

# INFORMATION SHEET



## Frequently Asked Questions

**Answered by the legal panel - Last updated: 9<sup>th</sup> April 2020**

### About the legal panel

Several years ago, CBF Trustees identified the need to make better use of the legal framework for enabling families to get the right support for their relatives.

An initial meeting was held including CBF, Mencap, Irwin Mitchell and Leigh Day and it was agreed that we would set up a “legal panel”, with a protocol to gain initial advice at an early stage. The legal panel is now made up of a number of law firms and barristers specialising in learning disability, enabling a co-ordinated approach to emerging issues. The panel is well placed to identify strategic issues and cases that will have the greatest impact, and is part of a wider approach to getting the right level of legal support for families at the right time (e.g. utilising template letters and other resources as appropriate to ensure early resolution to legal issues).

Over the past couple of weeks, legal panel members have been considering questions families have raised with us related to the coronavirus pandemic. The answers they have put together so far are below

*With very grateful thanks to the lawyers, barristers, and others who have generously provided their time and expertise to produce this FAQ resource.*

### **Topics covered by questions:**

- Right to activities and routine for well being
- Visiting your relative or friend
- Meeting health needs
- DANR notices
- Mental Capacity Act
- Access to advocacy
- Support around behaviour that challenges
- Personal Health Budgets and Direct Payments
- Personal Welfare Deputy
- Children accommodated under section 20 in residential schools
- Children with EHCPs continuing to attend school
- Complaints- Local authority and NHS complaints



If a care worker is concerned that they have symptoms of COVID-19, they should follow the NHS advice on self-isolation and should not have face to face contact with the individual to whom they provide care and support. If the individual being cared for has symptoms of COVID-19 then the government advice states that the risk of transmission should be minimised through safe working practices including the use of PPE.

**Q:** My relative needs to go out and does not understand the need to stay in the home all day, so we have taken them out in their vehicle isolated with 2:1 support in PPE and ID card for staff showing they are essential workers. What else do I need in place?

**A:** The Regulations state that a person may leave their home if they have a “reasonable excuse”. A reasonable excuse includes taking exercise and “to avoid injury or illness or escape a risk of harm”. The guidance gives walking, running and cycling as examples of exercise. However, “form of exercise” could extend to a drive in the case of a person with additional needs, so long as the guidance on social distancing is adhered to. Going out for a drive may also be a “reasonable excuse” if it is necessary for a disabled person to avoid injury or a risk of harm.

The [guidance](#) states that people with a specific condition, such as people with learning disabilities or autism, who require exercise in an open space more than once per day, are able to leave their homes more than once per day. The guidance states that a need to be outside more than once per day would be “*ideally in line with a care plan agreed with a medical professional*”.

When supporting your relative to leave the house, you should be prepared to be questioned by the police. It is a good idea for support workers to carry ID cards, and if possible, a letter confirming that they are key workers, for example from the care agency. Ideally the letter should set out your relative’s needs and that going for a drive will avoid injury or reduce the risk of harm.

The National Police Chiefs’ Council has published [guidance](#) on how police forces should interpret and apply the regulations. The guidance states that the police will apply the law in a system that is flexible, discretionary, and pragmatic, and directs police officers to use their common sense, and consider whether there are any safeguarding issues at play. If you are stopped from taking your relative out in their vehicle, contact the CBF, or specialist solicitors, as this may not be lawful.

**Q:** My relative with learning difficulties does not understand the changes and restrictions due to COVID-19. What should I do?

**A:** There are a number of EasyRead resources available about Coronavirus that are designed for people with learning disabilities. They include:

[Easy-Read-Online](#)

[Learning Disability England](#)

[BILD](#)

[Beyond Words](#)

[Oxford Health NHS Foundation Trust](#)

[Mencap](#)

## **Visiting your relative or friend**

Q: Am I able to continue to visit my relative in a mental health inpatient unit?

A: The [NHS England Visitor Guidance](#) dated 25 March 2020 applies across all NGS estate, and is not specific to mental health units. It states that

Visiting is suspended with immediate effect and until further notice.

The only exceptional circumstances where one visitor – an immediate family member or carer – will be permitted to visit are listed below.

- The patient you wish to visit is receiving end-of-life care.
- You are the birthing partner accompanying a woman in labour.
- You are a parent or appropriate adult visiting your child.

Please contact the ward or department in advance to discuss appropriate arrangements.

Your health, safety and wellbeing, that of our patients, communities and individuals and teams across the organisation remain our absolute priority.

Please find other ways of keeping in touch with your loved ones in hospital, like phone and video calls. Everyone should follow the expert national guidance on social distancing and self-isolation, staying at home wherever possible, to help limit the spread of coronavirus, protect the most vulnerable people in our communities and our NHS.

This guidance appears establishes a nationwide ban on visits to NHS facilities including mental health units.

This ban may fall foul of section 19 Equality Act 2010 which guards against indirect discrimination. This occurs when an apparently neutral provision, criterion or practice (in this case, the ban on all visitors) puts a disabled person at a particular disadvantage. a blanket ban on visitors may not be a proportionate way of achieving that aim, because there are creative actions that a care home or hospital can take to achieve the aim without causing the unwanted side effects. Illustrative actions that could achieve the aim include:

- enabling family and friends to have face-to-face contact in the mental health unit's grounds and keeping a distance, so as to reduce the risk of infection;
- seeing each other through the window of a mental health unit;
- the person being driven by car to see family or friends, so that a conversation can happen at a distance;
- encouraging relatives to send parcels, photographs and so on to the person (upon receipt, such items may have to be disinfected);
- facilitating regular contact via video conferencing such as on Skype, Facetime, Messenger, Teams, Zoom etc;

Detaining authorities have a duty under Article 8 of the European Convention on Human Rights to respect a person's right to private and family life, and to their home

and correspondence. In some cases this may require the detaining NHS Trust to provide or buy a suitable device for the detained person and – if they could not afford such a device – for the person the detained person wants to have contact with.

The responsible clinician (usually the consultant in charge of the person's care) should always keep the question of whether the person continues to satisfy the criteria for detention under review.

You should therefore contact the ward manager and/or the consultant in charge of your relative's care. You should explain your proposed solution to the cessation of your visits and ask for a written response in two working days. If the situation is not resolved, please contact CBF and ask for a referral to the legal panel for advice.

