of State for Education must review the effectiveness of the changes to the regulations
- the changes are for the period 1 May to 25 September 2020 (inclusive)

To illustrate how the amendments to the law will work:

- where a local authority has decided that it is necessary to issue an EHC plan following an EHC needs assessment the duty has been to do so as soon as practicable but in any event within 20 weeks⁶ of an initial request. The Amendment Regulations⁷ provide that if the incidence or transmission of coronavirus (COVID-19) makes it impractical for the local authority to do so within the 20 weeks they must discharge their duty to do so as soon as practicable
- where a request is made to a local authority to re-assess educational, health care and social care provision, the duty has been to notify the child's parent or the young person within 15 days⁸ of the request. The gloss⁹ to the duty in Regulation 2A of the Amendment Regulations, that will change

the way in which the provision should be read, applies here. It means that if it is not reasonably practicable to complete this process within the 15 days because of the incidence or transmission of coronavirus (COVID-19), the local authority must do so as soon as reasonably practicable

The timescales in the Regulations being amended relate to the following:

- the handling of requests for EHC needs assessments, decisions whether to issue plans and the preparation and issue of plans
- annual reviews of plans
- the processes relating to mediation
- the processes where there is a change of local authority or health commissioning body for a plan
- the process for a local authority reviewing for the first time the making and use of direct payments from a Personal Budget that is part of an EHC plan
- the actions that the local authority and health commissioning body must take when the First-tier Tribunal makes non-binding recommendations in respect of certain types of health and social care matters within an EHC plan (as part of the National Trial, which continues)

The Regulations being amended include those that set out the processes over EHC needs assessments and plans for detained persons (the Special Educational Needs and Disability (Detained Persons) Regulations 2015).

The duties over timescales apply variously to:

- local authorities (SEND and social care services)
- health commissioning bodies
- those who provide advice and information for EHC needs assessments, including educational psychologists, other health professionals and education settings
- parents or young persons (when requesting a mediation certificate)
- mediation advisers

Annex A: details of the amendments to the existing Regulations

(<https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/annex-a-details-of-the-amendments-to-the-existing-regulations>) sets out the full list of regulations that have been changed. For detail of what exactly has changed, refer to the Amendment Regulations themselves.

How the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 can affect timescales for EHC needs assessments and plans processes

Process for handling a request for an EHC needs assessment and the issue of a plan under regulations 4(1), 5(1), 10(1) and 13(2) of the Special Educational Needs and Disability Regulations 2014

Usual process

The local authority needs to decide whether to proceed with an EHC needs assessment as soon as practicable and in any event within 6 weeks of a request (Regulations 4(1) and (5)(1)). If the local authority ultimately decides, following an assessment, to issue a plan, it must issue the plan as soon as practicable and in any event within 20 weeks of the request for an assessment (Regulation 13(2)).

Exception relating to coronavirus (COVID-19)

If it is impractical for the local authority to meet the initial 6 week deadline because of a reason relating to the incidence or transmission of coronavirus (COVID-19), then it must instead reach that decision as soon as practicable.

When one process with a statutory deadline concludes and a further process begins: decision on whether to issue a plan following an EHC needs assessment

A reason related to the incidence or transmission of coronavirus (COVID-19) may make it impractical to complete the next stage of the process on time. In such a situation, the local authority will need to proceed to conclude the next stage as soon as practicable rather than within the statutory deadlines (16 weeks if it decides not to issue a plan, 20 weeks otherwise) (Regulations 10(1) and 13(2)).

Cases in progress on 1 May 2020

The Amendment Regulations will come 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.

Key elements of the processes relating to EHC needs assessments and plans are unchanged

These temporary changes to the law only affect various statutory timescales for processes relating to EHC needs assessments and plans. All of the other requirements of the EHC needs assessments and plan processes remain unchanged.

A local authority 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.

Section 19 of the Children and Families Act 2014, which requires local authorities to have regard to the views and wishes of a child, the child's parent or a young person when exercising its SEND functions under the Act, remains in force.

A local authority must continue to have regard to the guidance on the handling of delays in paragraph 9.43¹⁰ of the SEND Code of Practice. Where the circumstances relating to coronavirus (COVID-19) set out in the Amendment Regulations apply to more than one process, then an exception may apply to each of those processes. If a process with a statutory timescale begins where a delay relating to coronavirus (COVID-19) is likely, the local authority should advise the parent or young person of this.

One of the timescales relating to EHC plans¹¹ is giving parents or the young person at least 15 days to give views and make representations on the content of a draft plan. There is no change to the law here. Local authorities will wish to 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. It may be harder for parents and young people to contact early years providers, schools and colleges, for example, to gather information relating to deciding their preference over setting. Parents and young people may themselves be ill or otherwise directly affected by the outbreak.

A final EHC plan must still include all of the required advice and information.

The provision set out in the final plan should be in line with the statutory requirements for any EHC plan and not be limited because of the circumstances of coronavirus (COVID-19).

