

Date: 14 August 2020
From: Name Redacted SEND Division (07469 031757)

	To Comment/note	To Decide
Secretary of State	X	
Minister Ford		X

Also copied to: Advisers, Permanent Secretary, Name Redacted, Suzanne Lunn, Name Redacted

Name Redacted

Name Redacted

CEASING TEMPORARY CHANGES TO SEND LAW

Purpose

1. To decide whether to let the changes to statutory SEND timescales expire as planned on 25 September 2020; and to note our thinking about probably not needing any temporary changes to SEND law in the event of future lockdowns.

Summary

2. We have committed to the changes to SEND law only being in place as long as necessary. The notice modifying the section 42 duty over Education, Health and Care (EHC) plans has now expired and we have committed to not making any further notices unless the evidence changes. We now need to decide whether to let the Regulations that deliver flexibilities for statutory timescales for EHC needs assessments and plan processes expire on 25 September.
3. Given the limited use that local authorities are currently making of the coronavirus exception to the statutory timescales contained in the Regulations, we recommend that they should be left to expire as planned.
4. Also, in line with wider policy, we want to ensure much higher attendance from children with EHC plans in future lockdowns. We therefore envisage no need for changes to the law in the event of future local or national lockdowns, both in relation to (a) the timescales in Regulations; and (b) notices to modify the duty on local authorities and health bodies over the provision in EHC plans. (We will still have the power to issue such notices if need be.)

Recommendation

5. That the Minister:
 - agrees that the Regulations that amend timescales for SEND processes should expire as planned on 25 September with no savings provisions; and

- notes that in the event of future outbreaks we do not expect to need further changes to the law (through notices under the Coronavirus Act 2020 - the provision in EHC plans, or amending Regulations - statutory timescales).

Timing

6. We would like to give local authorities and their partners as much advance warning as possible of when the usual statutory timescales will resume. A response by 24 August would allow us to provide four weeks' notice.

Argument

The temporary changes to the statutory timescales for processes relating to EHC needs assessments and plans

7. As part of the response to the coronavirus outbreak, Ministers laid the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 (the 'Amendment Regulations'). These temporarily amend the law to give flexibility over the timescales that apply to local authorities, health bodies and others: principally for various processes relating to EHC needs assessments and plans. These Regulations came into force on 1 May and are due to expire on 25 September.
8. The Regulations were a response to the significant extra pressure that the coronavirus outbreak put on the ability of local authorities and their partners to meet the statutory timescales for EHC needs assessments and plans. We recognised that there would be a detrimental impact on children and young people with SEND and their families, but judged that this was justified by the imperative of responding to the national health emergency.
9. Ministers have given public undertakings to keep the changes in place no longer than is necessary. The Minister has previously given a steer to let the Regulations expire as planned on 25 September. This submission sets out the arguments and underpinning evidence, with a recommendation that there is indeed a compelling case for letting the Regulations expire at that time.

Relevant evidence and the views of stakeholders

10. We have taken various steps to gather relevant information and stakeholder views over the expiry of the Amendment Regulations (details at Annex A). The key points emerging from that engagement are as follows:
 - The exception is not being used often. Of the 134 local authorities who replied to our survey, 76 (57%) said that they had not used the coronavirus exception in relation to any of the plans that they had issued during June, and a further 38 had only used the exception 1-5 times. When the exception is being used,

key reasons given include difficulties over input from health bodies and educational psychologist (EPs) and the difficulties for EPs of not having face-to-face contact with children being assessed.

- The capacity of local authorities and their partners to provide the necessary input to EHC needs assessments and plans has built back up, as staff redeployed at the height of the crisis have returned to their usual duties and new ways of working have been developed (which seem to be reasonably effective in all the circumstances).
- The majority view is to let the Regulations expire as planned. The Children's Commissioner, Equality and Human Rights Commission, IPSEA and some other SEND organisations disagree, favouring early revocation.