Q: My relative has tested positive for Coronavirus. The care home she lives in has isolated her and won't let me visit. What can I do?

A: The government's "[COVID-19 guidance for residential care, supported living and home care](#)" includes the following:

- Family and friends should be advised not to visit care homes, except next of kin in exceptional situations such as end of life.
- Visitors should visit the resident in their own room directly upon arrival and leave immediately after the visit.
- Alternatives to in-person visiting should be explored, including the use of telephones or video, or the use of plastic or glass barriers between residents and visitors.

The guidelines also state that in the event that a resident has COVID-19, the care home should isolate the resident in a single occupancy room.

It will be difficult to challenge a ban on visiting a resident who has COVID-19, given that the care home is following government guidance. However, there may be alternatives to face to face visiting which could be explored- see the question above about visits to Mental Health Units.

Q: My relative lives in supported living with a small team 100 miles away. He has been in isolation for a few weeks, but I have been told that he is not allowed visitors and to send letters instead. He has a phone, but this rarely gets used. I was not consulted on this decision and I am worried that he will not deal well with these restrictions and would have coped better following social distancing guidelines. What do I do when they make these decisions without me?

A: The government's "[COVID-19 guidance for residential care, supported living and home care](#)" includes the following:

- Family and friends should be advised not to visit care homes, except next of kin in exceptional situations such as end of life.

- Visitors should visit the resident in their own room directly upon arrival and leave immediately after the visit.
- Alternatives to in-person visiting should be explored, including the use of telephones or video, or the use of plastic or glass barriers between residents and visitors.

It will be difficult to challenge a ban on visiting, given that the supported living placement is following government guidance. However, the supported living placement should make alternative arrangements for you to be in touch with your relative, through the telephone or digital means. Please contact the manager of the supported living placement and ask for this to be put in place in the next 2 working days, so that you can maintain contact. If the situation has not been resolved in 2 working days, please contact the CBF for further advice.

Q: I have limited access to my relative due to previous trauma he underwent in care. A Court of Protection order states we are allowed to visit him. I have been told by the provider I can only stand in the garden. Staff regularly congregate in the kitchen and workmen have been going in all week without protective gear. What should I do to protect my relative and gain access to him?

A: The provider's policy seems to be in line with the government's "[COVID-19 guidance for residential care, supported living and home care](#)" which states that "[f]amily and friends should be advised not to visit care homes, except next of kin in exceptional situations such as end of life". The scenario you describe does not seem to be an exceptional situation. The Court of Protection cannot change the provider's policies. Visiting your relative in the garden of the placement sounds like a very sensible solution: it is in the fresh air, and you can maintain a 2-meter distance. It is important that your relative understands that they have to maintain the distance too. This sounds similar to the agreement reached between the parties in the Court of Protection case of [BP v Surrey County Council](#).

If your relative has capacity to make decisions about where to live and care to receive, he can decide to live somewhere else in the interim. If they lack capacity to make decisions about where to live and care to receive, then a best interests decision needs to be made: either by a health and welfare attorney (if appointed), or by people concerned including the local authority, or ultimately by the Court of Protection.

Q: I have been declined my request to stay with my relative in their home (single person supported living) in the event of more extreme developments. I feel it is important my relative has family support under the current crisis, but the service feels they can adequately staff the service. What can I do?

A: It sounds like you would like to maintain contact with your relative. Moving into their home is one way to achieve that. What are the reasons the service provider has made this decision? Can you meet their concerns? This may be something that is capable of agreement if you and the provider fully understand each other's perspectives and concerns. If your relative lacks capacity to decide on where he

lives and the care they receive, someone else must take decisions on their behalf in their best interests, and if there is no agreement between you, the provider and the local authority, the Court of Protection will make the decision. Please note that the Court of Protection cannot force the provider to change its policy not to provide care to your relative while you live in the same home. You may wish to write to the provider and explain your proposal in full, and suggest you arrange a time to discuss it.

### **Meeting health needs**

**Q:** Will people with learning disabilities or autism be a priority for testing for COVID-19?

**A:** This group will not be a priority for testing above others exhibiting symptoms of COVID-19, unless they are in a care setting where there has been a break-out of COVID-19.

The government guidance states the following:

- Patients requiring critical care for the management of pneumonia, acute respiratory distress syndrome, or influenza-like illness or an alternative severe illness are first in priority for testing (group 1)
- All other patients requiring admission to hospital for management of pneumonia, ARDS or influenza-like illness are also prioritised for testing, but below group 1.
- Individuals resident in a setting where there is a 'cluster' of disease (e.g. in a residential or care setting such as long-term care facilities and prisons where there has been a break-out of COVID-19) are also prioritised for testing, but again below group 1.

For more information, see the government guidance "[Priorities for SARS-CoV-2 \(COVID-19\) testing](#)". The guidance may be updated and should be checked regularly.

**Q:** Full self-isolation will not be possible for people with learning disabilities with support needs. How should this be approached?

**A:** The government guidance is that people with learning disabilities are at increased risk of COVID-19 and should not leave their home out for at least 12 weeks, beginning 23 March 2020 (see the government's "[Guidance on social distancing for everyone in the UK](#)").

People with learning disabilities with support needs should therefore stay at home and not go out.

The guidance says that "essential care" which includes, for example, help with washing, dressing, or preparing meals, should continue to be provided. Other non-essential social contact, whether with carers or with friends and relatives, should not take place.

If a person is currently entitled to care from a local authority under the Care Act 2014, you should note that schedule 12 of the new Coronavirus Act 2020 means local authorities no longer need to carry out some of the key duties under the Care Act 2014. If the local authority has decided to make use of the “easements” in Schedule 12, the local authority is no longer obliged to provide care and support unless this would breach the person’s human rights. Local authorities do however still have the power to provide this care if they so wish.

Local authorities that are making use of the “easements” are also no longer obliged to conduct any assessments of individuals for care until the pandemic is over. Where a person’s care is provided by a local authority, you may see some resistance to the provision of care, depending on the particular local authority. This may remain the case until the end of the COVID-19 pandemic.

