

SEND provision beyond 24 September 2020 - a brewing storm?

By [Caroline Stone](#)

The amended SEND Regulations

1. On 1 May 2020, the [Special Educational Needs and Disability \(Coronavirus\) \(Amendment\) Regulations 2020](#) ('the Amendment Regulations') came into force, temporarily amending the Special Educational Needs and Disability Regulations 2014 ('the SEND Regulations') by relaxing various time limits for the completion of steps to be taken in the preparation of education, health and care ('EHC') assessments and plans. The legality of these measures – introduced as part of the Government's response to the coronavirus pandemic in an attempt to ease the pressures on local authorities and healthcare providers – was recently upheld in the case of *R (Amber Shaw (a child, by her mother and litigation friend Deanne Shaw) and ABC (a child, by his mother and litigation friend XYZ))*.¹
2. The effect of the Amendment Regulations is that if it is either not reasonably practicable² or it is impractical³ for a local authority, health commissioning body or others to conclude a process within the usual timescale *for a reason relating to* the transmission or incidence of coronavirus, the relevant timescales can be modified. Depending on the regulation in question, the modified duty will become:
 - for the body to discharge the relevant duty "as soon as reasonably practicable". See, for example, rr.21(7), (8) and (9) of the SEND Regulations (review of an EHC plan where the child or young person does not attend a school or other institution);
 - to discharge the relevant duty "as soon as practicable". See, for example, r.5 of the SEND Regulations (decision whether or not to conduct an EHC needs assessment). By virtue of the new provision in r.5(4)(e), the 6-week

¹ [\[2020\] EWHC 2216 \(Admin\)](#), hereinafter '*R(Shaw and ABC)*'. See my article "Legislating in the Time of Corona" for further details.

² See, for example, r.2A(3)(c) of the SEND Regulations, modifying r.20(9) (provision of a written report following a review of an EHC plan) and r.20(10) (determining the outcome of the review).

³ See, for example, r.5(4) of the SEND Regulations (decision whether or not to conduct an EHC needs assessment).

backstop for completion of this process is disapplied where it is impractical to comply with it due to coronavirus; or

- in other instances, where the governing provision only calculates the timescale for completion of a step by reference to a certain number of weeks (i.e. there is no reference in the alternative to a “practicable” period), the Department for Education’s (‘DfE’) non-statutory guidance (‘the Guidance’) suggests that the requirement “is to respond in a timely manner”.⁴

See, for example, r.8(1) of the SEND Regulations, regarding the duty to co-operate in EHC needs assessments.

Looking to the future: SEN provision post-24 September 2020

3. The Amendment Regulations “cease to have effect on 25 September 2020”⁵, meaning that any new requests for an EHC needs assessment arising from 25 September onwards must be dealt with in accordance with the standard timescales set out in the SEND Regulations (which will, by then, be restored to their original pre-Covid terms).
4. The approach to be adopted to EHC needs assessments and plans which are not yet finalised as of 25 September and which have been progressing in accordance with the more flexible timetable set out in the Amendment Regulations is less straightforward.
5. In relation to managing the transition back to the usual statutory timescales, the Guidance states:⁶

“The temporary changes to the statutory timescales made by the Amendment Regulations will expire on 25 September, so any case that is in progress after that date to which the coronavirus exception has previously been applied will become subject to the usual statutory timescales (such as 6 weeks for needs assessments, 6 weeks for the provision of advice or information and 20 weeks for issue of a final plan).

⁴ See [Annex A](#) of “Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus (COVID-19)” (version in force as at 9 September 2020). The other such regulations are r.44(2)(b) (in relation to the 2-week requirement in the header to 44(2)(b) - the time limit for notifying a child’s parent or young person about the making of an assessment or reassessment); r.44(2)(c); r.45(3) and r.45(6).

⁵ Amendment Regulations, r.2(2) – the ‘sunset clause’.

⁶ [‘Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus \(COVID-19\)’](#) (version in force as at 9 September 2020).

Local authorities, health commissioning bodies and others who play a part in these processes will need to consider how best to ensure that these cases are progressed in a timely way, given that the law will have changed. It will be crucial to discuss with families where the progress of their assessments or plans will be affected by the change in the law (because for example the estimated date for a plan being issued has changed)...

Local authorities and their partners should identify the risks of any cases becoming overdue and do their best to prevent this. If it looks as if a number of cases will become overdue, local authorities should discuss their plan for managing this with their Department for Education SEND Adviser.”

6. The deceptively simple terms of this Guidance paper over what is, in reality, a complex situation.
7. The Amendment Regulations contain no saving provisions which would enable any cases in progress between 1 May 2020 and 24 September 2020 to be dealt with after 24 September 2020 as if the coronavirus provisions still applied. See, by comparison, Part 13 of the [Adoption and Children \(Coronavirus\) \(Amendment\) Regulations 2020](#). Nor, as one might have expected, are there any transitional provisions which provide for such cases to be dealt with according to a different timetable – i.e. something stricter than “as soon as reasonably practicable”, but less exacting/more realistic than the usual statutory timescales.
8. In the absence of saving or transitional provisions it is eminently possible that many local authorities will be automatically in breach of the SEND Regulations on 25 September. If, for example, a request for an EHC needs assessment was made on 1 May (the date the changes came into force), a finalised EHC plan would usually - but for the pandemic - have to be in place by 18 September. Where this process has been delayed due to coronavirus, up until 24 September the local authority will be acting lawfully as long as they are working to finalise the EHC plan “as soon as practicable”⁷. On 25 September, however, the local authority will instantly be in default of the SEND Regulations as they will have not provided an EHC plan “within 20 weeks of the local authority receiving a request for an EHC needs assessment”.

