IAN BROWNHILL JOINS 39 ESSEX CHAMBERS

Chambers is delighted to welcome Ian Brownhill. Ian is an established education law practitioner with particular interest and experience in:

(i) safeguarding in educational settings;

(ii) race and disability discrimination claims;

(iii) university discipline and school exclusions.

In addition, Ian has acted for students and schools in a number of judicial reviews both as claimant and defendant. Ian is currently acting in a number of Court of Protection cases which involve education law issues.

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FRESHERS' WEEK IN THE TIME OF CORONA

Ian Brownhill

In this article, Ian considers what the start of the new term will be like for University Students this year, in the wake of the Covid-19 pandemic.

September and October 2020 will see the start of term for a number of new University Students. Their University experience has the potential to be unlike any other and with it comes a unique set of legal considerations.

Delivery of learning

Many Universities have already indicated how they intend to deliver learning in the new term. Most have described a mixture of face-to-face and online learning platforms. The University of Oxford has described their starting assumption as, *"an optimal blend of online and in-person teaching, combined with clear guidance and personalised support."* In respect of online teaching, Coventry University have stated, *"attendance requirements will remain the same as normal, so that you have the best chance of success."*

No matter the way in which learning is delivered, Universities will have to keep a keen eye on issues of equality. The Office of the Independent Adjudicator has been clear that, *"Students shouldn't be penalised for missing any teaching or assessments because they have coronavirus symptoms, because they are following advice to self-isolate, or because they have unexpected caring responsibilities."* Universities should be considering in advance how to make adjustments to online platforms, face-to-face teaching requirements and attendance levels for those students with protected characteristics which are impacted by the covid-19 outbreak.

Enabling participation

University is not only about learning in tutorials and lectures. Part of the University experience is making friends and trying new things. The EHRC have suggested to employers that they reserve car parking spaces for disabled employees to allow them to travel to work without using public transport. Arguably, similar arrangements should be considered by Universities for disabled students too, not only in the context of accessing learning but other activities on campus too.

Student Unions will have to actively consider how they deliver services to those students who are shielding and how they enable their participation within their democratic processes. Likewise, those Student Unions which are charities and are reducing their services due to covid-19 constraints may have to consider whether to reduce or return fees payable to, as the Charity Commission describes it, protect their, *"reputation with its service users."*

International students

Tuition fees remain the primary source of revenue for UK universities. That revenue stream is supported by 200,000 overseas students who attend UK universities each year. Two of the largest sources of those overseas students are China and India; neither is (at the time of writing), exempt from travel restrictions. The result being that overseas students arriving from countries which are not exempt, will have to self-isolate ahead of commencing their studies. The logistical challenges that this presents will have to be considered before their arrival to avoid regulatory breaches.

The British Council are continuing to operate a website on their study-uk.britishcouncil.org website which brings together travel, immigration and health advice for overseas students. The OIA are yet to update their briefing from March 2020 in respect of overseas students. However, significantly, the OIA encourage Universities to consider housing overseas students in the event they cannot return home due to travel restrictions and to adjust arrangements for exams, especially for practical assessments.

Complaints processes
The OIA continue to consider new complaints as they arise and have produced updated general guidance in June 2020.

The OIA emphasise that, *"a rigid adherence to regulations and processes is unlikely to be fair: empathy and flexibility are key."* That is likely to be sound advice for all Universities welcoming new students in September and October 2020.

R (AW) v ST GEORGE'S UNIVERSITY OF LONDON

Rory Dunlop QC

Rory considers the recent case of *R (AW) v St George's University of London* here, in which he acted for the Claimant, a medical student, who successfully challenged the termination of her registration.

Rory Dunlop QC acted for the Claimant, AW, a medical student at the Defendant University. AW interrupted her studies to receive treatment for cancer. When she asked the Defendant about returning, she was told (i) that no adjustment would be made to the University's attendance policy to allow her to take longer than usual breaks to receive treatment, (ii) that she would need to undergo an Occupational Health ("OH") assessment and (iii) that the OH report would be shared with the University's administrative staff. She argued that her disability required an adjustment to the attendance policy and she objected to any OH report being shared with a particular member of staff.