Sections 2 and 4 of the guidance issued under the Coronavirus Act 2020 say that local authorities should do everything in their power to continue to provide care for as long as possible. Care must also continue to be provided if it is required to maintain an individual’s human rights. The Act will expire by March 2022 or earlier if the crisis is over before then. When it has expired/is repealed, local authorities will again have to provide care in line with their old duties. For more information, see [here](#).

The Coronavirus Act 2020 does not apply to private bodies providing care. These private service providers will probably have their own policies on how they will continue to provide care.

If your child attends a school for children with special educational needs and disability, you should read the government guidance on [isolation for residential educational settings](#) and on [vulnerable children and young people](#). The guidance suggests that young people with education, health and care plans should be risk-assessed by their school or college to decide whether they should continue to be offered a school or college place during the pandemic, or whether, for example, their care and learning should be provided at home.

**Q: How will the rights of disabled people be safeguarded where intensive care resources need to be rationed?**

**A:** The European Convention on Human Rights makes clear that everyone, including people with learning disabilities, has a right to life (Article 2), to not be treated in an inhuman or degrading way (Article 3), the right to respect for a private and family life (Article 8) and to non-discrimination (Article 14). NHS hospitals, as public bodies, have to consider all of these when treating disabled people. So do private providers such as care homes and private hospitals, because they are carrying out public law duties.

Doctors have been issued with [NHS clinical guidance for the management of patients with a learning disability or autism](#). The guidance highlights a number of key points which should be addressed when assessing and/or treating a patient with learning disabilities or autism. This includes the duty to listen to parents/carers

especially when understanding behavioural responses, the duty to make reasonable adjustments, and to seek specialist support if necessary. Care home providers have also been referred to this document in the most recent [guidance](#) provided to them.

Regarding intensive care specifically, doctors have been told by the National Institute for Clinical Excellence, which provides clinical guidance to medical professionals, to “*base decisions on admission of individual adults to critical care on the likelihood of their recovery, taking into account the likelihood that a person will recover from their critical care admission to an outcome that is acceptable to them*” (paragraph 4.2, “[COVID-19 rapid guideline: critical care in adults, National Institute of Clinical Excellence](#)”). The guidance suggests that there is a sensitive balance that will need to be struck in each individual case. The guidance also suggests that clinical decisions will ultimately depend on what resources are available and the demand for those resources at any one time.

Q: My relative has sleep apnoea and needs waking throughout the night. Health and social care have suspended this for nearly a year, putting his life in danger. How can I legally challenge this?

A: Everyone has the right to life under Article 2 of the European Convention of Human Rights. While the Coronavirus Act 2020 waters down the duties of social care services, the Act makes clear that health and social care must continue to meet needs for care and support where not doing so would breach a person’s rights under the European Convention in Human Rights, and this includes the right to life. If you would like to discuss a legal challenge, please contact CBF which will seek to link you with a solicitor on its legal panel.

Q: A worker in a residential college for disabled children was told if their children gets COVID-19 in a serious way they will be admitted to hospital initially but they are likely to be returned to the college for end of life care if they get to the point of ICU rationing. The nurses at the college were all in tears at the thought and are not equipped and trained for what they could be asked to do. How can this be challenged if it is being written into procedures?

A: The Royal College of Nursing has issued [guidance](#) which says that health and social care professionals will need to be flexible in what they do and that this may entail working in unfamiliar circumstances. The guidance does however make clear that individuals will only be expected to support in emergency situations within the bounds of their individual competence, in accordance with the [Nursing and Midwifery Council Code](#).

Chief Executives of the statutory regulators of health and care professionals (including the Nursing and Midwifery Council, which regulates the work of nurses), have published a [joint statement](#) on how the bodies will continue to regulate in light of COVID-19. The statement emphasises that the standards to which professionals are held are designed to be flexible. Where any concerns are raised about the conduct of a professional, that case will be decided in its own context, taking into account the factors relevant to the environment in which the professional is working.

If you would like to discuss a legal challenge, please contact CBF which will seek to link you with a solicitor on its legal panel.

**Q: What reasonable adjustments will be made for my loved one if they contract the virus and need medical attention?**

**A:** All bodies delivering a public function, including all NHS and social care providers (whether public or private), are under a legal obligation under the Equality Act 2010 to consider how their policies or decisions impact on people with protected characteristics. “Disability” is one of the protected characteristics. This includes people with learning disabilities and/or autism. Bodies delivering a public function also have a duty to make “reasonable adjustments” to ensure that disabled people are able to access services, including hospitals, where they are otherwise disadvantaged in doing so.

The specific adjustments that such bodies will be expected to make in the context of COVID-19 will depend on the individual facts of a case. For example, if a person with learning disabilities is unable to transport himself or herself to hospital but requires urgent treatment, the equality duty may require the hospital to arrange for transport. The resources available to the service provider are likely to be relevant in considering what adjustments providers are required to make.

### **DNAR notices**

**Q: I am worried that a health professional will add a Do Not Resuscitate notice to my relative’s medical records - what can I do, will I be informed, how can I prevent or challenge it, what is the legal position?**

**A:** Firstly, whether or not you will have any rights or knowledge of your relative’s medical position will depend on whether they have capacity to make their own healthcare decisions and/or have agreed for private confidential medical information to be shared with you.

Do Not Resuscitate (DNR) decisions are no different than other medical treatment decisions. So if you are concerned your relative has a DNR, DNAR (Do Not Attempt Resuscitation), or DNACPR (Do Not Attempt Cardiopulmonary Resuscitation) - all of which are all different abbreviations used to describe advance decisions not to give a patient Cardio Pulmonary Resuscitation if their heart and breathing stops – you can ask their doctor or nurse, and they should tell you if you have the right to have confidential medical information shared with you.

DNR decisions should not be a surprise as there is a legal obligation on healthcare professionals to consult with a patient (or if they lack capacity, their Attorney or Deputy for health and welfare where appointed, family and carers) before making such a decision and to take into account their wishes. A patient (or if they lack capacity, their Attorney or Deputy for health and welfare where appointed, family and carers) must be informed of the decision.

