



Coronavirus Act 2020, Children's Health & Social Care, SEN & EHCPs | An Update 10 August 2020

Welcome



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10 August 2020

The Coronavirus Act 2020 – Recap...

- Unprecedented times, unprecedented measures.
- What does it impact?
 - Hospital discharge process.
 - NHS Continuing Healthcare & NHS Funded Care for Adults.
 - Local Authority funded care/Social Care for Adults.
 - Special Educational Needs provision and EHCPs – these changes are now in force however a further 'Modification Notice' downgrading the Section 42 Children & Families Act 2014 duty has not been issued by the Secretary of State for August as was the case in May, June and July.
 - Mental health but changes not yet in force.
 - Mental capacity and best interests decision-making.

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- Changes to special educational needs provision and EHCPs under the Children & Families Act 2014 (CFA 2014).
- Effective? From 1 May 2020 until 25 September 2020. The effectiveness of the Regulations has to be reviewed during this period. **Given that 25 September 2020 is fast approaching, it is expected that the Government will indicate whether it intends to extend the changes beyond 25 September 2020 soon.**
- Key changes:
 - 1) Previously the Secretary of State issued 'Modification Notices' in May, June and July 2020 modifying the absolute duty to secure SEN (Section 42 CFA 2014) to a duty of 'reasonable endeavours' – i.e. watering down/downgrading the core Section 42 absolute duty.
 - 2) Key timescales modified where 'Coronavirus Exception' applies.

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- In accordance with the Secretary of State's announcement on 2 July 2020, a 'Modification Notice' was not issued on 1 August 2020, meaning the previous modification ceased on 31 July 2020.
- Practical effect? The absolute duty in Section 42 CFA 2014 is restored to the pre-Coronavirus position in time for when children and young people must return to school in September.
- This means if your child or young person has special educational provision (SEP) listed in Section F of their EHCP, which is required to meet Section B SEN, a Local Authority must ensure the provision is provided without excuse.
- There is no 'reasonable endeavours' fall-back in the absence of a current 'Modification Notice'.

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- Guidance has been updated on 31 July 2020 to reflect the re-instatement of absolute Section 42 duty.
- The Guidance: [Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to Coronavirus \(COVID-19\) \(updated 31 July 2020\)](#)
- The Guidance is clear that:
- *“It is only those aspects of the law relating to the timescales for particular EHC needs assessment and plan processes that are changed temporarily because of the Coronavirus outbreak: all other aspects of SEND law are unchanged”.*
- Note that whilst the Guidance confirms no further national modification notices will be issued there is a caveat of *“unless the evidence changes”* and a suggestion that Local Authorities may be afforded flexibility locally to respond to outbreaks.

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- It is not entirely clear what the updated Guidance means by flexibility locally to respond to outbreaks, however, it seems likely that a similar model to the Care Act 2014 Easements process may be envisaged.
- No doubt more information with regard to this caveat will follow.

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- Modification to timings remain in place until 25 September 2020 unless extended.
- Under these modifications, there is a significant relaxation of the deadlines for various aspects of the EHCP process until 25 September 2020 unless extended.
- A Local Authority can, therefore, delay whilst the modifications to timings are in force when ordinarily delay would not be acceptable or lawful.

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- Modifications to timescales.
- 'Coronavirus exception'.
- According to the 'Coronavirus exception' where it is not 'reasonably practicable' for a Local Authority to meet a requirement for a reason relating to the incidence or transmission of coronavirus, any 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'.

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- Modifications to timescales – key changes:
 - The determination of requests for EHC needs assessments, decisions whether to issue EHCPs and preparation and issue of plans.
 - Annual reviews of EHCPs.
 - Processes relating to mediation.
 - Actions that a Local Authority and CCG must take when the Tribunal makes non-binding recommendations under the National Trial.

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- Modifications to timescales.
- Example: Previously where a Local Authority decided 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.
- Now, if the incidence or transmission of COVID-19 makes this impractical (i.e. to meet the 20 week deadline), it must discharge its duty 'as soon as practicable'.

