

## INFORMATION SHEET

### Making It Happen: Positively managing risk for children and adults with severe learning disabilities

#### Children and Families Act 2014

Thank you to Doughty Street Chambers for their help with this resource. The following individuals contributed to this resource:

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#### Introduction

Summary information about the Children and Families Act 2014 and how it is relevant to positively managing risk for children and adults with severe learning disabilities during Covid 19.

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#### Summary

Part 3 of the [Children and Families Act 2014](#) (“CFA”) governs local authority obligations to children and young people in England with special educational needs or disabilities (“SEND”). In particular, Part 3 contains the law governing Education, Health and Care Plans (“EHCPs”).

Part 3 CFA is supplemented by [The Special Educational Needs and Disability Regulations 2014](#) (“SEND Regs”), which provide further detail about the process local authorities must follow in relation to EHCPs.

During the first wave of the Covid-19 pandemic, some changes were made to the duties owed by local authorities to children and young people with EHCPs: see [The Special Educational Needs and Disability \(Coronavirus\) Regulations 2020](#) and section 38 and Schedule 17 para 5 of the [Coronavirus Act 2020](#). However, these changes are no longer in force. The Regulations have expired. The changes under the Coronavirus Act 2020 are only in force for the period of one month at a time when the Secretary of State for Education makes a Notice; no Notice has been in force since July 2020. Government [guidance](#) states that the government do not intend to issue further notices unless the evidence changes. Accordingly, at present, the full legal duties owed under the CFA and SEND Regs apply.

## Key Points

Section 19 CFA provides that in exercising any function under Part 3, a local authority in England must have regard to –

- (a) the views, wishes and feeling of the child and his or her parent, or the young person;
- (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
- (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
- (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best educational and other outcomes.

The obligations placed on local authorities by Part 3 CFA include:

- To exercise its functions with a view to identifying all the children and young people in its area who have or may have SEND (section 22);
- To exercise its functions with a view to ensuring the integration of educational provision with health care provision and social care provision (section 25);
- To co-operate with local partners in the exercise of its functions under Part 3, including with the governing bodies/proprietors of schools, nurseries, Academies and educational institutions (section 28, see also section 29 for the obligation on governing bodies etc to cooperate with local authorities);
- To publish information about the SEND local offer, that is, the provision available in that area for children and young people who have SEND (section 30);
- To provide advice and information to children and young people, and their parents, about matters relating to the special educational needs and/or disabilities of the children and young people (section 32);

Sections 33-35 provide for the general presumption that children and young people with SEND who do not have EHCPs will be educated in mainstream settings, subject to a few narrow exceptions. Section 39 provides that for children and young people with EHCPs, the starting point in terms of placement is the preference expressed by the parent of the child or young person. However, this preference may be displaced if the local authority considers the preferred placement to be inappropriate (either unsuitable or inefficient).

The EHCP regime provides:

- A child's parent or young person can make a request to a local authority for an EHC needs assessment. Where a request is made, the authority must decide whether it is necessary for special educational provision to be made for the child or young person in accordance with an EHCP (section 36). In effect, this means the local authority must decide whether the SEN of the child or young person

can be met within a mainstream school and within the notional SEN budget allocated to schools of £6,000 per child. If meeting need will cost more than this or if need can only be met in a specialist setting, a child should have an EHCP. The local authority must inform the child's parent or the young person of their decision whether to put in place and EHCP or not.

