

INFORMATION SHEET

Frequently Asked Questions 1

Answered by the legal panel - This information sheet will be reviewed regularly and updated accordingly First published 9th April 2020. Last updated: 21st September 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. Thank you also to the families who ha



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THANK YOU FOR YOUR CONTRIBUTION

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*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 and include **LEGAL QUESTION** in the subject.*



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RIGHT TO ACTIVITIES AND ROUTINE FOR WELL BEING

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](#)

Q: PLEASE PROVIDE CLARITY ABOUT SOCIAL DISTANCING FOR THOSE THAT NEED TO GET OUT BUT REQUIRE PHYSICAL SUPPORT/CLOSE PROXIMITY FROM ANOTHER PERSON TO DO SO.

A: Whenever people leave their homes, they are required to adhere to the social distancing measures. The current advice on social distancing requires everyone to stay two metres apart from anyone they don't live with, to avoid non-essential use of public transport, and to take extra care with handwashing. The government is advising those who are at an increased risk from COVID-19 - including people with learning disabilities - to be particularly stringent in following social distancing measures.

People from the same household need not stay two metres apart, and therefore if an individual requires close support when out of the house, this can be provided by someone from the same household. If an individual receives care from someone who is not part of their household, the carer and individual need not stay two metres apart. The government advice is that care workers should use personal protective equipment (PPE) such as gloves, masks, and aprons for activities that bring them into close personal contact, such as washing and bathing, personal hygiene and contact with bodily fluids.

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: LAS ARE PROVIDED WITH FUNDING RETAINERS FOR SERVICES IN THEIR COMMUNITIES (E.G. SOCIAL CARE SERVICES) TO HELP THEM SURVIVE WHEN THEY ARE NOT BEING UTILISED DURING COVID-19. THIS FUNDING IS DUE TO END SOON AND COULD SEE MANY SERVICES GO UNDER. HOW DOES THIS TALLY WITH THE CARE ACT'S MARKET SHAPING DUTIES IF A LARGE NUMBER OF LOCAL SERVICES, AS ADASS PREDICTS IN ITS LATEST REPORT, GO UNDER? WILL THEY BE IN BREACH OR WILL THERE BE ALLOWANCES MADE IN LIGHT OF CURRENT CIRCUMSTANCES?

A: The Care Act's market shaping duty is a qualified duty. The duty is to 'promote' and this doesn't mean that (at any one time) there must be a variety of providers and high quality services for disabled people to choose from.

If a council simply stated, in a particular case, that it was unable to provide services and there was nothing more it could do – then this would probably be unlawful. Equally, a local authority would need to provide evidence that it is seeking to 'promote' a marketplace, and the longer the problem has gone on for, the harder it would be for the authority to justify its efforts. However, if the problem has come about due to the current pandemic, and it if it said that it was exploring all possibilities but in the short term all it could offer was X,Y,Z (e.g. a direct payment etc.) then this might be lawful – although a great deal would depend upon the particular facts of the case.

The Care Act 2014 section 5(1) and associated regulations place a duty on local authorities to promote an efficient and effective market 'with a view to ensuring that any person in its area wishing to access services in the market' has (among other things), a variety of providers and high quality services to choose from.

The duty imposed by section 5 is qualified by the words 'to promote'. In this respect it mirrors the duty on the Government in the NHS Acts which obliges it to 'continue the promotion ... of a comprehensive health service ...'. The Courts have held that this doesn't mean the Government must ensure that there is a comprehensive health service – merely that they must be seen to be taking steps to this end – ie 'to continue to promote' such a service - ***R v North and East Devon Health Authority ex p Coughlan*** [2000] 2 WLR 622 para 22.

If a local authority simply stated that it was unable to provide services and there was nothing more it could do in a particular case, then this might be justiciable (i.e. *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119) but if it said it was exploring all possibilities but in the short term all it could offer was X,Y,Z (e.g. a direct payment etc.) then I think it would be unlikely that the courts would interfere.



