

Covid19: changes to special educational needs and disability (SEND) legislation

The DfE has published a notice under the Coronavirus Act 2020 as well as amending regulations and guidance which make some changes to the special educational needs and disability (SEND) framework arising from the Children & Families Act 2014 and the SEND Regulations 2014.

05 May 2020

Please note: the information contained in this legal update is correct as of the original date of publication

The DfE has published a notice under the Coronavirus Act 2020 as well as amending regulations and guidance which make some changes to the SEND framework arising from the Children & Families Act 2014 and the SEND Regulations 2014. The changes broadly reflect the previous indications for change given by the DfE over the past few weeks and will impact on local authorities, health bodies and parents of children, or young people, with SEND.

Amendment to section 42 Children & Families Act 2014

The Secretary of State's notice is set out [here](#).

Section 42 of the 2014 Act places an absolute duty on local authorities to secure the special educational provision in an EHCP and on health commissioning bodies to secure healthcare provision in an EHCP. This is an absolute duty for these bodies and, in the case of local authorities, had been linked to the need to ensure sufficient funding was provided to ensure the specified provision could be provided by the relevant school or other institution.

The notice, which is in force initially until the end of May 2020, replaces that absolute duty with a duty to make reasonable endeavours to secure the relevant provision. This does not mean that local authorities or health commissioning bodies can step back from making provision available during this period. The accompanying [DfE guidance here](#), makes it clear that both bodies must consider the individual needs of the child/young person and decide what provision they can reasonably make in the current circumstances. The DfE guidance suggests that:

- Communication and co-production between local authorities, health commissioning bodies, schools, colleges and other institutions as well as parents/young people and parent carer forums will be an important element of ensuring decisions around what provision can reasonably be provided are appropriate during the currency of the notice;
- Local authorities must ensure that independent advice and guidance is available (from SENDIASS or other bodies) to parents and young people at this time when decisions about potentially reduced provision are being made;
- That local authorities and health commissioning bodies must make reasoned decisions in relation to individual children/young people, taking account of local circumstances as well the needs and views of the child or young person and communicate those decisions to the parents or young person;
- That such decisions must be kept under review and that parents or young person may challenge these decisions through the local authority or health commissioning body's complaint processes.

This process of reviewing provision will have resource implications for local authorities and health commissioning bodies. It will be important to look at how these decisions are made and communicated in situations where many SEND Teams or health authority staff will be working from home. There will need to be some form of virtual decision making and moderation to ensure a consistent approach is

maintained that meets the needs of the child and young person as well as reflecting the reality of practical provision during the Coronavirus outbreak.

Given that it is possible that some children or young people with EHCPs may still be attending a school, communication between local authority, health commissioning body and school will be vitally important. Where services/provision may no longer be available to the school, it may be necessary for the school and local authority to revisit the SEND risk assessments that should be in place to determine whether a place can remain open at the school for the child/young person during the lockdown period.

Changes to timescales for actions to be completed

The regulations [here](#) and the detailed list of changes are set out [here](#).

These changes disapply timescales, mainly found in the SEND Regulations 2014, for certain aspects of the processes leading to the assessment or making of an EHCP. The amending regulations operate where it is impractical or not reasonably practicable for the local authority or another body to comply with a timescale in the original 2014 regulations for a reason relating to Covid-19. In such cases, the local authority, or other body, must undertake the task as soon as reasonably practicable.

The changes permitted under the 2020 regulations only apply to the timescales for complying with the duty. The changes do not remove the requirement to comply with the duty.

The areas which are potentially subject to relaxed timescales are:

- 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)

Clearly, these will have implications across the sector. It may reduce immediate burdens on local authorities, health bodies and other agencies involved in EHC needs assessments, decisions over EHCPs and annual reviews. However, there may be consequential impacts on parents and/or schools awaiting decisions on EHC needs assessments and EHCPs which are required to inform appropriate provision for children and young people. Again, communication between all parties will be key to ensuring that the process continues to work and that decisions are made (and effectively communicated) within reasonable timescales.

No change

The DfE guidance does indicate some areas are not changing and these are important to note:

- The majority of the SEND framework remains in force as does the requirement to have regard to the SEND Code of Practice 2015. The Code should be read in line with the 2020 guidance where appropriate;
- The general duty under section 19 Children & Families Act 2014 to have regard to the views of children, young people and parents when exercising functions around SEND remains in place. This duty also underpins the DfE guidance, especially the requirements around consultation and co-operation with parents on decision making;
- There remains a duty to consult school or colleges prior to that school or college being named in section I of an EHCP. The school will still have 15 days to respond to the consultation, although the DfE guidance does reference that communication between the bodies could result in extended periods for a response being agreed in these circumstances;
- Where a school or college is named in an EHCP, the duty to admit under section 43 still applies. Schools will be required to take the pupil on roll and will, at that stage, need to undertake the SEN Risk Assessment with the local authority to assess whether provision should be made for that pupil in school; and
- Annual Reviews must still take place – only the timescale has been amended. Local authorities and schools will need to co-operate to find different ways to ensure these reviews can happen; and
- Complaint mechanisms and rights of appeal to the SEND Tribunal remain in force.

Browne Jacobson's Education Team has extensive experience of advising on SEND matters, including tribunals, and is able to support you with any concerns or queries arising from these changes. Should you wish to have a further discussion, please contact [Richard Freeth](#) or Sophie Jackson.

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