Sometimes a DNR decision is made because a patient requests it. On other occasions it is made because the healthcare professional is concerned that the patient's heart and breathing may stop and that resuscitation may not be successful in terms of the patient making a meaningful recovery. It is unlawful for healthcare professionals to make any blanket decisions about a 'group' of people (such as 'everyone with learning disabilities' or 'everyone with autism') but instead they should use their clinical expertise and knowledge of an individual patient's health and wishes to make a decision. In current times where resources are scarce there is no doubt that DNR decisions may be impacted upon as whether or not an ITU bed or specialist staff are for example available may mean a patient has lower chances of recovery than they otherwise would have done.

What is most important is a discussion and a decision made on an individual basis. Often when people understand the reality of CPR and that a DNR decision is aimed at allowing a natural death, agreements can be reached, including a timescale for a review.

Agreement of the patient (or if they lack capacity their family or their Attorney or Deputy for health and welfare where appointed, family and carers) is not required. Put another way, a DNR does not require consent. It is a decision made by a clinician.

If there is a disagreement about whether a DNR order should be made, first discuss this with the senior doctor. As a matter of good practice, second opinions on whether CPR would work should be offered (which could be from another doctor in the hospital who has not previously been involved). It is important to listen to the second opinion carefully. If a dispute still remains, you may want to seek legal advice.

You should remember however that the Courts will not compel any doctor to give treatment that the doctor reasonably considers not to be in his/her patient's best interests, and the Courts will be slow to criticise individual decisions taken by healthcare professionals exercising reasonable skill, made genuinely and honestly in these extraordinary circumstances.

If you do find out about an unexpected DNR, raise it immediately with the relevant healthcare professional and if this decision was not made based on the individual patient's needs and/or wishes, please inform **CBF** and request that it is withdrawn so that a lawful decision, with consultation can be taken.

You may have heard about the controversy of clinicians using the Clinical Frailty Scale on people with learning disabilities and/or autism. You can read NHS England's clarification [here](#) which says that this scale is not to be used for people with learning disabilities and/or autism. If you think this has been wrongly applied, do seek further legal advice.

## **Mental Capacity Act**

Q: How can I ensure my views are considered when making decisions in my loved one's best interests?

A: The Mental Capacity Act 2005 says that if a person lacks capacity to make a particular decision, any decisions made for them must be in their "best interests". If you are a person engaged in caring for such a person, or interested in their welfare, the person making a best interests decision must take your views into account if it is practicable and appropriate to consult you. You can be consulted by telephone or email, so the restrictions on meeting in person due to coronavirus should not stop you being involved.

Q: Will I still be able to access the Court of Protection if the local authority and I cannot agree what is in my relative's best interests?

A: If you cannot agree, and nobody has power of attorney or deputyship for your relative's health and welfare, then you or the local authority can [apply to the Court of Protection](#) for the court to decide what to do. During the Coronavirus pandemic, the Court of Protection is still working but using telephone and video-link hearings. You can make an application to the Court of Protection without a solicitor, but CBF strongly advise you to use a solicitor. You may be eligible for legal aid. Please contact CBF who can put you in touch with a solicitor.

## **Access to advocacy**

Q: What can I do if my relative is being denied access to an advocate (IMHA) due to Coronavirus? (either by a clinician or provider)

A: None of the Coronavirus regulations or guidance suspend the duty of local authorities to appoint an Independent Mental Capacity Advocate (IMCA) or an Independent Mental Health Advocate (IMHA).

IMCAs: A local authority must appoint an IMCA if (i) The person is aged 16; (ii) A decision needs to be made about either a long-term change in accommodation or serious medical treatment; (iii) The person lacks capacity to make that decision, and (iv) there is no one independent of services, such as a family member or friend, who is "appropriate to consult". A local authority may appoint an IMCA for other decisions such as care reviews or adult protection. Click [here](#) for the relevant Regulations.

IMHAs: Access to an Independent Mental Health Advocate (IMHA) is a statutory right for people detained under most sections of the Mental Health Act, subject to Guardianship or on a community treatment order (CTO). Clearly, the work of an IMHA may be impacted by Coronavirus due to restrictions on visiting or workforce shortages. Contact with an IMHA may have to be through telephone or video conferencing.

There is no legal basis for clinicians, providers or local authorities to restrict access of a patient/resident to an IMCA or IMHA. If this happens, in the first instance, you should write an email to the person who has made the decision (always cc-ing the Chief Executive of the detaining NHS Trust, private hospital or care home owner) pointing out that the organisation is acting unlawfully and asking for a speedy resolution. In your letter, ask for a response in no later than 2 working days. If the situation is not resolved, please contact CBF and ask for a referral to the legal panel for advice.

## **Support around behaviour that challenges**

**Q: What is the duty of social services at this time?**

**A:** The Coronavirus Act 2020 [replaces](#) the duty of local authorities under the Care Act 2014 to meet individuals' eligible needs for care and support with a duty to meet eligible needs where not doing so would result in a breach of an individual's human rights under the European Convention on Human Rights, for instance the right private and family life, and the prohibition of inhuman and degrading treatment. These suspended duties are referred to as "easements". Easements in this sense mean an easing or relaxing of the duties. Not all local authorities have decided to apply the "easements" and those that have not decided to apply them remain under the same duties as before. Local authorities that do apply the "easements" retain a power (but not a legal duty) to assess and meet needs.

The threshold for a breach of human rights is very high. However the human rights of people with disabilities and vulnerable people may be particularly impacted by the current public health emergency.

The changes to the law permit local authorities to make decisions about how to prioritise care. This is so that they only have to deal with the most urgent and acute needs. For example, a local authority may prioritise helping someone to get the support they need to eat by reducing the support with personal care they give to someone else.

The Government has published [guidance](#) about what the easements to the Care Act 2014 duties, which local authorities must have regard to.

The guidance says that all local authorities should continue to comply with Care Act duties as long and as far as possible, and unless and until *"the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties (as they stand prior to amendment by the Coronavirus Act) and where to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life"*.

This means that for the moment, and until the threshold outlined above is reached, local authorities must maintain their duties to assess and meet needs in the usual way. If a local authority is failing to meet an individual's needs, this may be challenged by judicial review, and specialist advice should be sought from a community care solicitor. If you need such a solicitor, please contact CBF.