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Q: MY 26 YEAR OLD DAUGHTER LIVES IN SUPPORTED LIVING. SHE IS FUNDED FOR 41 HOURS A WEEK OF ONE TO ONE (AND ADDITIONAL 1:3 HOURS ETC) BUT I HAVE BECOME AWARE THAT SHE IS NOT RECEIVING THAT LEVEL OF SUPPORT AND OFTEN THE PERSON WHO IS SUPPORTING HER HAS TO SUPPORT OTHER TENANTS IN THE HOUSE AT THE SAME TIME. I HAVE RAISED THIS ISSUE OVER A NUMBER OF MONTHS WITH THE HOUSE TO NO AVAIL - ABOUT A WEEK AGO WHEN I RAISED IT AGAIN I WAS TOLD THERE WERE LOTS OF PEOPLE WHO WOULD BE DELIGHTED TO HAVE MY DAUGHTER'S ROOM AND I WAS FREE TO TAKE HER FUNDING ELSEWHERE. FINALLY WE HAD A ZOOM MEETING YESTERDAY AND I WAS TOLD SHE COULD HAVE 1:1 FROM 6.30AM-9.30AM DAILY, BUT I DON'T THINK THAT IS APPROPRIATE AS SHE WOULD NOT BE UP AND WANTING TO ENGAGE WITH STAFF AT 6.30AM. I THINK THEY CHOSE THIS TIME AS THEY HAVE ANOTHER TENANT IN THE HOUSE WHO GETS UP EARLY SO AGAIN IT IS TO FIT IN WITH ANOTHER TENANTS' NEEDS AND NOT MY DAUGHTER, I AM FINDING THIS VERY STRESSFUL. CAN YOU ADVISE ME HOW TO PROCEED?

A: The legal position is quite straightforward, which is that if someone has had an assessment which confirms that they have eligible needs under the Care Act, and then a care plan is put in place which sets out the hours that are needed to meet those needs (in this case it would appear to be 41 hours a week), then the 41 hours should be provided to that person to meet their needs and not 'shared' as appears to be suggested here. Equally the care plan should be delivered in a person-centred way and the individual should have their support provided at the times that best meet their needs, not are most convenient to anyone else.



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VISITING YOUR RELATIVE OR FRIEND

Q: AM I ABLE TO CONTINUE TO VISIT MY RELATIVE IN A MENTAL HEALTH INPATIENT UNIT?

A: The new [NHS visitor Guidance](#) states that the restrictions on visiting have now been lifted and is up to the discretion of local NHS trusts and bodies. It does stipulate that bedside visitors will be limited to one person. However, those who are there to support the needs of a patient, such as a familiar carer/supporter/personal assistant, should not be counted as an additional visitor. Patients may also be accompanied where appropriate and necessary to assist with the patient's communication and/or to meet the patient's health or social care needs. Where possible patients should contact the ward or department in advance to discuss local considerations and make appropriate arrangements.

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: When a care home decides to restrict visitors, this decision interferes with their residents' right to enjoy their private and family life. Public bodies (which can include care homes, even if their fees are paid for privately by residents or their families) are not allowed to interfere with that right, which is protected by Article 8 of the European Convention on Human Rights ('ECHR') - unless they have a lawful reason for doing so. There is also a prohibition on 'blanket bans', which means that public bodies are not allowed to apply policies to everyone indiscriminately irrespective of an individual's specific circumstances.

The updated Government [guidance](#) on policies for visiting arrangements in care homes during the pandemic provides that visits to a resident who has tested positive for Coronavirus should only be made in "essential circumstances", for example end of life. If you believe that the care home has not taken into account your relative's specific circumstances, and you believe that the restriction on your visits is unreasonable, then you should contact the CBF promptly who can refer you to specialist solicitors for advice.



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 [guidance](#) for supported living says that visits in person should be limited to protect the health and wellbeing of people being supported, but recognises that for some people there are important reasons for having in-person visits, including where not having visits may be difficult for a person to understand and may lead to distress. This reflects the law which prohibits “blanket bans”, which means that public bodies are not allowed to apply policies to everyone irrespective of their individual circumstances.

The supported living guidance sets out that if the service user has capacity and wants a visit, the provider should:

- advise them about the safest ways to have visitors
- risk assess individual settings and individual vulnerabilities consider risks to other people (if in shared settings)
- encourage, agree and support decision-making regarding visitors

The guidance also sets out some advice on infection prevention and control around visits, for instance encouraging the use of outdoor spaces for visits, and encouraging visitors to wear appropriate face coverings.

If the care provider is operating a blanket ban on visits, or you consider that your relative’s individual circumstances have not been taken into account, contact the CBF promptly who can refer you to specialist solicitors.

The guidance reflects that if the person is assessed as lacking capacity to make decisions around visits, then the provider should work within the framework of the Mental Capacity Act 2005 (MCA) to establish whether a visit is in the individual’s best interests. That framework includes consulting those interested in the individual’s welfare, where doing so is practicable and appropriate. Determining your relative’s best interests would likely involve a risk assessment and consideration of how to minimise the risk infection, for instance by holding the visit outdoors if possible.