Recommendations about the expiry of the Amendment Regulations

11. Consistent with the Minister's earlier steer, we believe that the evidence points strongly to not extending the Amendment Regulations beyond 25 September.
12. At the point that the Regulations expire, any processes that are in progress that are beyond the usual statutory deadline where the application of the coronavirus exception has made that lawful will become overdue. [REDACTED]

[REDACTED] given that local authorities are not using the exception often. Preparing and laying Regulations is a substantial undertaking, in a circumstance where there is not a compelling need for savings provisions. We also feel that it would give the wrong signal: we are looking for the early resumption of normal levels of service and local authorities have been working to a 25 September deadline for that.

13. A further option would be to lay further Regulations to revoke the Amendment Regulations earlier than 25 September. We feel that the better option here is to encourage, support and challenge local authorities to get swiftly back to the usual levels of service (see next section below); using the time between now and 25 September to do this. In any case, given the lead in times for drafting, checking and processing Regulations and their coming into force, the result would only be to revoke the Regulations a few days earlier. Again, this feels disproportionate.

Supporting a smooth transition back to the usual legal duties

14. With the return to full education in September we will be looking to local authorities and their partners to ensure that the full EHC needs assessment and plan procedures and timescales are returned to full operation as quickly as

possible. To support local authorities and their partners to manage the transition to the unamended legal duties and monitor local issues, we propose to:

- encourage local authorities and their partners to work with individual families and parent carer forums (PCFs) about how ongoing delays over individual cases and any backlog generally can best be dealt with;
- work with NHS England to ensure strong messaging to health services and providers about the full return to normal service delivery;
- carry out a further local authority SEND Survey in September to identify local demand and workforce capacity issues; and
- undertake a further round of structured conversations with local authority SEND teams and Clinical Commissioning Groups (CCGs) in October.

Responding to future outbreaks of coronavirus, locally or nationally: far less need for temporary changes to SEND law (by notice or by Regulations)

Regulations

15. We do not envisage currently that amending Regulations would form part of the response to future lockdowns. It would be disproportionate to prepare and lay further Regulations that would reduce temporarily the entitlements of children and young people with SEND and their families unless the lockdowns were likely to cause substantial disruption to local authorities' ability to administer the relevant processes. The evidence to date suggests that widespread disruption is not inevitable, even in the context of a further lengthy lockdown. Since the start of the pandemic, local authorities and their partners have developed alternative ways of working to enable EHC needs assessment and plan processes to continue whilst working remotely. This has probably contributed to the limited use reported of the coronavirus exception to timescales.

Notices modifying the section 42 duty relating to EHC plans

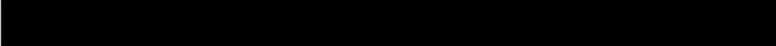
16. Similarly, we don't currently see notices to modify the section 42 duty as being part of our response to future lockdowns. The context from September onwards will be significantly different to that in the early stages of the outbreak, in terms both of the national policy position and resulting situation on the ground. Relevant considerations are as follows:

- Attendance at education settings – our approach over dealing with future lockdowns, locally or nationally, is now premised on schools and other settings staying open even if the outbreak is severe. We expect that more children and young people would be attending school/college in such situations than was the case in the spring, which would make it possible for more of the provision in their EHC plans to be delivered.
- Alternative arrangements to deliver provision – Since the start of the pandemic, local authorities and health bodies, working with education

settings and others, have developed alternative ways of delivering the provision specified in EHC plans. This means that, in the event of future outbreaks, the delivery of provision through alternative arrangements where necessary and appropriate should be more straightforward than in the early stages of the pandemic, when a rapid period of adjustment was required. Whilst alternative methods of delivery may not be ideal (e.g. therapies delivered remotely are not as satisfactory as face-to-face), they will make an important contribution to the continuation of provision.

- Health prioritisation – on 3 June NHS England published guidance on the restoration of community health services for children and young people, that states that services for those with EHC plans should be fully restored. Prior to this, since 31 March, some community health services with responsibility for delivering the provision in EHC plans (e.g. therapies) had been partially stopped. Even if health staff are redeployed to respond to the future outbreaks, if services for those with EHC plans continued to be prioritised there would be less impact on the capacity of community health services to deliver the health care provision in EHC plans.