- Where a local authority decides to put in place an EHCP for a child or young person, they must consult the child's parents or young person about the content of the plan. Once a draft plan is prepared, the local authority must give the child's parents or young person an opportunity to make representations in response to the draft plan and to request a particular placement. The local authority will then finalise the EHCP. The local authority may or may not agree with the requests for change made by the parents at the draft stage. (See sections 37-40).
- Once an EHCP is finalised, the local authority has a duty to secure special educational provision stipulated in that plan for the child or young person. If the plan specifies health provision, the responsible commissioning body is under a duty to arrange that health provision for the child or young person (section 42).
- The school or other educational institution named in a child or young person's EHCP has a legal duty to admit that child or young person (section 43).
- A child or young person's EHCP must be reviewed at least annually. A review or full re-assessment may be requested at other times (section 44).
- A local authority responsible for a child or young person's EHCP must prepare a personal budget for him or her if asked to do so by the child's parent or young person. This involves identifying an amount as available to secure particular provision specified in the EHCP, with a view to the child's parent or the young person securing the provision (section 49).
- A child's parent or young person may appeal to the First-tier Tribunal against, amongst other things, a decision of a local authority not to secure an EHC needs assessment, a decision following an assessment not to put in place an

EHCP and the content of an EHCP (including specification of special educational needs, provision and placement) (section 51).

- Specific timescales apply to all of the steps in the EHCP process: for example, there are specific timescales within which local authorities must complete an EHC needs assessment and within which local authorities must finalise an EHCP (see the SEND Regs).

A fuller description of EHCPs and the EHCP process is set out in the [SEND Code of Practice](#), Chapter 9.

## Relevance

Where a child or young person has an EHCP, this will stipulate the special educational provision to which that child or young person is legally entitled. It will also name the placement (or type of placement) which that child or young person is legally entitled to attend. This is significant in the context of the pandemic because many children and young people have seen their provision reduced or removed entirely. While there were some legal changes that allowed for this earlier in the pandemic, this is no longer legally permissible. Where a child has an EHCP, they are now legally entitled to full provision under that EHCP, just as they would be during normal times.

It has been common for children with SEND to be prevented from attending school during the pandemic. The Government's current [Guidance on Restricting Attendance During the National Lockdown](#) provides that, during the period of national lockdown, schools, alternative provision (AP), special schools, colleges and wraparound childcare and other out-of-school activities for children should allow only vulnerable children and young people and the children of critical workers to attend. The definition of vulnerable children and young people includes those who have a social worker or an EHCP. Schools are expected to allow and strongly encourage vulnerable children and young people to attend. Parents/carers of vulnerable children and young people are strongly encouraged to take up the place. See also the

## Government's Guidance for Full Opening: Special Schools and Specialist Settings.

The Guidance recognises that the characteristics of the cohorts in special schools and alternative provision will mean these settings will need to continue to offer face to face provision to their pupils. Schools should ensure that appropriate support is made available for pupils with SEND, for example by deploying teaching assistants and enabling specialist staff from both within and outside the school to work with pupils in different classes or year groups.

Specialists, therapists and other support staff should provide support and interventions for pupils with SEND as usual. Children with disabilities and their parents or carers can continue to make use of respite care, and the government [guidance](#) says that it is encouraging local authorities to prioritise this support.

Where pupils need to self-isolate, schools should work with families, putting in place reasonable adjustments as necessary so that pupils with SEND can successfully access remote education. Decisions on how provision specified within a pupil's EHC plan can be delivered remotely should be made on a case-by-case basis.

Where a setting has to temporarily stop on-site provision on public health advice, they should inform the local authority and discuss alternative arrangements for vulnerable children and young people, and work towards reopening as soon as possible. The Guidance encourages schools to work collaboratively with other schools and education providers and other local partners (including the local authority, social workers, police and youth services) to best facilitate opportunities for face-to-face provision for vulnerable children.

If vulnerable children and young people do not attend, schools should work together with the local authority and social worker (where applicable) to follow up with the parent or carer to explore the reason for absence and discuss their concerns, considering the child's circumstances and their best interests. If a vulnerable child's parent or carer wishes their child to be absent, they should let the school know. The Department for Education expects schools to grant applications for leave of absence given the exceptional circumstances.