This led to a stand off. Two academic years went by without the Claimant returning to the University. She remained on an 'Interruption of Studies'. She filed county court proceedings challenging the University's attendance policy. Then, in 2019, the University told her again to undergo an OH assessment by a certain date on the understanding that the OH report would be shared with staff. She said an OH assessment was premature given the outstanding issues in the county court. The University terminated her registration. The principal reason given was that she had failed to undergo an OH assessment by the required date.

AW brought a judicial review and won. The High Court quashed the decision to terminate her registration. The judge said that public law principles and the law of contract pointed to the same outcome – the decision to terminate was unfair, inconsistent with policy and in breach of AW's legitimate expectations. The judge held that a university place is so precious that a student may not lose it without the clearest of warnings and the opportunity to make submissions and provide evidence. It is not enough if the student repeatedly refuses to do something the university tells them to do. The university must spell out that if they continue to refuse, their place will be terminated. In this case, the University had never expressly said that if AW did not attend an OH assessment or enrol by a certain date, they would terminate her registration.

The judge also noted that the University erred in failing to issue a Completion of Procedures Letter but declined to make a declaration to that effect as it was academic – AW had chosen to pursue a claim for judicial review rather than a complaint to the Office of the Independent Adjudicator.

The Defendant argued that, even if the termination decision was unlawful, relief should be refused by reason of section 31(2A) of the Senior Courts Act 1981 (which permits relief to be refused where it was 'highly likely' that the outcome would have been the same). They submitted that, even if it was unlawful to terminate AW's registration for failing to attend an OH referral, it made no difference. Her registration would have ended anyway for other reasons (e.g. because the Defendant would have terminated her registration for failure to enrol).

The judge accepted Rory Dunlop QC's submissions that (a) he should not accept the Defendant's assertions as to what would have happened in the absence of a signed witness statement

saying, in terms, that it was highly likely that AW's registration would have ended even if the Defendant had not relied on her failure to attend the OH referral; and (b) the Defendant's submissions miss the point that, with fair warning that her registration might be terminated if she did not enrol, AW would probably have enrolled.

The judgment records an interesting submission on an issue of principle – i.e. whether s.31(2A) can ever be relied on when the unlawfulness in question was a failure to give a fair hearing. Rory Dunlop QC submitted that the answer was 'No'. He relied on *R (Bahbahani) v Ealing Magistrates Court* [2019] EWHC 1385 (Admin); [2019] 3 WLR 901 to argue that 'outcome' within the meaning of s.31(2A) is not restricted to the final decision but includes hearings that lead to that decision. Thus, a student who loses their place after a hearing has a different 'outcome' to someone who loses their place without any hearing. The judge did not need to rule on this submission as he rejected the s.31(2A) defence for the other reasons set out above.

REGISTRATION CANCELLED

Jennifer Thelen

Jennifer Thelen considers a recent Upper Tribunal case which considered – and criticised – the process of "registering" claims for disability discrimination operated in the First-tier Tribunal.

In disability discrimination claims, the First-tier Tribunal has exercised a process of "registering" claims, whereby each act of discrimination raised is analysed. As part of that process, the Tribunal Judge will indicate what claims, under what sections of the Equality Act 2010 (the **"Equality Act"**), will proceed. Thus, if a claimant argues that he or she was discriminated against because a particular adjustment was not put into place, the First-tier Tribunal could review the claim form and issue a case management direction indicating that the incident in question was registered as a claim under the reasonable adjustment provisions of the Equality Act. Often, pursuant to registration, a First-tier Tribunal judge will indicate that a claim is to be treated one way (e.g. as a reasonable adjustments claim) even if it is pleaded another way (such as a claim for direct or indirect discrimination). Plainly the First-tier Tribunal has found this a useful case management tool in disability discrimination claims, where often the parties, and in particularly the parents, are not legally represented.

In *F v Responsible Body of School W*, Upper Tribunal Judge Ward considered the lawfulness of the registration process in disability discrimination claims.

In *F,* which concerned school exclusion, the First-tier Tribunal judge had registered a number of claims under s.15 of the Equality Act 2020 ("arising under" discrimination claims) but not a separate reasonable adjustments claim by way of "Case Management Directions on the Papers". F applied to vary those directions. The directions were upheld by First-tier Tribunal Judge Lewis who stated that the reasonable adjustments claim was not sufficiently well-pleaded. F appealed.

