

# Entitlements for children and young people with SEND during Covid-19

6<sup>th</sup> May 2020

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# Changes to EHCP timescales

## Changes to SEN hearing practice and procedure

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# Key Documents

- 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)).

# Another Example

- There is a power under the Coronavirus Act 2020 (para. 5 of Schedule 17) for the Secretary of State by notice to disapply temporarily the duty to conduct **annual reviews** of EHCPs. This has not (yet) been invoked, so annual reviews must still take place.
- The Amendment Regulations, however, create what amounts in effect to a brand new delay excuse. Where it is impractical for the LA to complete an annual review within the prescribed timescales (e.g. the routine statutory 12 monthly annual review created by section 44(1) of the Children and Families Act 2014) because of the coronavirus exception the LA must instead complete it **as soon as reasonably practicable**.
- (See: reg. 18A of the 2014 Regulations, inserted by reg. 11 of the Amendment Regulations 2020.)



# 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 over the coming weeks and months 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 ...

- It is also important to appreciate what has **not** changed.
- Crucially, 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.”*

# What about EHCP processes already underway?

- The key date here is 1 May 2020. The Amendment Regulations came into force on that date and not before. So, if the final deadline (such as the end of the 20 weeks for issuing a final EHCP) had passed before 1 May 2020, the relaxations to timescales for a reason relating to COVID-19 simply could not apply because the relaxations were not in force then.
- If, however, consideration of a request for an EHC needs assessment or one of the processes that may follow was still in progress on that date, then the relevant exception to the timings in the Amendment Regulations *could* apply if COVID-19 had caused delay. This Guidance says that this ‘... would depend on the facts of the case’. Again: blanket approaches must be avoided.

# 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”?

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