

Entitlements for children and young people with SEND during COVID-19

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This presentation is intended for general information and should not be relied upon in relation to any individual case.

Section 42 CFA

(1) This section applies where a local authority maintains an EHC plan for a child or young person.

(2) The local authority must secure the specified special educational provision for the child or young person.

(3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.

An 'absolute' duty

R (N) v North Tyneside [2010] EWCA Civ 135

17. There is no best endeavours defence in the legislation. If the situation changes there is machinery for revising the statement, but while it stands it is the duty of the LEA to implement it. In a margin of intractable cases there may be reasons why a court would not make a mandatory order, or more probably would briefly defer or qualify its operation.

The Notice

Coronavirus Act 2020 Modification of section 42 of the Children and Families Act 2014 (England) Notice 2020

The Secretary of State for Education by this notice modifies section 42...so that any duty imposed on a person by that section is to be treated as discharged if the person has used reasonable endeavours to discharge the duty during the period specified in this notice.

The Notice

Appropriate and proportionate to introduce because:

- Local authorities have reduced staff resources
- Many CYP with EHC Plans educated at home
- Normal educational programmes probably disrupted
- Some CCGs have had to redeploy staff or reprioritise services

The Notice

No alternatives (eg remote delivery) because:

- Unlikely to be sufficient specialist staff to deliver all provision remotely
- Provision may not be possible to deliver remotely
- ‘Even if a remote equivalent were to be provided for each aspect of provision specified in an EHC plan, this would not constitute securing the provision as specified.’

The Notice

Modifications proportionate because:

(i) The modification allows local authorities and [CCGs] to adapt to the changing situation in their specific area, based on the nature and demands of the outbreak locally, workforce capacity and skills, and the needs of each individual with an EHC plan.

(ii) The modification enables local authorities and [CCGs] to arrange reasonable alternatives to the usual service during the outbreak, such as by delivering therapies remotely, or using video.

The Guidance

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.

The Guidance

a. 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)

b. the needs of and specific circumstances affecting the child or young person

c. the views of the child, young person and their parents over what provision might be appropriate

The Guidance

The framework for ‘reasonable endeavours’:

a. What?: Differences in the provision stated in the plan.

b. Where?: Location where provision is to be provided may be altered.

c. How?: Frequency and timing of provision may be altered or modified.

d. When?: Method of delivery may be altered, such as to employ video technology.

e. By whom?: Changes to the person delivering the provision.

Implications

- ‘Do nothing’ plainly unlawful
- Should *try* to secure provision set out in sections F and G, whether as specified or in modified form
- Will be difficult to challenge failure to exercise ‘reasonable endeavours’ in any case
- Responsibility to meet needs will fall back on schools – CFA 2014 s 66 (‘best endeavours’)
- No change to social care duties to children

Social Care

- Every 'disabled' child is child 'in need'
- All children in need are entitled to assessment – section 17 CA 1989
- Assessment must be in accordance with *Working Together to Safeguard Children*
- Duty to provide services – section 2(6) CSDPA 1970 – where 'necessary' to meet child's needs
- Duty to accommodate – section 20 CA 1989

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