The appeal was allowed. However, the import of the decision is its reasoning on the lawfulness of the Tribunal registration process. The concept of "registration" is not set out in either the Tribunals, Courts and Enforcement Act 2007 or the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) rules made thereunder (the **"HESC Rules"**). Not surprisingly, then, the decision of Upper Tribunal Judge Ward focused on the legislation which underpinned the registration process to consider it and its lawful limits. Two provisions of the HESC Rules were particularly relevant: (1) Rule 5(1), which provided for wide case management powers for the First-tier Tribunal; and (2) Rule 8, which provided a power to strike out, which could only be exercised upon a finding of no reasonable prospect of success and following an opportunity to make representations. Ultimately, Upper Tribunal Judge Ward concluded that the registration power as exercised here was

not lawful. In so finding, he noted that *"the very uncertainty and ambiguity in what is involved in a refusal to register is a powerful indicator that, as operated, it is not lawful."* In particular it was not clear what test was being applied. If it was the test for strike out (no reasonable prospects of success) that was not stated. If further detail was required, there were other powers, such as the power to require a party to amend a document, which a First-tier Tribunal judge could exercise.

Further, here F was not given an opportunity to make representations on the issue on which his reasonable adjustments claim was ultimately not allowed to proceed, namely that it was insufficiently pleaded, because that point only emerged in the second order, the Order of First-tier Tribunal Judge Lewis.

UT Judge Ward accepted that there was value in a judge providing *"initial, provisional, guidance to the parties, not least in discrimination cases with their potential for multiple heads of claim"*. To this end, a First-tier Tribunal Judge can lawfully make directions which:

- provides indicative guidance as to the Judge's views of the issue in a case; or
- operates the strike out provision of the HESC Rules in accordance with their terms.

The Judge acknowledged it may be possible to operate, lawfully, a registration system *"which may have the effect of screening out some cases, or parts of cases which might, later in proceedings, have been the subject [of a strike-out application]"*. However, for such a system to exist, procedural safeguards would be required. What that system, and those safeguards, should be was a matter for either the First-tier Tribunal itself (e.g. by way of Presidential Guidance) or the Tribunal Procedure Committee.

While the relief provided – that the claim be registered with a claim for the inclusion of a reasonable adjustments claim – appears to resurrect the concept of "registration", that plainly can not be right given the language of the Decision. Rather, that language was likely chosen to simplify case management on the facts of this particular case, where only one aspect of the registration decision had been appealed.

Jennifer Thelen represented the school, instructed by Birketts LLP.

REMOTE HEARINGS IN THE SEND TRIBUNAL

Tom Amraoui

Tom Amraoui considers remote hearings in the First-Tier Tribunal, four months on.

Ever since March 2020, the SEND tribunal (Special Educational Needs and Disability) has responded to the COVID-19 crisis by working remotely. It was always common practice for interlocutory hearings (case management directions hearing, for instance) to be heard by telephone. Now, all hearings – including final ones – are taking place remotely. In the case of final hearings, more often than not this has meant a hearing by video. Paper hearings remain available where the parties consent to this route.

Practitioners are increasingly getting used to this new way of working – but it imposes its own challenges and limitations.

A familiar pattern is now established. All participants, including witnesses, logon before the hearing to check their individual connections (usually with the assistance of a tribunal officer). The hearing then begins as usual at or close to 10:00 am, with the judge scoping out the issues and establishing a (rough) structure for the day. Witnesses give evidence in turn, depending on the issues in dispute. Closing submissions follow orally or in writing at the end. In many (but not all) cases the judge will check that the participants were happy with the format and satisfied that everyone said all that they wanted.

Thus, the basic structure is unchanged. What has changed are the special peculiarities imposed by

the new format. The process is more stilted, with a greater need for structure and order in the giving of evidence. Verbal and visual cues can be missed, increasing the chances of individuals speaking over one another. Microphones should be muted when people are not speaking! In the early days of this remote working, technical problems sometimes resulted in people being ejected from the virtual hearing room and needing to log back in – thankfully this seems to have been largely fixed.

