

# How the New National Restrictions to control the spread of Coronavirus (COVID-19) impact education and school attendance

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The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 came into force from 5 November 2020 and expire at the end of the period of 28 days beginning with the day on which they come into force i.e. 2 December. Schools continue to remain open for all children and young people for the duration of the national restrictions, as they have since the start of the autumn term. The Department for Education (DfE) has updated its *Guidance for full opening: schools* (5 November). Separate guidance is available for early years, further education colleges and for special schools.

The *Guidance for full opening: schools*, developed with advice from PHE, sets out the public health advice schools must follow to minimise the risks of COVID-19 transmission and the process that should be followed if anyone develops COVID-19 symptoms while at school. The rest of the guidance sets out how DfE expects schools to operate in the autumn term, covering school operations including attendance, workforce, estates, catering, curriculum, behaviour and pastoral support, and assessment and accountability including plans for inspection, and contingency planning in case of self-isolation of multiple pupils or staff or local outbreaks.

The 3PB Barristers Education Law team have received a number of queries about school attendance in times of Covid-19, particularly in relation to pupils and families who are anxious about attending school.

Like all legal areas in these 'interesting times', this is an area potentially subject to sudden and/or frequent change.

From the start of the autumn term the 'usual' law on school attendance has applied. Section 7 of the Education Act 1996 places a duty on parents to ensure that their child of compulsory school age receives a suitable education, either by regular attendance at school or otherwise. Parents can fulfil this duty by home educating their child, but where their child is a registered

pupil at a school, parents must ensure that the child attends at the school regularly. However, the DfE has made changes to the regulations governing school attendance registers to add a new category of non-attendance: *'not attending in circumstances related to coronavirus (COVID-19)'*. This category must only be used to record sessions that take place in the 2020 to 2021 academic year where a pupil does not attend because their travel to or attendance at school would be contrary to guidance relating to the incidence or transmission of COVID-19 from Public Health England (PHE) and/or the Department of Health and Social Care (DHSC), or prohibited by any legislation (or instruments such as statutory directions) relating to the incidence or transmission of COVID-19.

In advance of schools fully reopening in September, the DfE produced non-statutory guidance on school attendance, dated August 2020, for maintained schools, academies, independent schools and local authorities, with an addendum (updated 1 September), which provides examples in which *'not attending in circumstances related to coronavirus (COVID-19)'* could apply. These include pupils who are required to self-isolate as they, or a member of their household, has symptoms or confirmed coronavirus COVID-19, or because they are a close contact of someone who has symptoms or confirmed COVID-19, or as part of a period of quarantine, and "pupils who are clinically extremely vulnerable in a future local lockdown scenario only." The addendum advises that shielding advice for all adults and children paused on 1 August 2020, meaning that even the small number of pupils who remain on the shielded patient list can return to school, as can those who have family members who are shielding. The DfE *Guidance for full opening: schools*, updated 5 November, also advises that all pupils, including those who are clinically extremely vulnerable, can continue to attend school. However, both the addendum and the *Guidance for full opening: schools* appear out of date in this regard in light of the updated Department of Health and Social Care and PHE Guidance on shielding and protecting people who are clinically extremely vulnerable from COVID-19 which states, as at 11 November, that those children whose doctors have confirmed they are still clinically extremely vulnerable are advised not to attend school while this advice is in place, and that their school will make appropriate arrangements for them to be able to continue their education at home.

The DfE *Guidance for full opening: schools* (updated 5 November) states that where a pupil is unable to attend school because they are complying with clinical or public health advice, schools are expected to be able to immediately offer them access to remote education. Where children are not able to attend school as they are following clinical or public health advice related to COVID-19, the absence will not be penalised. It states that schools should bear in mind the potential concerns of pupils, parents and households who may be reluctant or

anxious about attending school and put the right support in place to address this. It recommends that schools discuss the concerns of parents of pupils with possible risk factors and provide reassurance of the measures they are putting in place to reduce the risk in school. However, it states that schools should be clear with parents that pupils of compulsory school age must be in school unless a statutory reason applies, for example, the pupil has been granted a leave of absence, is unable to attend because of sickness, is absent for a necessary religious observance.

Local authorities and schools have legal powers to use parenting contracts, parenting orders and penalty notices to address poor attendance in school. Local authorities also have powers to prosecute parents for offences under sections 444(1) and 444(1) of the Education Act 1996. Although the DfE *Guidance for full opening: schools* (updated 5 November) states that schools should be clear with parents that pupils of compulsory school age must be in school unless a statutory reason applies, it does not offer guidance on the thorny question, namely the circumstances in which these coercive measures should be used in relation to genuinely anxious parents who are not reassured by clinical or public health advice that it is safe for their child to be in school.

According to a briefing from the Children's Commissioner in October 2020 (updated 2 November 2020)<sup>1</sup>, the full re-opening of schools in September has been largely successful: on 15th October 89.2% of pupils on roll in state-funded schools were in attendance (statistics are CCO calculations of DfE attendance data). However, attendance is lower than at the equivalent point last year and the figures suggest that between 1% and 2% pupils (120,000-200,000 children) are absent over and above the expected rate. The Children's Commissioner's Office are concerned about this rise in absence but from the available data cannot identify from within these numbers persistent-absence and school refusal or the number of pupils who have been removed from the school roll, indicating they may have been withdrawn for home education. Anecdotally, local authorities and some schools have reported to the Children's Commissioner's Office concerns about rises in home education, but they do not have the data to substantiate these accounts at present.

Local authorities have a duty under section 436A of the Education Act 1996 to put in place arrangements for identifying (as far as it is possible) those children of compulsory school age in their area who are not school registered or receiving suitable education otherwise than at a school, and there is statutory guidance for local authorities on how to carry out this duty.

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<sup>1</sup> <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/10/cco-school-return-covid-19-and-school-attendance.pdf>

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