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# Changes to SEND duties

**12 May 2020**

## Modification of Section 42 of the Children and Families Act 2014

### What is the change?

Section 42 conferred an absolute duty on local authorities to deliver the special educational and healthcare provision set out in a child's EHCP. After changes made through the Coronavirus Act, local authorities will now be deemed to have met this duty if they have used their "reasonable endeavours" to secure the provision.

### Why does this change matter?

The implication of this change is that while this measure is in effect, children do not have an absolute right to the special educational provision set out in their EHCP.

The term "reasonable endeavours" lacks specificity. As stated in the guidance, "what constitutes reasonable endeavours will vary according to the needs of each child and young person and the specific local context". Leaving it in the hands of local authorities and CCGs to determine what is reasonable, given their particular circumstances, makes it difficult to hold local authorities and CCGs to account. This could further exacerbate the "postcode lottery" in SEND provision, which the Government pledged last year to tackle through the SEND Review.

During the passage of the Coronavirus Bill, amendments were put forward which would have seen the duty to use "reasonable endeavours" replaced with a duty to "take all practicable steps". This would have set the bar higher. For example, it would not have absolved LAs or CCGs of their duty to provide an alternative service to a child because the cost is higher – in contrast, cost is a factor which can be taken into account when determining what is "reasonable". It would, however, have absolved LAs or CCGs of their duties to provide (for

The guidance says that local authorities and CCGs should keep under review whether they are meeting their reasonable endeavours duty to secure provision, given that the needs of the child may change, as may the availability of key staff. And yet, as set out in the Department for Education's notice, one of the key justifications for triggering this change in the first place was reduced staffing levels (hence the relaxation around various timescales relating to assessments and reviews). It therefore seems unlikely that local authorities and CCGs will have the capacity to keep under review whether they are meeting their reasonable endeavours duty to a particular child. Instead, we may find that LAs start issuing blanket policies towards all children with SEND in their area (or all children with particular needs) – even though the guidance says they should not do this.

Because of this change, children could go without some of the vital services they need to access education while the notice is in effect. This is concerning in and of itself, but it also stores up problems for later on – if children with SEND fall behind in this period, they may need greater resources later on to catch up.

## Changes to regulations: the Special Educational Needs and Disability Regulations 2014

As set out above, the changes to regulations are all about timing. Where a statutory timescale was previously given, LAs and CCGs are now only required to perform their duty “as soon as reasonably practicable” – if, and only if, delays are a result of coronavirus.

[Read the full list of regulations which have been amended in this way.](#)

**Below is a list of the regulations we are most concerned about and why.**

### ***Regulations 4(1), 5(1), 8(1) and 13(2): assessing for and preparing EHCPs***

#### **What were the previous timescales?**

Upon receiving a request for an EHC needs assessment from a child's parents, local authorities had to decide whether or not to conduct one **within 6 weeks**.

If the decision is to carry out an assessment, other bodies asked to provide information (such as health bodies) were required to do so within **6 weeks** of receiving the request from the LA.

LAs were required to finalise the plan within **20 weeks** of receiving the initial request for the EHC needs assessment.

Under these timescales, an EHC needs request made by a parent or young person on **1 May** (when the changes were triggered), and granted by the LA, would normally have required a finalised EHC plan to be in place by **18 September** – just two weeks after the start of the academic year.

Under the amended regulations, there is **no guarantee** that children for whom an EHC needs assessment is requested from **1 May onwards** will receive one by **18 September**. If the LA cannot meet the deadline for reasons related to Covid-19, they must simply complete these processes **as soon as practicable**. This could mean children beginning the academic year without their EHCP in place.

Furthermore, the timescales for cases where the request for an assessment was made prior to **1 May, but were still in progress on 1 May** can also be suspended – if the LA was previously within the statutory timescales and the delay is related to Covid-19. This means it could be legal for there be no statutory timescale that a LA has to meet to deliver an EHCP for a child where an EHC needs assessment was requested as far back as **Christmas last year**. In this case, the usual 20 week limit would have been reached in the middle of May.