For advocates, the process arguably increases the incentive to limit disputes via the working document process – for the simple reason that unwieldy working documents, with masses of lines of dispute, are very difficult to resolve in a remote format. It is often more difficult than it would otherwise be to turn up pages in the bundle (though this ought not to be a problem if all participants have access to a copy, at least electronically). The process also arguably makes more challenging the introduction of large amounts of late evidence. For obvious reasons, late evidence cannot be presented in hard copy on the day and needs to be filed and served electronically. One positive feature of the new system seems to be increased capacity, resulting in more judicial availability and fewer adjournments.

It remains to be seen for how long the new regime will be in force. The bigger question, perhaps, is whether elements of this will survive beyond the end of 'lockdown'. It may well be that the option of a video hearing will remain available for parties who want it. Parents and nervous witnesses may well find, for example, that a remote hearing is less stressful than an in-person one, and they may prefer the new format for this reason.

COVID-19 CHANGES TO SEN DUTIES

Gethin Thomas

Gethin Thomas considers the most recent changes to SEN duties arising as a result of Covid-19.

Overview

1. In response to the COVID-19 crisis, significant changes have been made to the processes governing education, health and care (EHC) needs assessments and plans and to the duty to secure or arrange the provision they set out. EHC plans are for children and young people (up to the age of 25) with significant special educational needs (SEN). These plans set out the provision that a local authority (in relation both to education and social care needs) and health commissioning bodies (in relation to health needs) must secure or arrange for the individual to meet their needs.

2. On 1 May 2020, the following two instruments came into force: (i) the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 ("the Amendment Regulations"), and (ii) a notice issued by the Secretary of State to modify section 42 of the Children and Families Act 2014 (the duty to secure special educational provision and health care provision in accordance with EHC plan) ("the Notice"). A further notice has now been issued in relation to June 2020, and July 2020.

3. The Department of Education published guidance addressing these changes on 30 April 2020 (updated on 6 July 2020), which emphasises that:

   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'…

local authority decisions over EHC plans must continue to be made in accordance with the statutory framework; and must be based on the individual needs, provision and outcomes for the child or young person. This includes local authorities not applying blanket approaches in relation to EHC needs assessments or plan processes and decision-making.[1]

4. This note summarises the changes that have implemented pursuant to the Amendment Regulations and the Notices, as well as some of the key aspects of the guidance.

The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020

5. The Amendment Regulations[2] temporarily relax the timescales that apply to various processes relating to EHC needs assessments and plans. In short, where it is not reasonably practicable for a person to meet a specified timeframe for a reason relating to the incidence or transmission of coronavirus, the body instead will have to carry out the relevant process as 'as soon as is reasonably practicable' (or as otherwise specified by the Amendment Regulations).

6. In summary, the Amendment Regulations apply to timescales contained in the following four sets of regulations dealing with special educational needs and disability ("SEND"):

a. **The Special Educational Needs and Disability Regulations 2014 SI No 1530:** These Regulations prescribe: (i) how requests are made for EHC needs assessments, (ii) how local authorities must make decisions over whether to conduct an assessment or issue a plan, (iii) how to keep those plans under review and (iv) the processes for making appeals against decisions. Many of these processes have statutory time limits. In general, the Amendment Regulations provides a 'coronavirus exception' which allows most (but not all – as addressed further below) actions to be taken 'as soon as reasonably practicable' where the exception applies (see para 5 above for the exception).[3] Reg 5 sets out the majority of the specific time periods to which the exception applies, including in relation to compliance with Tribunal orders. Notably, reg 11 of the 2020 Regulations introduces a reg 18A that provides that:

1) *It is not necessary for a local authority to review an EHC plan in accordance with section 44(1) of the Act if it is impractical to do so because of a reason relating to the incidence or transmission of coronavirus.*
2) *Where paragraph (1) applies, a local authority must instead conduct such reviews as soon as reasonably practicable.*

b. **The Special Educational Needs (Personal Budgets) Regulations 2014 SI No 1652:** The requirement imposed by these Regulations for the local authority to review the making and use of direct payments within the first three months of them being made is, subject to the 2020 Regulations, to be read instead as a requirement for such action to be taken as soon as reasonably practicable, where it is not reasonably practicable for the local authority to meet the requirement for a reason relating to the incidence or transmission of coronavirus.[4]

c. **The Special Educational Needs and Disability (Detained Persons) Regulations 2015 SI No 62:** The 2020 Regulations

1 https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/education-health-and-care-needs-assessments-and-plans-guidance-on-temporary-legislative-changes-relating-to-coronavirus-covid-19

2 The 2020 Regulations are available online here: http://www.legislation.gov.uk/uksi/2020/471/made and the Explanatory Notes are online here: http://www.legislation.gov.uk/uksi/2020/471/pdfs/uksiem_20200471_en.pdf

3 Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 5 to 14.

