

Education-related provision of the Coronavirus Bill and recent guidance

By [Charlotte Hadfield](#)

Education Barrister, 3PB

Charlotte Hadfield's brief(ish) introduction to temporary closure directions and temporary continuity directions, with a review of how special educational provision may operate if the Coronavirus Bill is enacted in its current form.

A few caveats. Firstly, I haven't attempted to deal with every single provision; there may be other provisions that didn't make the cut but that may be highly relevant to an individual's situation. Secondly, this legislation is obviously in draft at the moment, and things are obviously changing quite rapidly as legislation and guidance are refined and as the wider picture in terms of public health becomes better understood. This makes firm predictions very difficult. All things considered, readers are strongly advised to take legal advice tailored to their situation rather than relying on any predictions or interpretations that they read about in the media (whether they're mine, or anyone else's).

In summary (with particular reference to children and young persons with special educational needs and disabilities)

- The Bill introduces two different types of direction: Temporary Closure Directions, which direct educational institutions and registered childcare providers to wholly or partially close, and Temporary Continuity Directions, which require relevant institutions (educational institutions and local authorities) and registered childcare providers to open some or all of their premises to attendees or particular classes of attendees for a specified period. Further information in relation to these directions appears below.
- The Government has also published guidance for schools and local authorities on maintaining education, and information for parents and carers. These provide more information about what "critical workers" means and who "vulnerable children" are (so far we know that the latter includes children with EHC plans and children with social workers, so will include children in need, children with a child protection plan and looked-after children, but the list is not exhaustive).

- The Government has also stated in its guidance that residential and special schools should stay open wherever possible.
- Children with EHC Plans will be classed as vulnerable children and will be able to continue to attend school, presumably under a temporary continuity order if the government intends to close all schools from Monday (it is not yet clear exactly how this will be effected).
- EHC Plans will remain in force, although section 43 may be disapplied, and the absolute duty upon the Local Authority to secure provision under an EHC Plan may be modified to a reasonable endeavours duty, and annual reviews and reassessments of need may be put on hold.
- Parents and institutions will still be able to request EHC Needs Assessments, which can still be carried out; new Plans can still be issued, and appeals in respect of refusals to assess, refusals to issue and content of issued Plans can still be lodged.
- The First Tier Tribunal has already put measures in place to attempt business as usual by holding case management hearings and appeal by telephone and videolink. Early indications are that this is a viable way of conducting at least some final hearings.

Temporary closure directions (section 36 and schedule 15 of the Bill)

Directions to educational institutions and registered childcare providers to close completely; to close some of or part of their premises; to close to some categories of attendees; or to close to a section of attendees attending for a particular purpose. The direction may apply to all educational institutions, to some educational institutions, or to particular types of educational institution, and may apply across England, Wales, Scotland or Northern Ireland or within a part of those territories.

"Educational institutions" include schools, academies, 16-19 academies, FE providers and higher education providers.

Directions may be made by the Secretary of State or by "appropriate authorities" (local authorities or the Office for Student in relation to higher education providers) authorised to carry out his functions; similar provisions for Wales, Scotland and Northern Ireland. A notice of authorisation may include conditions to which the authorisation is subject. The direction will specify the period during which it will be in force.

The Secretary of State or appropriate authority must have regard to advice from the Chief Medical Officer or his deputies in relation to the incidence or transmission of coronavirus and must be satisfied that giving the direction is a necessary and proportionate response.

Appropriate authorities may enforce directions by seeking an injunction.

During closure the following statutory duties will be disappplied or modified:

- Section 19(1) Education Act 1996 (duty of LAs to arrange suitable educational provision at school or otherwise) will not apply where the reason for the non-provision is a temporary closure direction;
- Sections 432-443 Education Act 1996 (enforcement of school attendance) will not apply where the reason for non-attendance is a temporary closure direction; failure to attend where the reason is a temporary closure direction will be disregarded for the purposes of s444.
- Section 7 Childcare Act 2006 and section 1 of the Childcare Act 2006 (free nursery and preschool hours) will not be breached where the childcare provider is under a temporary closure direction.
- Ofsted must take account of a temporary closure direction in considering any allegation that a registered childcare provider has failed to meet the requirements of section 39(1) Childcare Act.

Temporary continuity directions (section 37 and Schedule 16 of the Bill)

Directions to "relevant institutions" to stay open, re-open, or open when they otherwise would be closed; to provide education, training or childcare, or related or ancillary services and facilities; to allow specified persons to attend the institution to receive that provision; to alter term dates; to provide or arrange provision for transport or other services related to that provision; and to comply with such other provision as may be specified in the Notice.