If a local authority considers that it is no longer able to comply with its Care Act duties, it must follow a formal process of decision-making before applying the “easements”, including consideration and scrutiny of the likely impact on service users, what steps have been taken to mitigate against the need to apply the easements, and notifying all providers, service users, and carers. The decision also needs to be reported to the Department of Health and Social Care. The local authority should also communicate this decision to all providers, service users and carers. The accessibility of communication to service users and carers should also be considered (see section 6 Guidance to easements).

**Q:** The changes in routine are disastrous for people with behaviour that challenges and leading to great fear and resulting in behaviour that others find difficult to manage. This is putting greater strain on remaining support workers and families managing them. What support can be provided?

**A:** For the moment, and until the threshold outlined above is reached, local authorities should continue to comply with their Care Act duties to meet individuals’ needs for care and support, including the needs of those who display behaviours which challenge. Where there has been an increase in need, you should contact your social worker to request that additional support is arranged urgently.

If and when a local authority decides to apply the “easements” to the Care Act duties, having followed the formal decision-making process outlined above, they may need to prioritise urgent and acute needs. The needs of those with learning disabilities and behaviours which challenge may often fall into this category, and you should continue to speak to your social worker to make them aware of any escalation or change in need.

**Q:** What will be in place for families if the situation in the home of a person with learning disabilities escalates? The usual advice is “call the police” but this is unsatisfactory at the best of times and even more so now.

**A:** No additional arrangements have been put in place to help families in these circumstances, and so the pre-existing guidance should be followed. If you think that someone is in immediate danger you should call the police. Please refer to the Frequently Asked Questions page about behaviour support, elsewhere on the CBF website.

**Q:** After five years as an inpatient my relative was in transition from an inpatient unit to his new home in the community. This has been put on hold and he is in lockdown in hospital. He will have great difficulty understanding what’s happening and we’ve been told we can’t visit. Due to a lack of a safe space following an incident has left him sectioned under the Mental Health Act. Is there anything we can do?

**A:** The [Coronavirus Act 2020](#) brought in temporary changes to the Mental Health Act aimed at managing the impact on mental health services. These are summarised [in this blog](#). At the time this FAQ was written (8 April 2020) these changes had not entered into force.

Patients and their relatives have the same rights currently as they had before the Coronavirus Act was passed. COVID-19 is causing practical difficulties for those transitioning from hospital into the community, but the legal framework remains the same. A patient can only be detained in hospital if they meet the criteria under the Mental Health Act 1983. Detention in hospital must be necessary in the interests of the patient's health and safety, or for the protection of others.

Blanket policies which place a whole hospital on lockdown, preventing patients from accessing leave and therefore transitioning back into the community, could be subject to legal challenge. Section 17 leave, which enables a patient to leave the ward for a defined period of time, should remain at the discretion of the patient's Responsible Clinician, and should be facilitated on a case-by-case basis within the boundaries of the government guidelines on social distancing. If it is not safe for visits to a placement to continue, clinical teams should consider other means of facilitating the transition through the use of technology for example. Contact between patients and their families should also continue with the use of video-conferencing facilities wherever possible. If video-conferencing is not possible, contact could take place on the grounds whilst respecting two metres' distance, or even through a window (see **Visiting**, below).

No changes have been made to the rights of nearest relatives to receive information and to be consulted about their relative's detention under the Mental Health Act. Nearest relatives can also request discharge from section, subject to the responsible clinician's ability to bar discharge if it is felt that the patient may act in a way dangerous to themselves or others.

If your relative does not have a partner or any adult children, then his nearest relative will be the eldest of his parents. Your relative cannot be detained under section 3 of the Mental Health Act if his nearest relative objects to this.

Patients still have the right to make an application to the First-tier Tribunal (Mental Health) to challenge their detention, and legal aid is automatically available for this. If your relative lacks capacity to request a tribunal himself, his case could be referred to the tribunal by the Secretary of State for Health and Social Care. Tribunal hearings are now taking place over the phone or through the use of video-conferencing. Another change is that the judge will hear the case alone – without the medical member and the lay member who usually sit with the judge. Judges are, however, able to seek advice from a medical or lay panel member during the course of the hearing.

Solicitors and independent mental health advocates are still assisting patients remotely to provide advice as well as representation at the tribunals and hospital managers' hearings. You can request a referral to advocacy services on your son's behalf. You may also be able to access free legal advice for yourself, subject to a means assessment.

## **Personal Health Budgets and Direct Payments**

Q: Will Care Co-ordinators and social workers be given additional power to authorise reasonable changes in how direct payments are spent? For example, to buy equipment if usual activities are not taking place? How can I access this, for example, to buy a jacuzzi if hydrotherapy is not available?

A: No additional powers have been given to local authorities or clinical commissioning groups (CCGs) to authorise how direct payments or personal health budgets are spent. However, local authorities already have powers under the Care Act 2014, or the Children Act 1989 in the case of disabled children, to meet an individual's needs by providing equipment, or direct payments to purchase equipment. CCGs have similar powers under the National Health Service Act 2006. Local authorities and CCGs should adopt a flexible approach when considering whether to agree to requests for equipment. The current public health crisis will require all parties to be flexible when considering how to meet the needs of disabled people and children and using direct payments imaginatively may be part of the solution.

Where the purchase of things such as equipment would assist to meet your loved one's needs, you should have a conversation with your social worker or care coordinator. It would be advisable to get authorisation in writing before making any purchases.

Q: I manage a complex package of support for my relative via a Personal Health Budget (PHB). I am struggling to access personal protection equipment (PPE), and also there is no support with managing all the complex employment issues for staff during this crisis-who can I ask for support?

A: This question has two parts.

### *Part 1: PPE*

The short answer is that if your relative has symptoms of COVID-19, there is a good argument that either his care provider and/or the NHS should provide PPE. If he does not have symptoms, it will be more difficult to argue that PPE should be provided.

The explanation for this answer is as follows. The current [government guidance](#) is that PPE is only required (above and beyond normal good hygiene practices) if the person being cared for is symptomatic. The guidance is the same if there is a symptomatic person in the household who is self-isolating, e.g. isolating in their own room and with separate bathroom facilities.