Contingency planning for future outbreaks

17. Whilst we do not see temporary changes to SEND law as a key element in our response to further significant outbreaks, we do recognise that careful contingency planning at local level is crucial if the needs of those with SEND are to be met adequately. EHC needs assessment and plan processes may need to be different temporarily. However, these processes should continue as far as possible, so that children and young people who have, or might be eligible for, EHC plans can access timely assessment and appropriate support. Effective communication with families is particularly important: where families understand the reasons for any differences or delays and can see that local authorities and their partners are doing their best in the circumstances, 

18. Through our support and challenge work with local authorities and CCGs we will therefore encourage them to prepare for future outbreaks by:
 - Working with PCFs, education settings and others to coproduce contingency plans to deliver provision and continue EHC needs assessment and plan processes through alternative arrangements, where necessary. This should include establishing clear expectations on education settings and health services and proportionate processes for monitoring the provision that is being delivered during the outbreak.
 - Having good plans for communicating with families if it will not be possible to complete EHC needs assessment or plan processes within the statutory timescales, or if the provision that is available may need to be different temporarily from that specified in an EHC plan.

- Working with their PCFs to evaluate effectiveness of coproduction and communication with families during the outbreak to date.

19. We will proactively engage with SEND stakeholders, to ensure that they understand the rationale for this approach and to seek their support with communicating to the sector where applicable.

Impact on those with protected characteristics and on the rights of children

20. The Minister has a duty under the Equality Act 2010 to have due regard to the Public Sector Equality Duty. In addition, the Government has committed in relation to relevant policy decisions to considering the rights of the child under the UN Convention on the Rights of the Child. Before the changes to the Amendment Regulations came into force, we identified that they would have an adverse effect on some with protected characteristics (particularly those with disabilities, boys and those from certain minority ethnic groups), as they account for an above average proportion of those with EHC plans. We considered that this temporary detriment was justified by the public interest in responding effectively to a national health emergency.

21. As the context has now changed, we believe that the balancing exercise now points the other way. Allowing the Regulations to expire will have a positive impact on those with the relevant protected characteristics and on the rights of relevant children, as the unamended statutory timescales will support them to receive timely assessment and support. A fuller equality impact assessment is set out in Annex B. We have also updated the Child Right's Impact Assessment that you previously approved.

Handling and communications

22. The temporary changes to SEND law have been widely reported. Much of this reporting has been critical. Specifically, the Amendment Regulations have attracted public criticism from SEND and parent carer organisations, including Contact, the Children's Commissioner and IPSEA. These organisations continue to press for the Regulations to expire as soon as possible. On the other hand, local authorities and the ADCS called strongly in the spring for these flexibilities, but largely they recognise that the need is now less compelling.

23. A decision this month on the expiry of the Regulations is widely expected. Should the Minister agree to let the Regulations expire, we don't expect stakeholders to be overly critical. We propose to alert stakeholders in a low key way, sharing the facts about the decision and doing a minor update of guidance to emphasise our expectations over usual levels of service being restored quickly. We would not recommend proactive communications at this juncture, but will prepare reactive lines.

Stakeholder views and evidence

To gather views and relevant information, we conducted the following exercises:

- structured conversations with every local authority, in which we asked about the use of the coronavirus exception and how long it might be needed;
- a survey of local authorities, in which one of the questions was how often they had applied the coronavirus exception for EHC plans issued in the calendar month of June; and
- a specific approach to some of our key stakeholders asking for their views on what should be done, including on the lead option that we had provisionally identified of letting the Amendment Regulations expire on 25 September.

The key points derived from this engagement are as follows:

Limited use of the coronavirus exception

- The exception is not being used often. Of the 134 local authorities who replied to our survey, 76 (57%) said that they had not used the coronavirus exception in relation to any of the plans that they had issued during June, and a further 38 had only used the exception 1-5 times. When the exception is being used, key reasons given include difficulties over input from health bodies and educational psychologist (EPs) and the difficulties for EPs of not having face-to-face contact with children being assessed.
- The capacity of local authorities and their partners to provide the necessary input to EHC needs assessments and plans has built back up over the last few months, as staff redeployed at the height of the crisis have returned to their usual duties.
- Local authorities and their partners have adapted well to new ways of working, with new needs assessments and annual reviews often continuing albeit in a different way. Whilst it may well be necessary to review some of those processes once face-to-face contact with the child becomes possible, the processes are for the most part still functioning.