"Relevant institutions" are educational institutions as defined in Schedule 15, with the addition of local authorities. The direction may apply to all relevant institutions, to some relevant institutions, or to particular types of relevant institution, and may apply across England, Wales, Scotland or Northern Ireland or within a part of those territories.

Directions may be made by the Secretary of State or by "appropriate authorities" (local authorities or the Office for Student in relation to higher education providers) authorised to carry out his functions; similar provisions for Wales, Scotland and Northern Ireland. A notice of authorisation may include conditions to which the authorisation is subject.

The Secretary of State or appropriate authority must have regard to advice from the Chief Medical Officer or his deputies in relation to the incidence or transmission of coronavirus and must be satisfied that giving the direction is a necessary and proportionate response.

The direction will specify the period during which it is in force, and will end when that period expires or when the DfE revokes the direction if earlier. (Note that a different deadline applies to notices to disapply or modify legislation.)

Appropriate authorities may enforce directions by seeking an injunction.

Unlike a temporary closure order, a temporary continuity order does not of itself modify or disapply statutory provisions currently in force. However, during a temporary continuity direction, the Secretary of State has the power to issue a notice disapplying the following statutory provisions:

- Section 512(3)(b) and (c)(ii) EA 1996 (provision of school meals).
- Sections 437, 443, 444(1) and 1(A) of the Act (attendance at school).
- Section 87 School Standards and Framework Act 1998 (no requirement to admit children permanently excluded from 2 or more schools).
- Section 1(6) Care Standards Act 2000 (school is a children's home in specified circumstances).
- Section 5(1), 13(2)(b), 15(3), 17(2), 48(3), 49(1) and (2) of the EA 2005 (provisions relating to inspections).
- Section 1A(1)(b) Academies Act 2010 (requirement for academy to have broad and balanced curriculum).
- Section 43 CFA 2014 (duty to admit child or young person to school or institution named in EHC Plan).
- Section 44(1) of that Act (duty of local authority to carry out annual reviews or to secure re-assessments).

The Secretary of State may also issue a notice modifying the following statutory provisions (or any similar Academy arrangements of provision in the corresponding manner):

- Further and Higher Education Act 1996 section 44 (collective worship) – any duty imposed on a person by this section is to be treated as discharged if the person has used reasonable endeavours to discharge the duty.
- Education Act section 3 (definition of “pupil”) – a person is not to be treated as a pupil at a school merely because any education is provided for that person at the school on a temporary basis for reasons relating to the incidence or transmission of coronavirus.
- EA 1996 sections 14, 15ZA-ZC, 19, 508A-F and Schedule 35C, 412-512ZB (any duty imposed on a person by this section to be treated as discharged if the person has used reasonable endeavours to discharge the duty).

- School Standards and Framework Act 1998 – Sections 70 (any duty imposed treated as discharged if reasonable endeavours used to discharge duty), 88D (as if ss (1) and (3) were omitted and (2) amended), 99 (as if ss (2) and (4) and the words from “unless” to the end of ss(3) omitted).
- Education Act 2005: s5, 13, 15, 17, 48, 49 (any duty imposed treated as discharged if reasonable endeavours used to discharge duty).
- Childcare Act 2006 – sections 7 and 7A, 12 - any duty imposed treated as discharged if reasonable endeavours used to discharge duty.
- Education and Skills Act 2008 – section 124(2) and section 125(2) time limit increased from 28 days to 3 months (time limit for appeal by proprietor against decision to deregister independent educational institution and for appeals against other decisions relating to independent educational institution).
- CFA 2014 – section 42 - any duty imposed treated as discharged if reasonable endeavours used to discharge duty.
- This list may be varied, added to or reduced by regulations.

A notice disapplying or modifying existing statutory provisions must be published, and must specify how long it will be in force. The longest a notice can be in force is 1 month, but further notices may be issued. The notice may limit the disapplication or modification to a specified person or description of persons, or a specified area, or to "any other matter", and may consequential amendments to any other enactment for the specified period as considered appropriate. The notice must give the reasons why the issuing of the notice is considered appropriate and proportionate, and the reasons must relate to the incidence or transmission of coronavirus.

[3PB's Education Team](#) will try to keep on top of any changes as they occur...

20 March 2020



Charlotte Hadfield

3PB Barrister

020 7583 8055

charlotte.hadfield@3pb.co.uk

3pb.co.uk