LAs were already often not meeting the statutory timescales for assessing and preparing EHCPs before Covid-19 struck. In 2018, just 60% of new EHCPs were issued within the 20 week limit – a decrease from 65% in 2017. The Local Government and Social Care Ombudsman (LGSCO) reports delays of up to 90 weeks, and regularly more than a year. It is likely that with the suspension of statutory timescales, children will face even longer delays before they access support.

It is unclear what will happen to cases already ongoing when the regulations are lifted and LAs likely have a backlog of EHCPs to deliver.

## Regulation 18A: reviews of EHCPs

### What was the previous timescale?

Under the Children and Families Act 2014, LAs are required to review EHCPs **annually**.

### Why does the suspension of this timescale matter?

The Coronavirus Act created a provision for this requirement to be temporarily disapplied, if the Department for Education gave notice. So far this notice has **not** been given.

However instead, a new regulation has been created which requires LAs to conduct annual reviews as soon as reasonably practicable, if they cannot meet the yearly timescale for reasons relating to Covid-19.

The timescales for phase transfer reviews have not been eased for children transitioning between different phases of education (e.g. from primary to secondary school, or from school

do not keep to these deadlines. The guidance says that “where, exceptionally, completion has been delayed, these transfer reviews need to be finalised as a priority”, but there is a risk that these children will be left without a school place in the Autumn term.

## Regulation 13(1): allowing time for parents to comment on a draft EHCP

### What was the previous timescale?

LAs are required to give parents at least **15 days** to comment on a draft EHCP. This allows parents time to give their views, request a particular school be named, and meet with an LA officer to discuss the plan.

### Why does the suspension of this timescale matter?

Parents are in many cases juggling multiple competing demands during lockdown. 15 days may be inadequate for them to scrutinise a draft EHCP properly. This is recognised in the guidance:

*“Local authorities will wish to 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. It may be harder for parents and young people to contact early years providers, schools and colleges, for example, to gather information relating to deciding their preference over setting. Parents and young people may themselves be ill or otherwise directly affected by the outbreak.”*

## Regulation 44(2): compliance with binding orders of the First-tier Tribunal

### What was the previous timescale?

The First-tier Tribunal (SEND) is the court which hears appeals by parents and young people against decisions made by local authorities in relation to SEND provision.

Regulation 44(2) concerns binding orders the First-tier Tribunal can make to local authorities regarding special educational provision (the Tribunal can also make non-binding recommendations in relation to health and social care provision but these are set out in different regulations). Under this regulation, the First-tier Tribunal could make the following orders with the accompanying timescales:

- LA to conduct a needs assessment or reassessment – let parents know within **2 weeks** of the order, inform parents of outcome within **10 weeks** of the order, and if special educational provision is needed, finalise EHCP within **14 weeks** of the order.

- LA to reconsider the case – within **2 weeks** of the order
- LA to amend the special educational provision set out in the plan – within **5 weeks** of the order
- LA to name a different school or setting in the plan – within **2 weeks** of the order
- LA to continue and amend a plan – LA continues plan and amends it within **2 weeks** of the order

These timescales have now been relaxed. Furthermore the timescales with which LAs and CCGs have to respond to non-binding recommendations about health and social care provision have also been relaxed.

## Why does the suspension of these timescales matter?

A significant number of cases are brought to the First-tier Tribunal, and [that number has grown year-on-year since 2015](#): 6,023 appeals were registered in 2018, compared to 3,126 in 2015.

Appealing to the Tribunal is lengthy, typically taking 20 weeks from registration of the appeal to the hearing take place. On top of this, the child then has to wait for the local authority to comply with the orders of the Tribunal, depending on the outcome – these are the timescales that have been relaxed by the Covid-19 recommendations. It means that families who initially applied for an EHCP in the **middle of last year (or earlier if their LA hadn't kept up with other timescales)**, who are reaching Tribunal now, cannot be sure when any changes to the EHCP ordered by the Tribunal will be made.

The Government should publish additional guidance to add clarification on this particular change. The current guidance makes clear that the timescales in relation to non-binding recommendations have been relaxed. But it does not mention that the timescales for the **binding orders set out above** have been relaxed, in its summary of which timescales have been amended.

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