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School of Law
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Coronavirus Research by the European Children's Rights Unit

The Impact of COVID-19 on Children with Special Educational Needs and Disabilities

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Coronavirus (COVID-19) #LivUniCOVID
Research and response

Briefing Paper #2

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Introduction

The impact of Covid-19 on children's education rights has been profound. However, children and young people with special educational needs and disabilities (SEND) have been doubly impacted by this pandemic. In addition to the closure of schools on the 20th March 2020, children and young people with SEND stand apart as a distinct group who have had their education rights formally altered and diluted as a result of a significant relaxation of the legal duties which Local Authorities (LA's) owe towards children with SEND in England.

SEND Legal Framework

Children with SEND account for approximately [14.9%](#) of the total pupil population in England. Support for children with SEND was overhauled by the enactment of the Children and Families Act (CFA) 2014 which replaced the old system of Statements of Special Educational Needs with a new system of [Education, Health and Care \(EHC\) Plans](#). This [new approach was designed to unify service provision](#) across all relevant statutory and local government agencies so that children and young people aged between 0 – 25 years would have their education, health and social care needs supported, and their learning and life outcomes accommodated . Guided by a new [SEND Code of Practice](#), the stated purpose of EHC plans was to [“to meet the special educational needs of the child or young person, to secure the best possible outcomes for them across education, health and social care and, as they get older, prepare them for adulthood”](#). As of January 2019, there were [354,000 children](#) with an EHC Plan maintained by LA's in England. Of particular significance is that Section 42 of the CFA 2014 requires LA's to arrange the provision as set out in an EHC Plan. This duty is absolute and the contents of an EHC Plan must be implemented

fully.¹ Additionally, children with SEND enjoyed the benefit of a legal framework which provides definitive timescales in relation to the provision of education, health and social care services to meet their needs. However, the governmental response to Covid-19 has significantly diluted and suspended these legal obligations.

Coronavirus Act 2020

On the 28th April 2020, the Secretary of State for Education issued the relevant [notification](#) to modify section 42 CFA 2014, as required under the Coronavirus Act 2020. Initially taking effect from the 1st May 2020 until the 31st May 2020, this was [subsequently extended](#) to the 30th June 2020. This replaces the absolute duty enshrined in section 42 CFA 2014 with a duty on LA's to use "reasonable endeavours" to ensure the needs of SEND children are met. This may be extended upon its expiration on the 30th June 2020. Without any clarification of the precise legal parameters within which this new "reasonable endeavours" duty operates, this has the potential to weaken an already unstable system and further delay and deny children access to important educational, health and social care services. In longer terms, this could have a regressive impact on children's wider developmental needs.

[The Special Educational Needs and Disability \(Coronavirus\) \(Amendment\) Regulations 2020](#)

Similarly, on the 1st May 2020, the above regulations temporarily modified four existing sets of regulations relating to SEND children: The Special Educational Needs and Disability Regulations 2014; The Special

¹ See *R (On the Application Of) v London Borough of Camden* [2018] EWHC 3354 (Admin).

Educational Needs (Personal Budgets) Regulations 2014; The Special Educational Needs and Disability (Detained Persons) Regulations 2015; and The Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) Regulations 2017. [These changes](#), which will remain in place until the 25th September 2020, relax the time periods pertaining to EHC planning processes, assessments, direct payments, and annual reviews. All usual timeframes regarding the obligations of LA's have been modified to "as soon as reasonably practicable". For example, the timeframe within the SEND Regulations 2014 stated that LA's must send the finalised EHC plan to the child's parent, or to the young person and to the school named in the plan, as soon as is practicable and in any event [within 20 weeks](#) of the LA receiving a request for an assessment.² This 20 week timeframe has been modified to "as soon as reasonably practicable".

These changes to the legal framework which underpin the rights of children with SEND must be considered against the government's wider children's rights obligations. While Covid-19 presents unique challenges for the wider delivery of public services, the government response in relation to SEND is bereft of any reference to basic children's rights standards such as the child's best interests principle, the child's right to development or specifically to the rights of children with disabilities. Indeed, the formal dilution of children's SEND rights occurred in the absence of a children's rights impact assessment which could have arguably considered the effects of such changes on an already vulnerable group of children within our education system. Without such an assessment, important human rights principles such as the proportionality and necessity of such measures elided formal scrutiny.

² The Special Educational Needs and Disability Regulations 2014, s(13)(2).

Recent research by [Alghrani and Byrne \(2020\)](#) into the actual impact of Covid-19 on the education rights of children and young people with SEND reveal the devastating impact which this pandemic is having on an already vulnerable group of children. Out of a survey of 234 parents of children with SEND from across England, 14.7% of the respondents reported having had no contact at all from their child's educational provider; 95% reported no contact from the LA, while 87.8% gave compelling evidential accounts of the negative effects Covid-19 was having on their children and the wider family unit with declining mental health, increased anxiety, social regression, behavioural breakdowns, and a cessation to essential health and therapeutic services recurrent themes among the respondents. In light of the pre-existing vulnerabilities which children with SEND have, the need for robust, evidence-based and rights-compliant interventions becomes apparent.

Pre-Existing Vulnerabilities

Children with SEND represent one of the most vulnerable population groups in our education system. [In 2018](#) for example, they accounted for 45% of all children who had been permanently excluded and 43% of all children who had been subject to a fixed term exclusion from all state-funded primary, secondary and special schools. Prior to the outbreak of the Covid-19 pandemic, the provision of services for SEND children was already in a state of flux. Research by the [House of Commons cross-party Education Committee](#) determined that the current SEND framework was characterised by confusion, unlawful practices, bureaucratic nightmares, buck-passing, a lack of accountability, inadequate resources and an overly adversarial process for parents. House of Commons cross-party Education Committee At the local level , research [by Byrne et al.,\(2020\)](#) into the quality of service provision for children with SEND in the Liverpool and Merseyside area has unveiled systemic issues involving delay,

unquantified EHC plans, evidence of immense personal and familiar stress for parents accessing SEND provision and a broader systems-wide failure in communicating with parents in an honest and transparent manner. These realities reflect a system already under strain and where children's rights are in a clear state of precarity. Rather than diluting them, the response of government should be to strengthen and support the rights of children with SEND.

Conclusion

At a time of national crisis, children's rights must guide the government response. In the context of SEND law and policy, the failure to follow elemental children's rights principles is evident. This will exacerbate the serious implementation flaws which already underpin SEND provision in England. In view of the evidence as outlined above, concrete action must now be taken to prevent, or at least alleviate, the emergence of future pressure points within the SEND system. Further to this, the "reasonable endeavours" duty should be rescinded, and the absolute duty reinstated as the guiding principle underpinning the delivery of SEND provision. Moreover, the relaxation of LA obligations as contained in the 2020 SEND Regulations should be subject to a monthly assessment to determine their necessity and reasonableness while LA's should now commence a process of reviewing existing EHC Plans to prepare for future amendments and expedited reviews which will likely occur in light of the immeasurable and devastating disruption to children's provision which has thus far occurred.

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