Reviews and re-assessments of EHC plans must still take place (although there can in some circumstances be flexibility over the timing of an annual review, see paragraphs below)

Decisions, including those over the content of any EHC plan, must continue to be made in accordance with the statutory framework and be based on the individual needs, provision and outcomes for the child or young person. Local authorities must not apply blanket approaches in relation to EHC needs assessments or plans processes and decision-making. For example, local authorities cannot implement a general policy of refusing to consider new requests because of coronavirus (COVID-19). Neither can they make blanket decisions based on particular age groups of children and young people, those with certain types of need, or based on whether they are at home or in school.

Examples of how local authorities might need to adapt how they manage the processes relating to EHC needs assessments and plans

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.

Annual reviews of EHC plans

There is a power¹² under the Coronavirus Act 2020 for the Secretary of State for Education by notice temporarily to disapply the duty to conduct annual reviews. However, he has not issued a notice under this power at this point in time, so the annual review requirements remain in place.

However, the government has legislated to provide extra flexibility for local authorities over the timing of these reviews. Where it is impractical for a local authority to complete an annual review of a plan within the prescribed timescales for a reason relating to the incidence or transmission of coronavirus (COVID-19), then the local authority must complete it as soon as reasonably practicable¹³.

Annual reviews may, in the current circumstances, need to take a different form. However, it is important that they continue to ensure that the child or young person is at the centre of the process and can engage with the process in a meaningful way. A review meeting, even if by necessity briefer than usual, can be reassuring for parents, children and young people, through ensuring that their EHC plan is up-to-date so that they can receive appropriate provision.

Many local authorities have been working on improvements to the timeliness and quality of annual reviews and will want to continue to build on this work to manage reviews effectively during the outbreak. For example, it may be appropriate to use a simpler format to gather information electronically and to hold the meeting by phone or as a virtual meeting. Professionals contributing to the review may need to base that on the information already available and discussion with the family as they may not be able to meet the child or young person. While meetings might take a different format, they should still involve all the key professionals wherever possible.

Local authorities should identify priorities for review, which may include:

- children and young people with significant changes of need or circumstances
- looked after children
- children and young people in residential provision
- children and young people in out of area provision, especially independent and non-maintained provision

Local authorities must already have completed this year's required transfer reviews for a child or young person moving between key phases of education (transfers into or between schools, moves from secondary school to a post-16 institution or apprenticeship, or moving between post-16 institutions). There is no change to the statutory deadlines for these reviews. Where, exceptionally, completion has been delayed, these transfer reviews need to be finalised as a priority.

Implications for early years providers, schools, colleges etc

The duty on education settings to admit (section 43): no change

Whilst the Secretary of State for Education now has powers¹⁴ under the Coronavirus Act 2020 by notice temporarily to disapply the duty to admit, he has not issued any such notice at this point in time. An early years provider, school, college or other setting named in an EHC plan must accordingly admit the child or young person.

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. The government's advice on SEND risk assessments (<https://www.gov.uk/government/publications/coronavirus-covid-19-send-risk-assessment-guidance/coronavirus-covid-19-send-risk-assessment-guidance>) is that during the outbreak local authorities should consider the needs of those with an EHC plan, and make a risk assessment, consulting educational settings and parents or carers, to determine whether these children and young people can have their needs met at home and be safer there than attending an educational setting. In addition, the local authority must make reasonable endeavours to secure the provision in the EHC plan.

The timescale for education settings to respond to a proposal to name them in an EHC plan: no change

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. The request to consider a placement that is sent to the setting for consultation over the naming of that setting will include the draft plan and all of the advice and information received as part of the assessment. This provides considerable levels of information about the individual's needs, provision and outcomes. In addition, the proposed setting can, as part of its consideration, make direct contact with the parent or young person to discuss the admission.

We therefore expect that, in most instances, settings should remain able to engage effectively in this aspect of the EHC plan process and families might still reasonably expect this to happen as part of the timely completion of an EHC plan. We recognise, however, that staff absence because of illness, self-isolation etc may affect the speed with which a setting can reply. In such circumstances, the setting needs to communicate with the local authority about a possible delay in responding.

Communication during this part of the process is key to effective decision-making. We recommend that in parallel with sending the proposal to the setting, the local authority also makes phone contact. While settings may remain closed to pupils or students, we look to them to make arrangements that enable them to continue to respond to consultations on future admissions during this period.

Complaints and rights of appeal of parents and young persons: no change

Clearly these are unprecedented times. One aspect of this is that the vast majority of those with EHC plans are not currently attending their usual education setting. This may make it more difficult for the local authority or health commissioning body to secure or arrange the full range of provision in an EHC plan. It may also not be appropriate during the outbreak for local authorities, health bodies, educational psychologists and other professionals to provide their usual level of service delivery in relation to the EHC needs assessments and plans processes. This is why the law in relation to these matters has temporarily been modified.

