

COVID-19: Guidance on temporary legislative changes to EHCP Process

There have been 2 changes to SEND legislation:

1. Section 42 of the CAFA 2014 (duty to secure special educational provision and health care provision in accordance with EHC plan):

The duty on Local Authorities (LA) or commissioning health bodies to secure or arrange the provision is temporarily modified to a duty to use **'reasonable endeavours'** to do so. In other words:

LAs must use 'reasonable endeavours' to secure or arrange the provision in an EHCP

2. The SEND (Coronavirus) (Amendment) Regulations 2020 amend Regs that specify timescales that principally relate to EHC needs assessments and plans:

Where it is not reasonably practicable, or is impractical, to meet that time limit for a reason relating to the incidence or transmission of coronavirus, the specific time limit will not apply - process must be completed **as soon as reasonably practicable**. In other words:

Where time limits cannot be met due to coronavirus, LAs must instead complete processes 'as soon as reasonably practicable'

When will the changes be in place?

- Both sets of changes are effective from 1 May 2020.
- They cannot be applied retrospectively.
- The section 42 modification (1) is in place until 31 May 2020 but can be renewed **monthly**, where the Secretary of State decides it is still appropriate and proportionate.
- The timescale amendments (2) are in place until 25 September 2020.

1. The Reasonable Endeavours Duty

- Local Authorities and health bodies must use their 'reasonable endeavours' to secure or arrange the provision in an EHC plan.
- Local Authorities and health bodies must consider for each child and young person with an EHC plan what they need to provide during the notice period.
- For some, this will mean that the provision specified in their plan can continue to be delivered.
- For others, this may result in a child or young person's provision being different to that which is set out in their EHC plan, for some, or all, of the time that the notice is in force.
- The modified section 42 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.

How will LAs decide which provision must be secured?

The Local Authority and health commissioning body should consider:

1. the specific local circumstances, e.g. workforce capacity and skills and that of others whose input is needed; temporary closures of education settings; guidance on measures to reduce the transmission of coronavirus;
2. the needs of and specific circumstances affecting the child or young person;
3. and the views of the child, young person and their parents over what provision might be appropriate

Can alternative arrangements be put in place?

Alternative arrangements 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 will be dependent on:

- the availability and 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

Examples of alternative arrangements include:

- Alterations to the frequency and timing of the delivery of provision in school, e.g. moving to a part-time timetable.
- A temporary placement in another school - mainstream or special, with the agreement of the parent or young person.
- Attendance at a local hub.
- Video class sessions for children to keep in touch with classmates and teaching staff.
- Home learning reading programme, provided by SENCo, reviewed weekly.
- Educational Psychologists providing brief therapy interventions.
- Specialist SEN Teachers providing advice and support to parents re autism, visual or hearing impairment or literacy.
- A speech and language therapist delivering sessions via video link.
- An occupational therapist video linking to a child's home and modelling exercises that the parents could do with their child.

What about record keeping and communication?

The Local Authority and health commissioning body should:

1. keep a record of the provision it decides it must secure or arrange;
2. confirm to the parents or young person what it has decided to do, and explain why the provision differs from that in the plan for the time being;
3. keep under review whether the provision it is securing or arranging means that it is still complying with the reasonable endeavours duty, and takes account of the changing circumstances for the child, and for services.

2. The Reasonably Practicable Timescales Duty

- The law is changed **only** where, in a particular case, it is not reasonably practicable, or it is impractical, for a Local Authority, health commissioning body or other body to discharge its duties for a reasons relating to coronavirus;
- The modification is to the timing **only**. Where it is not reasonably practicable or impractical to conclude an action within the statutory timescale – e.g.. 6 weeks for a decision whether to make an EHC needs assessment - for a reason relating to 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 any of the regulations being amended

Which key timescales will be affected?

- Handling of requests for EHC needs assessments;
- Decisions whether to issue plans;
- The preparation and issue of plans;
- Annual reviews of plans;
- The processes relating to mediation;
- 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; and
- The timing of actions that the Local Authority and health commissioning body must take when the First-tier Tribunal makes non-binding recommendations in respect of health and social care matters within an EHC plan.

What are the implications of this change?

- Each case needs to be determined based on its own circumstances - there is no blanket lifting of the timescale requirements.
- Local Authorities and health bodies cannot make blanket policies, such as “We are unable to provide educational psychologist or speech and language therapist’s advice in 6 weeks”.
- Where there is a delay due to reasons related to coronavirus, Local Authorities and health bodies must complete the action as soon as is practicable.
- Decisions, including those over the content of an 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.

What should happen if there are any timescale delays?

The Local Authority must continue to have regard to the SEND Code of Practice (9:43):

1. The child’s parent or the young person should be informed if exemptions apply.
2. 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.
3. All remaining elements of the process must be completed within their prescribed periods, regardless of whether exemptions have delayed earlier elements.

Where the circumstances relating to coronavirus set out in the Amendment Regulations apply to more than one process, then an exception may apply to each of these processes.

Annual reviews

- Annual review requirements remain in place.
- 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.
- 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 coronavirus, then the Local Authority must complete it as soon as reasonably practicable.
- Annual review meetings may need to take a different form.
- 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
- Local Authorities should identify priorities for review, which may include:
 - children and young people with significant changes of need or circumstance;
 - looked after children;
 - children and young people in residential provision; and
 - 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. Where, exceptionally, completion has been delayed, these transfer reviews need to be finalised as a priority.

The duty on education settings to admit

- There is **no change** to the duty on education settings to admit (Section 43)
- An early years setting, school, college or other setting named in an EHC plan must admit the child or young person.
- Where a setting is temporarily closed, the setting must still admit – child or young person must be placed on the roll and treated similarly to other pupils or students in the setting.
- 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.
- Local Authorities and health must make reasonable endeavours to secure the provision in the EHC plan.

Timescales for education settings to respond to a proposal to name them in an EHC plan

- There is **no change** to timescales for education settings to respond to a proposal to name them in an EHC plan
- The expectation that early years settings, schools, and colleges have up to 15 days to respond to a proposal to name their institution in an EHC plan remains in place, and settings should be able to engage effectively in this aspect of the process.
- Local Authorities must send the proposed setting the draft plan and all advice and information received, which includes information about the individual's needs, provision and outcomes. The proposed setting can also make direct contact with the family.
- 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 Authorities also makes phone contact.
- Where the setting expects a possible delay in responding, it needs to communicate with the Local Authority early.

Complaints and rights of appeal for parents/young persons

- There is **no change** for complaints systems or processes.
- It is particularly important that there are effective ways of resolving disagreements about how a Local Authority or health body have discharged their modified section 42 duty, or about timeliness.
- In the first instance, families will be able to use the LA's or health commissioning body's complaints procedures. Local Authorities and health commissioning bodies 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, please feel free to contact us if you have any further queries.

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