If the person being cared for is symptomatic, the guidance states that *“care workers should use personal protective equipment (PPE) for activities that bring them into close personal contact, such as washing and bathing, personal hygiene and contact with bodily fluids.”*

The guidance is aimed at “*local authorities, clinical commissioning groups (CCGs) and registered providers, who support and deliver care to people in their own homes, including community health services.*”

Whether your relative is under or over 18, the NHS has an absolute duty to ensure his eligible needs are met, including where they discharge this duty with a personal health budget. The same would apply if the person being cared for receives direct payments from a local authority.

If your relative is symptomatic, and if you are using a “registered provider”, the guidance suggests that the provider should access and use their own PPE. If you are not using a registered provider, and you cannot access your own PPE, there is a good argument that the NHS (i.e. the Clinical Commissioning Group or NHS England) is required to provide PPE, as without PPE your son’s needs can’t be met.

The guidance goes on to state that:

*“There will be a free issue of PPE to support adult social care providers (residential care and domiciliary care) to comply with the updated advice on use of PPE to support management of symptomatic patients presenting in these settings. This will be issued from the pandemic influenza stockpile. Arrangements will be put in place for adult social care providers to access further PPE as necessary.”*

If you use a formal domiciliary care provider, the guidance therefore states that they will be issued with PPE.

If your relative is not symptomatic, then given that the guidance doesn’t require PPE to be used, it will be difficult to argue that this must be provided by the care provider, the LA or the NHS.

### *Part 2: No support for managing complex employment issues*

The short answer is that [NHS Guidance](#) requires the CCG to provide support with management of your son’s PHB. You should contact the CCG and remind it of the obligations set out below. There has not been a change in the law in this area, although realistically it would not be surprising due to capacity issues if the CCG took a little longer to respond.

The explanation for this answer is as follows. The relevant provisions are these (emphases added):

*147) People may wish to use their direct payment to employ staff to provide them with care and support. **CCGs should support them to do so whenever possible, while ensuring that there is appropriate practical support.***

*148) For some people who receive direct payments, it may be their first experience of being an employer, and **it will be vital that there is good support available to them, if they want it. This support could include***

**provision for payroll, training, sickness cover or other employment related services....**

149) Where direct payments are being used to employ one or more people, the person receiving care, the representative or the nominee, should be made aware of their legal responsibilities as employers. **CCGs should ensure that individuals are fully aware of their responsibilities, and of any potential risks and should be supported to manage them ...**

150) Concern about becoming an employer should not discourage people who would otherwise be willing and able to manage a direct payment. **People should be informed of the local support available in relation to being an employer and the different options in relation to taking on staff, such as use of agencies.** This should be done accurately and responsibly, making recipients aware of what is involved without overstating the extent and complexity of these responsibilities.

The local authority also has similar duties to signpost you to support if the person receiving care is over 18; see paragraph 12.7 of the Care and Support statutory [guidance](#).

Q: I manage a direct payment for my relative and therefore employ support workers. Several of them are off sick. What support is available to help me maintain a safe rota and what sanctions might be applied to me should I not be able to get cover? What support is available to help me maintain a safe rota?

A: This question has two parts.

1. Support to maintain a safe rota

The short answer is that if you are unable to identify sufficient carers to maintain a safe rota, then the LA has a duty to support you to identify carers or, ultimately, to put in place care themselves.

The caveat to this is that the Coronavirus Act 2020 removes the duties on Local Authorities to assess and meet needs; they now only have the power to do so. This is referred to as an “easement” of the duties. The government guidance accompanying the Act, which came into force on 31 March 2020, allows the Director of Adult Social Care for a local authority to apply the “easements” if “...the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties (as they stand prior to amendment by the Coronavirus Act)” and that “...to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life” (para. 6 of [this](#)).

The answer below explains what should happen if the easements are not applied but bear in mind that the local authority will not have an absolute duty to meet needs if the easements are applied.

The explanation for that answer is as follows. Ultimately the responsibility for ensuring your son's needs are met remains with the local authority which is also required to support you to manage the direct payment, as explained in the answer above. The local authority or NHS should also have included contingency arrangements in your son's care plan (see para 12.28 of the Care & Support statutory guidance). The NHS Guidance provides that 'hidden' costs such as for "emergency cover" should be included in your personal health budget (see para 121 of [this](#)).

You could also consider asking the local authority to allow you to be paid from the direct payments, for care you provide to your relative because carers are unable to do so. The local authority has the power to make a direct payment to a close family member living in the same household as the person needing care, if it deems that it is **necessary** to do so (Regulation 3 of the Care & Support Regulations 2014). If the person with care needs is under 18, the local authority will consider whether it is necessary for promoting the welfare of the child (see Regulation 200 of [this](#)).

The fact that the health and social care workforce is depleted due to COVID-19, is, on the face of it, a good reason why it is "necessary" for direct payments to be paid to family members in the same household. If your local authority applies the easements referred to in the Coronavirus Act 2020, then this could also be a good reason to do so. The local authority may also wish to see evidence that you have sought to find alternative carers and have been unable to do so.

## 2. Sanctions

The short answer is that there should not be any 'sanctions' applied as long as you inform the local authority of any difficulty you have in arranging cover.

The explanation for that answer is as follows If you are unable to get cover, it is important to inform the local authority. As explained above, the local authority has ultimate responsibility for meeting eligible care needs. If alternative arrangements (such as family members in the same household being paid to provide care) are not available, the local authority may seek to stop direct payments and take over providing the care; having said that, if at that stage the local authority are able to find alternative carers, you may wish to see whether you could take over employment of those carers by way of your direct payment. If you inform the local authority if you are having difficulty in not providing cover, there should not be any question of "sanctions" being employed.

*Q: Families managing PHBs are not linked into to access information that large provider organisations have "I do not know of anyone in my networks who have heard from their Social Services team."*

*A: You could make contact with the CCG (or local authority, if it is the commissioner) and ask them for advice on how best to access relevant information. For adult social care, a local authority "must establish and maintain a service for providing people in its area with information and advice relating to care and support for adults and support for carers." Admittedly, this is likely to be a website with generic information,*

but the CCG could be reminded of this and the ‘principle’ of the need to empower families by providing them with information.

Q: Can you provide more clarity around the 80% of pay, when the usual pay is so varied due to hourly pay.

A: This is an employment issue and we would advise specialist advice is sought, as the CBF and its legal panel are unable to assist. There are a number of law firms who are providing factsheets to assist understanding how the changes take effect.