⁷ SEND Regulations, r.13(2)

9. This apparent lacuna in the law is all the more surprising given that the Guidance expressly states that the amended timescales apart, all of the other requirements of the EHC needs assessment and planning process remain unchanged by the Amendment Regulations, including the following:
- A local authority must still consider requests for a new EHC needs assessment or a re-assessment.
 - Where the local authority decides to carry out an EHC needs assessment, it must still secure all of the required advice and information in order to be able to issue a plan.
 - Reviews and re-assessments of EHC plans must still take place.

In other words, local authorities were being actively encouraged, quite rightly, to ensure that EHC processes, where possible, continued throughout the height of the pandemic.

10. How then to resolve this dilemma? Subject of course to the particular facts of a given case, it seems likely that the Administrative Court would withhold a remedy if presented with a judicial review premised merely on a 'technical' breach of the SEND Regulations. In other words, the litigation risk for local authorities may be more apparent, than real. However, the absence of any saving or transitional provisions makes for an unwelcome lack of clarity regarding SEND provision - for all concerned - in relation to the cohort of cases which have been affected by the pandemic.
11. Whilst it would be unworkable to now expect local authorities and others involved in SEND provision to meet deadlines which in no way take into account the changes enacted by the Amendment Regulations (and the slower progress of certain cases in consequence), it also cannot be the case that time limits can be recalculated afresh from 25 September, particularly given the especial difficulties that lockdown has posed for many children and young people with SEND and the potential need for additional support in this regard.
12. Rather, the correct position must be that local authorities are required to behave in a rational manner in their approach to completing any outstanding EHC assessments and plans. What is reasonable in this regard will depend on the specific local context, the specific steps remaining outstanding as of 25 September (and whether compliance with at least some of the usual timescales remains possible) and the circumstances of the child or young person involved.

When do the Amendment Regulations expire?

13. Another grey area surrounding SEND provision appears to be a degree of confusion about precisely when the Amendment Regulations lapse and the ordinary timescales kick back in.
14. Paragraphs 12.3 and 14.3 of the [Explanatory Memorandum](#) accompanying the Amendment Regulations note that they have effect “up to and including 25th September 2020” (to align with the date for Parliamentary renewal of the Coronavirus Act 2020⁸). The Guidance, no doubt reflecting this intention, refers to transitioning back to the usual statutory timescales “after 25 September 2020” and refer to “any case that is in progress after that date”.
15. Whatever the intention underlying the statutory instrument, the ordinary and natural meaning of the phrase “ceases to have effect on 25 September” is that the Amendment Regulations expire at the end of 24 September 2020.
16. A review of other temporary Covid-related regulations bears out that this is the correct interpretation. [The Adoption and Children \(Coronavirus\) \(Amendment\) \(No.2\) Regulations 2020](#) replace the aforementioned statutory instrument of the same name which also “ceases to have effect on 25 September 2020”.⁹ All bar one of the provisions in The Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020 come into force on 25 September.¹⁰ This commencement date only makes sense if the former amendments - some of which are identical or very similar to the replacement regulations - cease to have effect on 24 September. Further, it is also clear from the terms of some of the saving provisions in the original regulations that they expire on 24 September. Thus, r.22 of the Adoption and Children (Coronavirus) (Amendment) Regulations 2020, for example, provides:

“Where, *on the 25th September 2020*, a child is being deprived of their liberty in a children’s home in accordance with regulation 20(3) of the Children’s Homes

⁸ See section 98 of the Coronavirus Act 2020. The 6-month review period ends on 24 September, at which point the House of Commons must debate and vote on whether the temporary provisions of the Act should not yet expire.

⁹ The Adoption and Children (Coronavirus) (Amendment) Regulations 2020, r.14(1)

¹⁰ The Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020, r.1(3)

(England) Regulations 2015, that regulation continues to have effect *as if* the amendment made by these Regulations *remains in force*.” (emphasis added)¹¹

Conclusion

17. Arguably the omission of any saving or transitional provisions in relation to statutory obligations which were merely being amended, not suspended, renders the ‘sunset clause’ in the Amendment Regulations susceptible to judicial review as unlawful on the grounds of irrationality.¹²

18. Further, notwithstanding the terms of the Guidance, those involved in SEND provision would be well advised to consider 24 September 2020 as the final date on which the coronavirus exceptions can be lawfully applied.

19. Clarification of the position by the Department for Education would no doubt be welcomed by both local authorities and the families of those with SEND.

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¹¹ See also r.15(a) in similar terms.

¹² Note, this issue was not raised in *R (Shaw and ABC)*. There may be limitation issues regarding any such further challenge.