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- What has not changed?
- The substantive requirements relating to assessing needs & issuing EHCPs have not changed.
- You must still be given at least 15 calendar days to give your views and make representations on the content of a draft EHCP.
- Rights of appeal to the SEND Tribunal remain unaffected albeit the Tribunal has temporarily moved to fully digital working.
- Requirement to conduct EHCP annual reviews – this may change in the future.
- Duty on education settings to admit a child or YP remains.
- Timescale for education settings to respond to a proposal to name them in a plan.

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- Is it back to school in September?
- Yes. The current position (as of 3 August 2020) is that all pupils are expected to return to school in September. This included a child or young person with SEN or a child or young person with an EHCP.
- Sensible and proportionate measures should be taken to reduce the risks to a child or young person.
- Contact should be minimised.
- Social distancing maintained albeit this may not always be possible.

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- Is it back to school in September?
- If your child or young person has SEN, but does not have an EHCP, the educational setting must ensure 'reasonable adjustments' are made to facilitate a full-time return in order to comply with Equality Act 2010 obligations. A failure to make 'reasonable adjustments' may amount to discrimination.
- For any child or young person with an EHCP, the educational setting must ensure arrangements are made for the child or young person to return to school full-time in accordance with their Section I placement.
- As no further Modification Notice has been issued, Local Authorities must ensure a child or young person with an EHCP is provided with all of the Section F SEP required to meet their Section B SEN.
- Any excuse or failure to do so may be challenged informally or formally.

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- When is it possible for a child or young person not to return to school?
- If a medical professional agrees it will not be safe for a child or young person to return. There needs to be an objectively good reason for this.

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- What guidance should I consider when planning my child or young person's return to school?
- [DfE Guidance](#) "Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus (COVID-19)" (updated 31 July 2020)
- [DfE Guidance](#) for full opening: schools (updated 27 July 2020)
- [DfE Guidance](#) for full opening: special schools and other specialist settings (published 2 July 2020)
- [Joint Ministerial Letter](#) to children and young people with SEND and their parents (dated 21 July 2020)
- [DfE guidance](#) for parents on elective home education – (April 2019)

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- What guidance should I consider when planning my child or young person's return to school?
- [DfE Guidance](#) "Safe working in education, childcare and children's social care settings, including the use of personal protective equipment (PPE)" (updated 21 June 2020)
- [Public Health England](#) "Guidance on shielding and protecting people who are clinically extremely vulnerable from COVID-19 (Updated 31 July 2020)
- [Royal College of Paediatrics and Child Health advice](#) "COVID-19 -'shielding' guidance for children and young people" –updated 31 July 2020

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- Children's health and social care duties.
- There are no changes with regard to a Local Authority or Clinical Commissioning Group's statutory duties to provide children and young persons with health and social care support.
- [Guidance: Coronavirus \(COVID-19\): guidance for children's social care services](#) (updated 15 July 2020)
- Previously, this Guidance suggested there had been changes to statutory duties as a result of the Coronavirus Act 2020 and Coronavirus Regulations.
- As this is not the case, following a recent legal challenge, the Guidance was updated on 15 July 2020 to reflect this. This challenge focused on the impact of the previous Guidance on looked-after children.
- Guidance does, however, suggest Local Authorities should make "*sensible, child-centred, risk-based judgements about where to focus their efforts*".

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- Children's health and social care duties.
- Short breaks & respite provision. Guidance is clear that "*families caring for a disabled child or young person are entitled to short breaks services (known as respite)*" albeit there are practical challenges to facilitating these due to Coronavirus.
- Flexible use of direct payments to help fill in the gaps. Useful article explaining direct payments available via [Special Needs Jungle](#).
- In light of the updated [Guidance on shielding](#) (updated 31 July 2020), it seems likely the children's social care Guidance will be further revised with more information regarding short breaks and respite provision.

Further Questions?

If you have any questions or concerns, please email Patsy: patsy@thedcf.org who will pass on your queries.

Thank you for listening.