4 The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 15 to 17.

again apply a 'coronavirus exception' to a number of obligatory timescales for certain processes, replacing the deadlines of a specified period of time or by a certain day with a requirement for such action to be taken as soon as reasonably practicable.[5]

d. **The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 SI No 1306:** These Regulations require local authorities and health commissioning bodies to take various actions within a statutory time period when the First-tier Tribunal (SEND) makes non-binding recommendations in respect of certain types of health and social care matters within an EHC plan. The authority or body must now take action in response to health or social care recommendation as soon as reasonably practicable.[6]

7. The amendments implemented by the 2020 Regulations will cease to have effect on 25 September 2020.[7]

8. The Guidance addresses how the Amendment Regulations can affect timescales for EHC needs assessments and plans processes. The Guidance explains that, as the 2020 Regulations came into force on 1 May:

> *if consideration of a request for an EHC needs assessment or one of the processes that may follow is in progress on that date, then the relevant exception to the timings in the Amendment Regulations could apply if coronavirus (COVID-19) had caused delay. This would depend on the facts of the case.*
>
> *If the final deadline (such as the end of the 20 weeks) had passed before 1 May, the relaxations to timescales for a reason relating to coronavirus (COVID-19) made by the Amendment Regulations could not apply because they were not in force then.*

The modification notices: section 42 of the Children and Families Act 2014

9. Under the Coronavirus Act 2020, the Secretary of State for Education can issue notices to temporarily remove or relax statutory requirements where this is an appropriate and proportionate action relating to the incidence or transmission of coronavirus (COVID-19).[8] Pursuant to that Act, the Secretary of State has issued three notices that temporarily modify any duty imposed on a person by section 42 of the Children and Families Act 2014 ("the 2014 Act"), for the months of May 2020 and June 2020. Section 42 of the 2014 Act provides (insofar as relevant):

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.*
4) *"The responsible commissioning body", in relation to any specified health care provision, means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the child or young person.*
5) *Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.*

5 The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 18 to 27.

6 The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, regs 28 to 30.

7 The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, reg 2(2). Under reg 2(1), the Secretary of State must review the effectiveness of these Regulations during the period for which they have effect.

8 Coronavirus Act 2020, section 38(1) of, and paragraph 5 of Schedule 17.
The Notice is available online here: https://www.gov.uk/government/publications/modification-notice-ehc-plans-legislation-changes

10. Pursuant to the Notices, duties imposed pursuant to section 42 are treated as discharged if the person has used 'reasonable endeavours' to discharge the duty. In other words, the duty on local authorities to secure special educational provision and on health commissioning bodies (generally clinical commissioning groups, "CCGs") to arrange health provision in accordance with EHC plans, is modified such that the duty can be discharged by using their 'reasonable endeavours' to put such provision in place. The current notice applies from 1 July 2020 to 31 July 2020.

11. On 2 July, the Secretary of State confirmed that it is the government's plan that all children and young people, including those with EHC plans, will return to education settings full time from the beginning of the autumn term. The government has stated that it is committed to ensuring that children and young people can receive the support they need to return to school or college. As such, unless the evidence changes, it has stated that it will not be issuing further national notices to modify section 42 of the 2014 Act, but *'will consider whether any such flexibilities may be required locally to respond to outbreaks.'* [9]

12. The current Notice itself acknowledges that whilst 'most local authorities [SEND] capacity is now greater than it was early in the outbreak', it is still not possible for local authorities and responsible health commissioning bodies in England fully to meet their duties under section 42 of the 2014 Act because:

a. Children and young people with EHC plans are expected to attend education settings where it is determined, following risk assessment, that their needs can be as safely or more safely met in the educational environment. However, the majority of children and young people with EHC plans are still not attending education settings although numbers are increasing. It will still not be possible for all children and young people with plans to attend their education settings in July on a full-time basis for various reasons, including:

i. they are clinically extremely vulnerable;

ii. they attend a special school that is operating an attendance rota;

iii. the provision set out in an EHC plan is needed in order for the child or young person to be sufficiently safe, but the local authority or health commissioning body is not yet able to secure or arrange in full that provision because of staff shortages or the implementation of protective measures, and;

iv. Where children and young people are attending an education setting their normal educational programme will probably be disrupted for reasons such as the implementation of protective measures. This means that in many cases it will not be possible to deliver the special educational provision specified in EHC plans that would normally be delivered through the setting's normal educational programme.