Views on whether to revoke the Amendment Regulations early or to let them expire

- The local authorities and their representatives who responded were broadly in favour of letting the Amendment Regulations expire on 25 September, as they have been preparing for this date for some time. Providing them with sufficient time to prepare for a return to the unamended timescales would help them to deliver a good level of service to children and young people with SEND when the law reverts to the usual timescales.

- A number of stakeholders representing those with SEND (such as the NNPCF and Contact) were keen for the Regulations to cease as soon as possible. However, they also recognised the challenges around local authority delivery so would not be opposed to the Regulations expiring on 25 September.
- Representatives of education settings were broadly in favour of the Regulations expiring on 25 September, as a natural follow on to pupils' full return to schools in early September.
- The Children's Commissioner, Equality and Human Rights Commission and IPSEA have previously expressed strong concerns publicly about the appropriateness of the Regulations and continue to favour early revocation.
- Various other stakeholders (including some SEND organisations) tended to favour revoking the Regulations early, so that children and young people with SEND and their families would benefit from the statutory timescales for EHC needs assessment and plan processes as soon as possible.
- Very few respondents were in favour of extending the Regulations.

Challenges when the Amendment Regulations expire

- There is an expectation that demand for EHC needs assessments and reviews of existing plans will increase once children and young people are back in their education setting. This seems a reasonable assumption, with needs changing as a result of the protracted period out of education and the disruption to the usual procedures for EHC needs assessments and plans.
- Various reasonable concerns were expressed that there might be:
 - a significant backlog of cases in September; and
 - a need to address inevitable weaknesses in processes during lockdown, such as limitations in the advice from those feeding into EHC needs assessments and annual reviews.

Criticisms of local authorities' performance over EHC needs assessments and plans

- A number of the SEND stakeholders stressed that even before the outbreak, local authorities' performance in hitting their statutory deadlines was, in their view, highly unsatisfactory.
- Some stakeholders also made various complaints about local authorities:
 - acting unlawfully during the outbreak, particularly early on, such as freezing applications for needs assessments. (Whenever such accusations have been made in relation to named local authorities we have investigated and taken any appropriate action); and
 - not engaging fully with parents and PCFs over the use of the coronavirus exception in the ways that we have strongly encouraged.

Equality Impact Assessment:

**Expiry of Special Educational Needs and Disability (Coronavirus)
(Amendment) Regulations 2020 on 25 September**

1. In making the decision whether to let the Amendment Regulations expire on 25 September the Minister is required to comply with the Public Sector Equality Duty (PSED) under section 149(1) of the Equality Act 2010. The duty requires the Minister to have due regard to the need to:
 - **eliminate discrimination, harassment, victimisation** and any other conduct that is prohibited by or under the Act;
 - **advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it; and
 - **foster good relations** between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are age, disability, gender reassignment, marriage and civil partnership (in relation to workplace discrimination only), pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We have considered the effect of allowing the Regulations to expire on 25 September on each of the aims of the PSED in turn, as set out below.

Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act

2. In our submission of 9 April 2020, we identified that the Amendment Regulations would have an adverse effect on children and young people who either have, or might be eligible for, EHC plans. The time limits in the Regulations that have been amended provide families with strong rights to have needs assessed and provision put in place swiftly and reviewed at least annually. For the period that the Regulations have been in force, these rights have been reduced.
3. We identified that the Amendment Regulations would have a disproportionate negative impact on children and young people with the following protected characteristics, as they account for a higher than average proportion of those with EHC plans:
 - **Disability:** Whilst we have no data, we would estimate that well over half of those with EHC plans also meet the definition of being disabled.