If your relative lacks capacity in this area, you should remind the provider of the requirement to consult you in relation to your relative’s best interests. If there is a dispute about whether or not face-to-face visits would be in your relative’s best interests then you should contact solicitors who can advise you on a potential application to the Court of Protection.



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: There is nothing in law which prevents you from visiting your relative indoors. The Government [guidance](#) for supported living recognises that for some people there are important reasons for having in-person visits, including where not having visits may be difficult for a person to understand and may lead to distress. The guidance says that the use of outside space should be encouraged for visits, but provides guidance for visits indoors where that is not possible. This reflects the law which prohibits “blanket bans”, which means that public bodies are not allowed to apply policies to everyone irrespective of their individual circumstances. If the care provider is operating a blanket ban on visits indoors, you should contact the CBF promptly, who can refer you to specialist solicitors to advise about a potential judicial review challenge, or a potential application to the Court of Protection if your relative lacks capacity to make decisions about visits.

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: The supported living [guidance](#) sets out that if the service user has capacity and wants a visit, the provider should:

- advise them about the safest ways to have visitors
- risk assess individual settings and individual vulnerabilities consider risks to other people (if in shared settings)
- encourage, agree and support decision-making regarding visitors

The guidance also sets out some advice on infection prevention and control around visits, including that social distancing should be observed for as much of the visit as possible. The



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guidance does not address overnight visits specifically. If your relative has capacity and wants an overnight visit from you, the provider should follow the guidance and carry out a risk assessment. Any blanket ban on overnight visits could be unlawful, and if the provider is imposing a blanket ban, or if you consider that the provider has not taken your relative's individual circumstances into account, then you should contact the CBF who can refer you to specialist solicitors.

The guidance reflects that if the person is assessed as lacking capacity to make decisions around visits, then the provider should work within the framework of the Mental Capacity Act 2005 (MCA) to establish whether a visit is in the individual's best interests. That framework includes consulting those interested in the individual's welfare, where doing so is practicable and appropriate. Determining your relative's best interests would likely involve a risk assessment and consideration of how to minimise the risk infection were you to stay overnight.

If your relative lacks capacity and there is a dispute about whether an overnight visit from you would be in their best interests then you should contact the CBF who can refer you to solicitors to advise you on a potential application to the Court of Protection.



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SUPPORT AROUND BEHAVIOUR THAT CHALLENGES

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.



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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. The new [NHS visitor Guidance](#) states that the restrictions on visiting have now been lifted and is up to the discretion of local NHS trusts and bodies. It does stipulate that bedside visitors will be limited to one person. However, those who are there to support the needs of a patient, such as a familiar carer/supporter/personal assistant, should not be counted as an additional visitor. Patients may also be accompanied where appropriate and necessary to assist with the patient's communication and/or to meet the patient's health or social care needs. Where possible patients should contact the ward or department in advance to discuss local considerations and make appropriate arrangements.

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



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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.

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"*.



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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).



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, Acute Respiratory Distress Syndrome) (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 who are in addition "extremely clinically vulnerable people" should not leave their home for at least 12 weeks, beginning 23 March 2020 (see the government's "[Guidance on social distancing for everyone in the UK](#)"). As of 14th of July, the Government is advising that everyone who belongs to this 'extremely clinically vulnerable' group should continue to shield until 31st July 2020.

Not everyone with a learning disability or autism will be in this group. Those who are should have been contacted by their GP and/or have received a letter from The Department of Health and Social Care and the Ministry of Housing, Communities & Local Government.

If you think you or someone you support is in the "extremely clinically vulnerable group" but you have not received a letter then please check the [guidance](#) here. Having done this, if you think you are extremely clinically vulnerable you should contact your GP or hospital clinician to discuss.



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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.



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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](#).



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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.



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.

Q: DOES A RULE 1.2 REPRESENTATIVE STILL HAVE THE SAME LEGAL AUTHORITY TO OVERSEE THEIR RELATIVE'S CARE AND SUPPORT AND THE POINTS SET OUT IN THE DOLS AUTHORISATION AT THIS TIME?

A: We are not aware of any coronavirus-related legislation which affects the role of the Rule 1.2 Representative.