13. It also states that consideration was given as to whether there were any alternative options to issuing the notice, such as delivering EHC plans remotely. However, it was again determined that remote delivery would only be partially successful for the following reasons:

a. It is not possible for all the required provision as specified in EHC plans to be delivered remotely.

b. The need to redeploy specialist staff to respond to the outbreak means that there is unlikely to be sufficient specialist staff to deliver all provision remotely.

9 https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/education-health-and-care-needs-assessments-and-plans-guidance-on-temporary-legislative-changes-relating-to-coronavirus-covid-19

c. The limitations of remote working may make it impossible to deliver provision in this way for all families.

d. 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.

14. Moreover, consideration was also given as to whether the notice should be limited to specified areas of the country or to any specified persons or descriptions of persons or by any other matter. However, it was considered that the relevant factors that are making it impossible for local authorities and health commissioning bodies to secure or arrange the provision in EHC plans in full apply across England (principally, it is said that the fact that the majority of children and young people are not attending education settings and, where they are, it is likely that settings' usual educational programmes will be disrupted). Based on this, the modified section 42 duty was considered to apply across the whole of England without any limitation.

15. The Notice further explains that the change to the section 42 duty is deemed proportionate because:

a. The modification allows local authorities and health commissioning bodies in England 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.

b. The modification enables local authorities and health commissioning bodies to arrange reasonable alternatives to the usual service during the outbreak, such as by delivering therapies remotely, or using video.

16. The Guidance stresses that the Notice does not absolve local authorities or CCGs of their responsibilities under section 42, but simply provides that they must use their 'reasonable endeavours' to secure or arrange the provision instead.

17. As such, local authorities and CCGs must consider for each child and young person with an EHC plan what they can reasonably provide in the circumstances during the notice period. The Guidance notes that:

> *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 sections F and G of their EHC plan.*

18. The Guidance also explains that when making these kinds of decisions, determining what provision must be secured or arranged in discharge of its modified section 42 duty, the local authority or CCG should consider:

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.

19. Moreover, the Guidance also states that the local authority or health commissioning body should keep a record of the provision it decides it must secure or arrange.

The Guidance advises that the following steps should then be taken:

a. Confirm to the parents or young person what it has decided to do and explain why the provision for the time being differs from that in the plan.

b. Keep under review whether the provision it is securing or arranging means that it is still complying with the reasonable endeavours duty, recognising that the needs of a child or young person may change over time (particularly in the current circumstances) as may the availability of key staff or provision.

20. The Guidance also provides a framework to assist local authorities and health commissioning bodies determine what constitutes 'reasonable endeavours' in any given case. It acknowledges that what constitutes 'reasonable endeavours' is context and individual specific. In summary, the framework is as follows:

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.*

21. Finally, the Guidance states that:

[t]he modified s42 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.

Key elements of the processes which remain unchanged

22. Save for the changes to relaxations to the SEN duties set out above, all other requirements of the EHC needs assessments and plan processes remain unchanged. The Guidance makes clear that local authorities must still consider requests for a new EHC needs assessment or a re-assessment. Where the local authority decides to carry out an EHC needs assessment, it must still secure all of the required advice and information in order to be able to issue a plan.

23. Importantly, the Amendment Regulations do not apply to regulation 13(1) of the Special Educational Needs and Disability Regulations 2014, which prescribes the following timescale:

1) When a local authority sends a draft plan to a child's parent or young person it must –

a) give them at least 15 days, beginning with the day on which the draft plan was served, in which to –

(i) make representations about the content of the draft plan, and to request that a particular school or other institution be named in the plan; and

(ii) require the local authority to arrange a meeting between them and an officer of the local authority at which the draft plan can be discussed; and

b) advise them where they can find information about the schools and colleges that are available for the child or young person to attend.