The Guidance recognises that AP and special schools may encounter circumstances where they cannot provide their usual interventions and provision at adequate staffing ratios, or with staff with vital specialist training. In these circumstances, they should seek to resume as close as possible to full time provision, as soon as possible, for all vulnerable children and children of critical workers.

Importantly, the Guidance explicitly states that individual risk assessments should not be used to filter children and young people in or out of attendance, but could be helpful to prioritise the provision a child or young person can get if full time provision for all is not possible.

**Guidance** on transport to schools emphasises that local authorities need to take account of the particular needs of the children using the transport, and the views of the parents and school. The guidance recognises that some children and young people with SEND will not be able to use a face covering properly, or may be distressed by wearing them, and should not be expected to do so as this may increase the risk of transmission.

Government guidance specific to Further Education (FE) can be found [here](#). During the national lockdown, FE providers are to remain open for vulnerable students and the children of critical workers. All other students will learn remotely until February half term. Vulnerable students are strongly encouraged to attend on-site provision. Clinically extremely vulnerable students are advised to not attend: FE providers should



make arrangements for students to be able to continue their education at home. FE providers should work with schools and local authorities to support transitions. The Guidance recognises that many students will have found restrictions exceptionally difficult socially and emotionally, and some young people might need additional mental health and wellbeing support. FE providers should speak to the student or their parents, to find out if any challenging behaviours or social or emotional challenges are a response to restrictions. If they are, they should offer additional support, as a reasonable adjustment to support a disabled young person to access education successfully. FE providers should also assess where students are in their learning and agree on a plan to support catch up.

## Remedies if things go wrong

Common difficulties and possible remedies include:

- Failure by a local authority to secure provision set out in an EHCP. The legal remedy for this is to pursue a judicial review. However, often a local authority will respond to a legal letter without the need to go to court.
- Delay by a local authority in deciding whether to provide an EHCP, reviewing an EHCP or taking some other step related to the EHCP process. Again, the remedy here is a judicial review. However, often a legal letter will be sufficient to get a local authority to comply with its legal duties.
- Dissatisfaction with a local authority decision in relation to an EHCP. This might include a decision not to put in place an EHCP plan or it might be a dispute over the content of the EHCP plan. The remedy here is an appeal to the First-tier Tribunal.
- Refusal of a school to allow a child with SEND to attend. You should draw the school's attention to the guidance, set out above, which makes clear that children with SEND should be supported to attend. If the school still refuses, you could contact the local authority and seek their support. If matters cannot be resolved informally, seek legal assistance.



- Insistence of a school that a child with SEND attend, when their parents do not want this. You should first try to agree a way forward with the school. If it is possible to obtain a letter of support from a specialist or GP for the child staying at home, then you can provide this to the school and state that your child falls within the guidance as a child remaining at home on “clinical advice”. If the school will not agree to this, then they will record your child as absent if they do not attend and this could result in enforcement action being taken against you. You should seek legal advice if the school will not agree a plan with you in terms of attendance.

If you face any of the above difficulties, consider contacting [IPSEA](#), [SOS!SEN](#) or [Coram Children’s Legal Centre](#) for further advice. Also see [here](#) for a guide to legal aid solicitors with expertise in SEND cases.

## Further resources

Useful resources in relation to EHCPs and SEND are:

- SEND Code of Practice, Chapter 9 and Chapter 11: click [here](#).
- IPSEA website: click [here](#). For IPSEA’s update on Covid-19 and SEND provision click [here](#).
- Contact website: click [here](#).
- SOS!SEN information sheets: click [here](#).
- Council for Disabled Children information and resources: click [here](#).
- Special Needs Jungle website: click [here](#).

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### **The Challenging Behaviour Foundation**

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- Championing their rights
- Ensuring timely information and support
- Raising awareness and understanding
- Promoting and sharing best practice

To access our information and support, call 01634 838739, email [info@thecbf.org.uk](mailto:info@thecbf.org.uk) or visit our website: <https://www.challengingbehaviour.org.uk>