A Rule 1.2 Representative is appointed by the Court of Protection where a person who lacks capacity (known as “P”) is deprived of his/her liberty in the community. The Rule 1.2 Representative must be able to “fairly and competently discharge his or her functions on behalf of P” (Rule 17.9 of the Court of Protection Rules 2017). The Rule 1.2 Representative has three functions:

- (i) To elicit P's wishes and feelings and make them known to the Court;
- (ii) Critically examine, from the perspective of P's best interests, the pros and cons of a care package and whether it is the least restrictive option; and
- (iii) Keep the implementation of the care package under review and raise points relating to it and/or changes in P's behaviour or health.



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In summary, a Rule 1.2 Representative is someone who considers whether, from the perspective of the person's best interests, they agree or do not agree that the Court should authorise P's deprivation of liberty.

Being appointed as a Rule 1.2 Representative does not give that person legal "authority" per se, but the local authority should continue to recognise that the Rule 1.2 Representative has a duty to carry out the functions above.



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 or over ; (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.



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.

If a person does not want CPR, they can make an advance decision to this effect, but should be supported (but not coerced) to make one. On other occasions a DNR 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 recovering. 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.



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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.



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.



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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):



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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



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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



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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: I MANAGE A PHB FOR MY FAMILY MEMBER, CAN I ACCESS THE INFORMATION THAT LARGE PROVIDER ORGANISATIONS ARE BEING GIVEN TO SUPPORT THEM?

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](#)).



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.



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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”.



EDUCATION

On 2 July 2020, the Department of Education confirmed that unless the evidence changes, it will not be issuing any further notices to modify the legal duties under section 42 Children and Families Act 2014 beyond 31 July 2020 and therefore the existing legal rights of children and young people to receive the provision outlined in Section F of their EHC Plans has been fully restored as of 1 August 2020.

However, the changes to the legal duties of local authorities to comply with statutory timescales, for example to complete EHC needs assessments, remain in force until 25 September 2020. The Department of Education is currently consulting on what should happen after 25 September 2020 and a further announcement is expected soon.

In the meantime, on 31st July 2020 the Department of Education published updated guidance on temporary legislative changes to Education, Health and Care assessments and plans (EHCP). The updated guidance is [here](#).

For further information on schools re-opening relevant to children and young people with severe learning disabilities, see the CBF information sheet here:

<https://www.challengingbehaviour.org.uk/learning-disability-assets/schoolsreopening.pdf>

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 Guidance "Supporting children and young people with SEND as schools and colleges prepare for wider opening" (updated on 26 May 2020) states that:

Following the partial closure of education settings from 20 March 2020, we asked local authorities to consider the needs of all children and young people with an EHC plan and to carry out a risk assessment. Local authorities were asked to work with educational settings and parents or carers to determine whether children and young people would be able to have their needs met at home, and be safer there than attending an educational setting.

From 1 June, educational settings and local authorities should continue to offer places to all children and young people with EHC plans whose risk assessment determined that was the right course of action. Settings and local authorities should keep risk assessments up-to-date to reflect any changes in circumstances, including changes to coronavirus alert levels and the wider opening of education and care settings to more children and young people.

Risk assessments may prove useful when planning how best to support the return of individual children and young people with EHC plans. Local authorities and educational



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settings should make their own judgements as to whether risk assessments continue to be useful for each child or young person after they have returned.

In addition, the guidance states:

We recognise that some children and young people with special educational needs present behaviours that are challenging to manage in the current context, such as spitting uncontrollably. It will be impossible to provide the care that some children and young people need without close hands-on contact. In these circumstances, staff should minimise close contact wherever possible, increase hand-washing and other hygiene measures, and clean surfaces more regularly and maintain existing routine use of personal protective equipment. We recommend that educational settings follow the Public Health England guidance on [cleaning in non-healthcare settings](#) and the guidance on [safe working in education, childcare and children’s social care settings](#).

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.

Q: MY CHILD HAS AN EHCP, WHAT CAN I EXPECT FROM THE LA REVIEW PROCESS OF WHERE MY CHILD SHOULD BE EDUCATED AND HOW CAN I BEST MAKE SURE MY VIEWS ARE HEARD SO MY FAMILIES' NEEDS ARE MET?

A: The government has published detailed [guidance](#) setting out how a SEND risk assessment should be conducted for all children with an EHC Plan to determine where a child should be educated.

The guidance states that *"Ultimately, 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"*.