Q: All of these issues result in greater strain on remaining support workers and families managing them. Do you have any tips?

A: Unfortunately, greater strain seems inevitable. The changes brought about by the Coronavirus Act 2020 will only make matters worse. All we can suggest is that families continue to ensure that public authorities – local authorities and the NHS – continue to act lawfully. We have also suggested above that in the worst-case scenario, families may at least be paid via direct payments if they are providing care on the basis that it is ‘necessary’ to do so.

Q: Families who are paying support workers are struggling to match the enhanced payments being given out. What will social services do to support us financially?

A: The short answer is that this is partly an issue for an employment lawyer, so CBF and its legal panel are not employment lawyers. Having said that, direct payments should meet all of the costs of meeting the person’s needs, including sick pay.

The explanation for this answer is as follows. For children in receipt of social care, the guidance states that ‘councils should include associated costs that are necessarily incurred in securing provision, without which the service could not be provided or could not lawfully be provided’. A list of examples specifically includes sick pay (Department of Health, Guidance on direct payments for community care, services for carers and children’s services England, 2009 (amended 29 October 2010), para 114). If your requirement to pay sick pay has increased, this cost should be met by the commissioner.

For adults in receipt of social care, para 12.27 of the Care & Support statutory guidance confirms that, “The local authority should have regard to whether there will be costs such as recruitment costs, Employers’ National Insurance Contributions, and any other costs by reason of the way in which the adult’s needs will be met with the direct payment. If these costs will be incurred their amount must be included in the personal budget (and thus direct payment) if it is appropriate for the adult to meet the needs in a way which incurs the costs.”

For personal health budgets, the guidance states that “it is important to ensure that whatever support arrangements are made available, they are adequate to meet the

full range of requirements that people receiving direct payments will have” and reference is made to “provision for....sickness cover to assist a patient, representative or nominee where an employee provides services secured by direct payments for the patient” and “when calculating the budget, CCGs should ensure that they recognise the additional ‘hidden’ costs (para. 61 of [this](#)). For example, if someone is employing an assistant, they must ensure that there is sufficient funding available to cover the additional necessary costs of employment such as tax, National Insurance, training and development, pension contributions, any necessary insurance such as public liability, emergency cover and so on.” (see para. 118 of [this](#)).

### **Personal Welfare Deputy**

**Q:** I am appointed by the Court of Protection as Personal Welfare Deputy. What rights do I have in the current situation?

**A:** The Coronavirus Act 2020 is silent on the impact of the current health crisis on people who lack capacity to make decisions for themselves and for their Deputies. This means that if you are a Personal Welfare Deputy nothing has changed in respect to how you should make decisions. You must ensure that you continue to make decisions in the person’s best interests, having regard to their wishes and feelings.

However, the Coronavirus Act 2020 does make very significant changes to the Care Act 2014, in particular by removing the duties on local authorities to assess people who might need care and to provide care to meet eligible needs during this time of crisis. The duty to provide and review care plans has also been removed. Local authorities retain a power to assess a person’s needs and provide care but it no longer has an obligation to do so, unless not providing care will cause a breach of a their human rights (which is a very high threshold test to meet).

This may impact on the options available for a person’s care. As a Personal Welfare Deputy, you will have to consider whether any decision from a local authority (for example to reduce or withdraw care or not undertake an assessment of needs) is in the best interests of the person who you support.

Many local authorities and health bodies providing care and treatment are under huge strain. However, as a Deputy, you must continue to make decisions in the best interests of the person who you support.

The government has provided guidance to local authorities and has said they will still be expected to carry out proportionate and person-centred care planning. They must also provide sufficient information to all concerned, particularly those providing care and support. If any plan is revised (or sought to be withdrawn), the local authority must also continue to consult with and involve the care user, their carers.

As Personal Welfare Deputy the Court is likely to have set out the remit of your decision-making powers. You should also expect to be consulted about any decision taken about a person’s care or treatment. If the person you are supporting is taken to

hospital and decisions are being made about their care and treatment, you should be consulted about what is proposed and asked for your views, even if you cannot physically attend the hospital and visit the person you support. You can let the care team know your views by telephone or some other means.

Local authorities and hospitals must still comply with the Equality Act 2010. It is also worth noting that separate guidance is due to be published in relation to individuals who lack capacity and are deprived of their liberty.

If you are concerned that a friend or family member is not receiving the care or treatment they require or if you are concerned that decisions are being made that you consider are not in the person's best interests, you should seek legal advice. It may be that you can seek to challenge these decisions via the Court of Protection or by way of judicial review, depending on the type of decision.

### **Children accommodated under section 20 in residential schools**

**Q: What will happen to children accommodated under section 20 if their school closes?**

**A:** The duties under s.20 of the Children Act 1989 have not been changed by the government and must still be complied with by the local authority. This means that where a child in need meets the criteria to be accommodated by the local authority, it has a duty to ensure the accommodation provided is the most suitable option available. Any arrangements must still be with the consent of the child's parents which can be withdrawn at any time.

Subject to what is said below about closing Schools, if a school *does* close, the local authority would then have a duty to find suitable alternative accommodation that met the child's needs, taking into account the child's wishes and feelings.

**Q: What will happen to children funded by education if their residential school closes?**

**A:** The Department for Education's "[Coronavirus \(COVID-19\): guidance on vulnerable children and young people](#)" (updated on 1 April 2020) states that:

- Any decisions about individual placements should be made based on individual risk assessments.
- The department will support local authorities to work with residential special schools and specialist colleges (including independent and non-maintained special schools, state boarding schools, special post-16 institutions and other post-16 training providers) **to ensure children and young people who cannot be supported at home can remain in their setting safely.**
- The department is recommending that all residential special schools and specialist colleges conduct a risk assessment both for the institution and for individual pupils/students to identify how self-isolation measures should be

enacted, if needed. This will involve close working with local authorities, the local Public Health England health protection team, the clinical commissioning group and, where appropriate, the child's parents.

- The department will continue to work with local authorities and sector bodies (such as the National Association of Independent and Non-maintained Special Schools (NASS), Natspec and the Boarding Schools Association) to consider how best to support these settings, for example, to ensure they have the right staffing.