In most instances, families and the local authority or health body and their partners will be able to work together to agree a mutually satisfactory arrangement for the time being. However, where a parent or young person may be dissatisfied about the actions of a local authority or health body over how they have discharged their modified s42 duty or about the timeliness with which processes relating to EHC needs assessments or plans have been progressed, then effective ways of resolving disagreement are

crucial. In the current fast-changing and complex situation, it is particularly important that there are effective ways of resolving such disagreements swiftly, wherever possible using established decision-making mechanisms within the local area. The complaints mechanisms described in Chapter 11 of the SEND Code of Practice (<https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>) are unchanged, although the Local Government and Social Care Ombudsman has temporarily suspended all casework activity. In the first instance, families will often be able to use the local authority's or health commissioning body's complaints procedures. Local authorities and health commissioning bodies will need to ensure that these procedures remain effective for the current context. SENDIASS will continue to have a key role to play in supporting families in finding the best way forward.

Appeals to the First-tier Tribunal (SEND): no change

Rights of appeal to the First-tier Tribunal (SEN and Disability) remain unchanged.

HM Courts and Tribunal Service has confirmed that its service will continue during the outbreak and that the tribunal is making efforts to conclude as many appeals as possible, particularly phase transfer reviews.

In the same way that local authorities are finding new ways of working remotely, guidance from the tribunal indicates that it will be increasingly using phone, video and other technology to conduct its business during the current period.

The tribunal continues to hear cases as now that fall within its remit. These have not been changed.

The national trial, which extends the power of the First-tier Tribunal (SEND), is continuing. The trial provides that as part of a special educational appeal, the tribunal will be able to make non-binding recommendations on the health and social care aspects of EHC plans. These recommendations need to be considered in the usual way by the responsible health and social care bodies and, where agreed, included in the final EHC plan. The modified s42 duty will then apply.

The Amendment Regulations will temporarily modify current timescales for actions that local authorities and health commissioning bodies must take where the tribunal makes non-binding recommendations in respect of certain types of health and social care matters within an EHC plan.

Annually publishing a response to comments on the SEND Local Offer

The Amendment Regulations also provide that local authorities can take more than a year to publish their response to comments (from those with SEND and their parents) on their SEND Local Offer if it is not reasonably practicable to meet that deadline for a reason relating to the incidence or transmission of coronavirus (COVID-19). Where such an exception does apply, the local authority must publish the comments as soon as reasonably practicable.

Footnotes

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1. Section 42 of the Children and Families Act 2014 uses the term 'responsible commissioning body' to describe the body that is under a duty to arrange the health care provision set out in an EHC plan. In practice, the responsible commissioner is usually the Clinical Commissioning Group or in

some cases NHS England for directly commissioned services. The operational delivery of health provision is usually through health providers. For the purposes of this document we are using the term 'health commissioning body'. ↩

2. Which of these tests applies depends on the wording of the relevant regulation, for detail see Annex A: details of the amendments to the existing Regulations
(<https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/annex-a-details-of-the-amendments-to-the-existing-regulations>). ↩
3. We use the term 'parents' in this document in the same way that it is used in the SEND legislation, that is all those with parental responsibility, including parents and those who care for the child. ↩
4. Section 38(1) of, and paragraph 5 of Schedule 17 to, the Coronavirus Act 2020 ↩
5. Which of these tests applies depends on the wording of the relevant regulation, for detail see Annex A: details of the amendments to the existing Regulations
(<https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/annex-a-details-of-the-amendments-to-the-existing-regulations>). ↩
6. Regulation 13(2) of the Special Educational Needs and Disability Regulations 2014. Regulation 13 of the Special Educational Needs and Disability (Detained Persons) Regulations 2015 sets out similar provisions in relation to detained persons ↩
7. Regulations 9 and 10 of the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 amend regulation 13(3) of the Special Educational Needs and Disability Regulations 2014 by extending the reasons in regulation 10(4) for not complying with a time limit and applying these to regulation 13(3). Similar amendments apply to the Special Educational Needs and Disability (Detained Persons) Regulations 2015 ↩
8. Regulation 25(1) of the Special Educational Needs and Disability Regulations 2014 ↩
9. Regulation 25(1) of the Special Educational Needs and Disability Regulations 2014 is now subject to the gloss in new regulation 2A (as inserted by regulation 5 of the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020) ↩
10. The child's parent or the young person should be informed if exemptions apply so that they are aware of, and understand, the reason for any delays. Local authorities should aim to keep delays to a minimum and as soon as the conditions that led to an exemption no longer apply the local authority should endeavour to complete the process as quickly as possible. All remaining elements of the process must be completed within their prescribed periods, regardless of whether exemptions have delayed earlier elements. ↩
11. Regulation 13(1) of the Special Educational Needs and Disability Regulations 2014 ↩
12. Section 38(1) of, and paragraph 5 of Schedule 17 to, the Coronavirus Act 2020 ↩
13. Regulation 18A of the Special Educational Needs and Disability Regulations 2014, inserted by regulation 11 of the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 ↩
14. Section 38(1) of, and paragraph 5 of Schedule 17 to, the Coronavirus Act 2020 ↩