The risk assessment must be undertaken by local authorities in consultation with educational setting, the parents or carers and the child or young person. It should consider the following factors:



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- the potential health risks to the individual from coronavirus, bearing in mind any underlying health conditions
- the risk to the individual if some or all elements of their EHC plan cannot be delivered for the time being and the risk if they cannot be delivered in the normal manner or in the usual setting and the opportunities to meet needs in a different way temporarily, for example, in the home or online
- the ability of the individual's parents or carers or home to ensure their health and care needs can be met safely week-round or for multiple weeks, bearing in mind the family's access to respite
- the potential impact to the individual's wellbeing of changes to routine or the way in which provision is delivered
- any safeguarding risks for children with a social worker if not in school and the need to support care placements for looked-after children
- any other out-of-school/college risk or vulnerability, for example, a child or young person becoming involved in dangerous behaviour or situations (including the risk of exploitation)

The guidance also states that *“Where a risk assessment determines that a child or young person will be safer at home, local authorities and educational settings need to ensure the family understands the support plan that is in place for them, before a child or young person stops attending their educational setting.”*

Q: I AM CONCERNED THAT ANNUAL REVIEWS ARE NOT GOING TO BE TAKING PLACE AND MY LOVED ONE'S SUPPORT NEEDS WILL NOT BE MET, WHAT CAN I DO?

A: There is a power under the Coronavirus Act 2020 for the Secretary of State for Education by notice temporarily to disapply the duty to conduct annual reviews. However, he has not issued a notice under this power at this point in time, so the annual review requirements remain in place.

However, the government has legislated to provide extra flexibility for local authorities over the timing of these reviews. This means that where it is impractical for a local authority to complete an annual review of a plan within the prescribed timescales for a reason relating to the incidence or transmission of coronavirus (COVID-19), then the local authority must complete it as soon as reasonably practicable.

The government guidance states that:

“Annual reviews may, in the current circumstances, need to take a different form. However, it is important that they continue to ensure that the child or young person is at the centre of the process and can engage with the process in a meaningful way. A review meeting, even if by necessity briefer than usual, can be reassuring for parents, children and young people, through ensuring that their EHC plan is up-to-date so that they can receive appropriate provision.

Many local authorities have been working on improvements to the timeliness and quality of annual reviews and will want to continue to build on this work to manage reviews effectively during the outbreak. For example, it may be appropriate to use a simpler format to gather information electronically and to hold the meeting by phone or as a virtual meeting.



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Professionals contributing to the review may need to base that on the information already available and discussion with the family as they may not be able to meet the child or young person. While meetings might take a different format, they should still involve all the key professionals wherever possible.

Local authorities should identify priorities for review, which may include:

- *children and young people with significant changes of need or circumstances*
- *looked after children*
- *children and young people in residential provision*
- *children and young people in out of area provision, especially independent and non-maintained provision*

Local authorities must already have completed this year's required transfer reviews for a child or young person moving between key phases of education (transfers into or between schools, moves from secondary school to a post-16 institution or apprenticeship, or moving between post-16 institutions). There is no change to the statutory deadlines for these reviews. Where, exceptionally, completion has been delayed, these transfer reviews need to be finalised as a priority."

Q: SCHOOLS ARE ASKING FAMILIES TO SIGN WAIVERS WHEN THEY GO BACK TO REGARD TO THEIR SAFETY AND SUPPORT IN THE SCHOOL SETTING. THIS IS SAID BY THE DEPARTMENT FOR EDUCATION TO BE ILLEGAL, BUT WHAT IS THE BEST APPROACH FOR FAMILIES TO TAKE WHEN THIS HAPPENS TO THEM?

A: Schools should not be asking families to sign waivers and parents should decline to do so when asked. A decision that a child cannot attend School because their parents have not signed a waiver is likely to be considered an unlawful exclusion. Where Schools are insisting on waivers, we suggest that families report their concerns directly to the DFE and ask them to take steps directly. Where this is impacting on the child's education and cannot be resolved through discussion, legal advice should be sought.



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.



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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.



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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](#).

Unfortunately, in England both Local Government and Social Care Ombudsman and the Health Services Ombudsman have announced that they will not be considering complaints until further notice: for the LGO announcement – [click here](#) and for the Health Services Ombudsman [click here](#). This is troubling and it is difficult to understand why they have made this decision.

The Public Services Ombudsman for Wales (PSOW) has announced that he is taking an altogether more measured approach. His office will continue to consider complaints but 'will remain flexible and responsive to the needs of public service providers, who face unprecedented pressures at this time' – for the PSOW announcement [click here](#).