- **Sex:** A higher proportion of boys than girls who have EHC plans. In addition, the majority of primary carers and single parents are women.
 - **Race:** Certain minority ethnic groups have an above average proportion of plans (e.g. Travellers of Irish heritage and Black Caribbean).
4. We considered that this temporary detriment was justified by the public interest in providing local authorities and health bodies with the flexibility to respond to a national health emergency. As the pressures generated by the outbreak have subsided over the past few months, the capacity of local authorities and their partners to provide the necessary input into EHC needs assessments, plans and reviews has built back up; staff who were redeployed to respond to the outbreak at the start of the crisis have been returning to their normal duties and new ways of working have been developed and are working reasonably well. Based on this, we consider that the temporary detriment to children and young people who have or might be eligible for EHC plans would no longer be justified beyond 25 September.
 5. Allowing the Amendment Regulations to expire on 25 September would have a positive impact on persons with the protected characteristics identified above, as the statutory timescales intended to support children and young people who have, or might be eligible for, EHC plans and their families would be reinstated. Revoking the Regulations before 25 September would mean that these timescales would be reinstated sooner. However, providing local authorities and their partners with limited time to prepare for the return to the unamended timescales increases the risk that local delivery systems will be overwhelmed, which may have a negative impact on compliance with timescales.
 6. We do not consider that letting the Amendment Regulations expire on 25 September, rather than revoking them earlier, would have a significant adverse effect on children and young people who have, or might be eligible for, EHC plans because:
 - Local authorities are still required to carry out these processes, to enable children and young people to access appropriate provision as soon as reasonably practicable (or similar).
 - The coronavirus exception to timescales is not being used often by local authorities. This means that, for many relevant families the practical effect of the Amendment Regulations has been limited.
 - We will be providing support and challenge to local authorities and relevant health bodies to reduce the number of overdue cases as quickly as possible and to manage those cases sensitively, working closely with families.

Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

7. The provision specified in each EHC plan is personalised and intended to support children and young people to achieve the individual outcomes sought for them. The requirement to ensure that each EHC plan is reviewed at least annually ensures that provision continues to be appropriate to meet children and young people's changing needs, circumstances and aspirations. Delays to needs assessment, plan and review processes may make it more difficult for the children and young people who have, or might be eligible for, EHC plans to make good progress and fulfil their potential than for those who are not in this group. Allowing the Amendment Regulations to expire on 25 September would therefore have a positive impact on equality of opportunity for children and young people who have, or might be eligible for, EHC plans, by ensuring that they are able to access appropriate provision within a specified timescale.

Foster good relations between persons who share a relevant protected characteristic and persons who do not share it

8. We do not consider this to be a relevant consideration in relation to the expiry of the Amendment Regulations. This temporary change to the law has presented limited opportunities to tackle prejudice and build understanding between people with different backgrounds – particularly in the context of a national emergency, where local delivery systems have been under extreme strain.

Checklist (please keep this as the final page when you submit your advice)

Title of submission: Ceasing temporary changes to SEND law

SCS clearance of advice before sending: Suzanne Lunn

Legislative Considerations

- No legislative (primary or secondary) implications
- Advice relates to expiry of secondary legislation
- Advice has been cleared by Emran Mian (SRO for legislation) and/or with input from: [named individuals]
- Advice sets out appropriate parliamentary handling consideration
- For secondary legislation: clearance to lay the statutory instrument received?
- For secondary legislation: what is the unique identifier of your Statutory Instrument?
_____ (please consult the Parliamentary Team)

Communications

- Either Advice cleared by/with input from: **Name Redacted**
- Or No communications/handling implications at this stage, agreed by [named individual]

Analysis and data fact-checking

- Either Advice cleared by/with input from: **NR** (results of LA survey)
- Or No use of analysis/data

Finance and strategic finance (affordability, VfM, Accounting Officer issues)

- Either Advice cleared by/with input from: [named individual]
- Or No financial implications

Commercial (procurement, contracts, grants)

- Either Advice cleared by/with input from: [named individual]
- Or No commercial implications

Legal Adviser's Office

- Either Advice cleared by/with input from: **NR**
- Or No legal implications

Tests and Appraisals - the following tests apply and have been considered. The submission reflects our consideration (and/or confirms when we will provide detailed advice) of:

- DfE principles (the 7 principles which should guide all our work)
- Policy and/or Delivery tests
- Complies with the public sector equality duty - Equalities impact
- Burdens on the frontline, especially schools workload
- Regulatory impact on private, voluntary and independent sectors
- Child's Rights Impact assessment
- Family test

Business case for investment

- Business case complete and cleared by: [named individual]
- Business case in progress
- Judged not applicable