24. As such, the 15 day minimum time period for parental representations etc still applies. The Guidance notes that local authorities should be alert to the circumstances of parents and young people in the time of the outbreak and to take this into account in setting the deadline.

25. It is important to be aware that a number of key elements of the SEN duties and EHC processes have not been amended, and still apply as continuing obligations:

a. **Annual review:** The annual review requirements currently remain in place.[10]

b. **The duty on education settings to admit:** This is an ongoing un-altered duty (see section 43 of the 2014 Act). Even where a setting is temporarily closed, the setting must still admit. In the case of a school or college, the child or young person must be placed on the roll and treated in the same way as other pupils or students in the setting.

c. **The timescale for education settings to respond to a proposal to name them in an EHC plan:** The expectation in the SEND Code of Practice that local authorities give early years providers, schools and colleges up to 15 days to respond to a proposal to name their institution in an EHC plan remains in place.

d. **Complaints and rights of appeal of parents and young persons:** The complaints mechanisms described in Chapter 11 of the SEND Code of Practice are unchanged, although the Local Government and Social Care Ombudsman has temporarily suspended all casework activity.

e. **Appeals to the First-tier Tribunal (SEND):** Rights of appeal to the First-tier Tribunal (SEN and Disability) remain unchanged, although the timescale for compliance with orders and responses to recommendations has been relaxed where the exception applies.

10 The Secretary of State has not exercised his power under the Coronavirus Act 2020 to temporarily disapply the duty to conduct annual reviews.

CONTRIBUTORS

Rory Dunlop QC

rory.dunlop@39essex.com

Rory is a member of the Attorney General's A Panel. He has been, in effect, standing counsel for the Secretary of State for Education and, before that, the General Teaching Council for England, in all appeals by teachers against prohibition orders. In addition, Rory has acted for the Secretary of State for the Home Department in all of the most recent judicial reviews concerning the revocation of educational providers' Tier 4 licences. Rory has defended a university in a civil claim for allegedly negligent teaching and he has frequently advised parents and local authorities on education, health and care plans and the provision of education to children with special educational needs. To view full CV click here.

Thomas Amraoui

tom.amraoui@39essex.com

Tom is ranked as a leading junior in Education law by Chambers and Partners and The Legal 500. He regularly represents local authorities in special educational needs cases, has advised and represented schools in discrimination cases and has experience in the Upper Tribunal on education matters. Tom speaks regularly at education law conferences and seminars, and has delivered training to many authorities on effective case preparation in SEN appeals. Tom also has extensive experience of school admissions and exclusion appeals, having acted as both a representative and clerk at many such appeals. To view full CV click here.

Jennifer Thelen

jennifer.thelen@39essex.com

Jennifer is recognised in the Education law section of Chambers and Partners (Band 4) and The Legal 500 (Tier 5). She regularly appears in the First tier Tribunal and Upper Tribunal on behalf of local authorities in education cases as well as, for both local and central government, on education matters in the High Court. She has been instructed to advise and appear across a range of education matters including special educational needs, disability discrimination, governance, admissions and exclusions appeals, as well as challenges by way of judicial review to the implementation of statements of special educational needs and Ofsted reports. Jennifer has a broad legal background, having practised corporate and regulatory law before being called to the Bar. Jennifer is a member of the Attorney General's B Panel of Junior Counsel to the Crown. To view full CV click here.

Ian Brownhill

ian.brownhill@39essex.com

Ian is an established education law practitioner with particular interest and experience in: (i) safeguarding in educational settings; (ii) race and disability discrimination claims; (iii) university discipline and school exclusions. In addition, Ian has acted for students and schools in a number of judicial reviews both as claimant and defendant. Ian is currently acting in a number of Court of Protection cases which involve education law issues. To view full CV click here.

Gethin Thomas

gethin.thomas@39essex.com

Gethin is currently consultant counsel to the Office for Students, the higher education regulator. He is developing a broad education practice. Recent examples of instructions include assisting in a judicial review challenge of a school closure, and acting on behalf of a higher education institution in a breach of contract claim. To view full CV click here.

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Senior Practice Managers: Sheraton Doyle and Peter Campbell

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085