

The Coronavirus Act 2020 and SEN provision

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Coronavirus Act 2020 overview

- Section 38 and Schedule 17 of the 2020 Act permits the Secretary of State to give a notice which disapplies or modifies certain duties.
- Secretary of State may by notice disapply:
 - Section 43 CFA 2014 (duty on schools to admit if named in EHC Plan) (Sch 17, para 5(5)(g))
 - Section 44(1) CFA 2014 (requirement for annual review) (Sch 17, para 5(5)(h))

Coronavirus Act 2020 overview

- Secretary of State may by notice modify duties to a “reasonable endeavours” duty (Sch 17, paras 5(1) and (6):
 - Section 19 EA 1996 (exceptional provision of education in PRU or otherwise than at school)
 - Section 508A to 508F and Schedule 35C EA 1996 (school transport duties)
 - Section 42 CFA 2014 (duty to secure special educational provision in accordance with EHC Plan)

The power to issue a notice

- A notice must not exceed a period of a month (Sch 17, para 5(7)), although a second notice could be issued (Sch 17, para 5(11)).
- Notice must state “why the Secretary of State considers that the issuing of the notice is an appropriate and proportionate action in all the circumstances relating to the incidence or transmission of coronavirus”.
- Notice must take into account relevant considerations and be proportionate, particularly in light of article 2 protocol 1 (right to education), discrimination

Has anything been disapplied or modified?

- Not yet, but see DfE SEND Risk Assessment Guidance (19 April):

“At present the law in force in relation to EHC plans is unchanged, although we recognise that there will need to be some extra flexibility and are taking steps to deliver that as soon as possible. The Coronavirus Act 2020 includes temporary emergency powers to enable the Secretary of State, where appropriate and proportionate, to disapply or modify legal requirements under the Children and Families Act 2014. The powers have not yet been used. We are currently gathering evidence to understand the situation on the ground to inform our approach. To allow more flexibility, we also anticipate making temporary changes, where appropriate, to the Regulations that set out some of the timescales for the EHC plan process. At the point at which the law changes, we will provide formal guidance.”

Current situation

- “Ultimately, under the current legislative framework it is for parents/carers or a young person (or the corporate parent, where applicable and the child is in the care of the local authority) to decide whether the child or young person should continue to go to school or college.”
- But: “Although the duties on a local authority and any health bodies to secure provision under an EHC plan currently continue, in reality there may be times when it becomes very difficult to do so in practice...Decisions on how provision is delivered should be informed by relevant considerations including staffing availability and risk assessments.”
- There should be risk assessment of options: see DfE guidance.

What are reasonable endeavours?

- Need to be practical – what is realistic and achievable?
- Consider carefully policies adopted by LAs, blanket policies which do not consider individual circumstances unlikely to be lawful
- Delivery through remote learning, remote therapies, personal budgets.
- Particular issue for students with residential provision that cannot be delivered.

Potential challenges following exercise of notice

- Individual challenges to provision and LAs not using best endeavours
- Challenge to LA policies on what “reasonable endeavours” means
- Challenge to notice itself either in its entirety, or in respect of individual circumstances such as for residential settings, or children who are looked after by the local authority.

Thank you for listening

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