**Q: What is the advocacy process to ensure the right decision is made for each child?**

**A:** Any decisions about the provision of accommodation under s.20 Children Act 1989 must take into account the wishes and feelings of the child.

In relation to decisions about continuing education within a particular setting, the individual risk assessment must take into account a range of factors including:

- Potential health risks to the child;
- The risks to the child if some or all of the elements of their EHC Plan cannot be delivered at all, or in their usual setting;
- The ability of the child's parents and home to ensure health and care needs can be met safely; and
- The potential impact to the individual's wellbeing of changes to routine.

The [DfE guidance](#) makes clear that "Where children and young people may be placed at significant risk if their placement didn't continue, local authorities will need to work with the educational setting to ensure they remain open, deploying staff from other education settings to keep staffing ratios safe if needed".

### **Children with EHCPs continuing to attend school**

**Q: What arrangements are in place to ensure that vulnerable children are not grouped together and therefore at heightened risk?**

**A:** The Department for Education's "[Coronavirus \(COVID-19\): guidance on vulnerable children and young people](#)" (updated on 1 April 2020) states that:

*"There is an expectation that vulnerable children who have a social worker will attend an education setting, so long as they do not have underlying health conditions that put them at severe risk. In circumstances where a parent does not want to bring their child to an education setting, and their child is considered vulnerable, the social worker and education setting should explore the reasons for this, directly with the parent. Where parents are concerned about the risk of the child contracting the virus, the school or social worker should talk through these anxieties with the parent following the advice set out by Public Health England"*

Schools and local authorities should undertake an individual risk assessment for each child to decide whether they should continue at School. That risk assessment should include factors such as:

- Potential health risks to the child;
- The risks to the child if some or all of the elements of their EHC Plan cannot be delivered at all, or in their usual setting;
- The ability of the child’s parents and home to ensure health and care needs can be met safely; and
- The potential impact to the individual’s wellbeing of changes to routine.

**Q: How will safe transport be provided, especially where a child needs to attend a different school to usual?**

**A:** The local authority retains a legal duty to arrange suitable transport to the School named in the child’s Education, Health and Care Plan. Where a child needs to attend a setting that is not local, the Department for Education’s “[Coronavirus \(COVID-19\): guidance on vulnerable children and young people](#)” (updated on 1 April 2020) states:

*“Where children are receiving support from a social worker, we would expect the local authority to review transport arrangements and make appropriate provision for children to reach their education setting safely. We will work closely with local authorities to put the necessary arrangements in place to support children”.*

**Q: How will medical and health needs be met?**

**A:** At the time of writing this note, health bodies remain responsible for meeting the health needs set out in a child’s EHC Plan and ensuring that the provision outlined in Section G is delivered.

However, the Coronavirus Act 2020 allows these legal duties to be varied so that the health body will be considered to have met this duty if it has used ‘reasonable endeavours’ to do so. This provision can only be enacted following a Notice being issued by the Department of Education which has not yet happened.

Particularly where children are being educated at home, this may mean changes to the way that provision is delivered – for example by working with families to deliver therapy ‘virtually’ using an online platform.

**Q: What will be done to avoid the need for restrictive interventions, particularly when there are staff shortages? For example, it would be sensible to reduce normal school demands likely to result in anxiety or distress during this period and to focus on wellbeing as the main priority.**

**A:** We would suggest that this is something that should be discussed with the local authority and school as part of its individual risk assessment for that individual child.

The Department for Education's "[Coronavirus \(COVID-19\): guidance on vulnerable children and young people](#)" (updated on 1 April 2020) emphasises that local authorities should work with schools to ensure that they maintain sufficient staffing ratios, including deploying staff from other education settings, to keep ratios safe.

Q: Will schools still be open for children of key workers over the Easter holidays? What do families do if they are closing and will not be able to take time off as key workers?

A: The Department for Education's "[Coronavirus \(COVID-19\): guidance on vulnerable children and young people](#)" (updated on 1 April 2020) states that the government is asking providers, wherever possible, to maintain provision for children of workers critical to the COVID-19 response and vulnerable children over the Easter holidays.

Q: One of my children's peers has significant needs and needs 2:1 support, and sometimes more. Their dad is a paramedic and mum works in a supermarket. Usually mum would not work over college holidays and personal assistance support would be brought in to help. Just now this will be difficult but also the fact that she is also a Key Worker. Will the child still be able to access school / college under the provisos that are in place now?

A: As explained above, the government has asked that education settings remain open over Easter for the children of Key Workers wherever possible.

In addition, the Department for Education's "[Coronavirus \(COVID-19\): guidance on vulnerable children and young people](#)" (updated on 1 April 2020) explains that:

*"Local authorities will need to ensure, as usual, that provision continues to be available to meet education, health and care needs. Following discussion with schools, this may involve some special schools and colleges continuing to offer some or all of their provision over the Easter holidays."*

Q: Having an EHCP and being a key worker meant nothing to our child's residential special college, as they sent her home. She will likely be home to September and will not receive any of that provision. What can we do?

A: We would suggest all families who are not receiving the support and provision that they need to speak to their social worker or local authority SEN officer and if it remains unresolved, to take legal advice. Legal aid remains available where financial eligibility criteria is met.

## **Complaints- Local authority and NHS complaints**

Q. Can I still make a complaint about a failure by a local authority or the NHS and will existing complaints continue to be investigated?

A. You are still able to make complaints about local authority and NHS failures. In England the NHS has advised that the investigation of complaints may need to be 'paused' during the emergency but that this should not apply to complaints concerning 'patient safety, practitioner performance or safeguarding'.

No formal guidance appears to have been issued concerning local authority investigations of complaints but it is probable that the same considerations would apply.

The NHS England [announcement](#) can be accessed by [clicking here](#) and a brief commentary on this announcement can be accessed by [clicking here](#).

*We know this is a very challenging time for families caring for loved ones with severe learning disabilities. These FAQs may raise further queries or you may have further questions that you would like answered – if so please let us know and we will do our best to address them. With the legal panel members we will be working on additional resources to address the issues raised so far. To share queries or further questions, please email [info@theCBF.org.uk](mailto:info@theCBF.org.uk) and include **LEGAL QUESTION** in the subject.*

*This inbox will not be monitored over the Easter weekend, but we will respond as soon as possible from Tuesday 14<sup>th</sup> April.*