EXPLANATORY MEMORANDUM TO

THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY (CORONAVIRUS) (AMENDMENT) REGULATIONS 2020

2020 No. 471

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument temporarily relaxes the timescales contained in four sets of Regulations dealing with special educational needs and disability (SEND) where those timescales cannot be met because of coronavirus (COVID-19). The Regulations being amended are listed in paragraph 6.1 below.

2.2 Where the outbreak of coronavirus (COVID-19) has reduced the ability of local authorities, health commissioning bodies and others involved in Education, Health and Care (EHC) needs assessment and plan processes to meet the statutory timescales for particular actions, those bodies will instead be required to complete these actions as soon as is reasonably practicable (or in line with any other timing requirement in the regulations being amended). The aim of these changes is that those bodies involved in EHC needs assessment and plan processes can deploy their resources more flexibly to respond to the coronavirus (COVID-19) outbreak and focus their remaining resources on those whose need is greatest. In doing so, such bodies must still ensure that they provide an appropriate level of service to children and young people with SEND and their families.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 It is not possible in the case of this instrument to comply with the 21-day rule which requires relevant instruments to be laid before Parliament for at least 21 days prior to coming into force. The instrument forms part of the Government's response to the outbreak of coronavirus (COVID-19), a national public health emergency. This instrument will come into force on 1st May 2020, in order urgently to reduce pressures on local authorities, health commissioning bodies and others involved in EHC needs assessment and plan processes; thereby allowing them to focus on the response to coronavirus (COVID-19) and direct their resources where most needed. Local authorities in particular have asked for these changes to take effect as a matter of urgency.

3.2 If we complied with the 21-day rule, it would delay these bodies having the flexibility they need urgently to adapt their priorities during the coronavirus (COVID-19) outbreak. It was not possible to make this instrument sooner. The Government announced social distancing guidance on 16th March 2020, then introduced 'stay at

home' rules on 23rd March. The Department was not in a position to assess the full extent and impact of these measures on the EHC needs assessment and plan processes immediately and needed to engage with the sector to understand the impact.

3.3 By taking effect on 1st May, we are also responding to calls from the families of those with SEND for greater certainty as to what they can reasonably expect over the EHC needs assessment and plan processes during the outbreak. It should also be noted that this instrument is relaxing the timescales for EHC need assessments and plan processes, rather than changing the substance of those processes.

3.4 To help ensure that all those involved in EHC needs assessment and plan processes, including families, have a full understanding of the changes, the Government has published guidance available at gov.uk[1]. This instrument places an obligation on the Secretary of State to keep these changes under review, and it will remain in force until 25th September 2020. Should the Government lift its social distancing guidance or stay at home rules then the Government may need to lay an instrument to revoke this instrument early. Equally, if there is evidence that the effects of coronavirus (COVID-19) will last for longer then it may be necessary to extend the period for which the instrument is in force.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.5 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The instrument is made under existing statutory powers contained in the Children and Families Act 2014 and the Education Act 1996. The Regulations being amended are as follows:

- The Special Educational Needs and Disability Regulations 2014 (S.I. 2014/1530)
- The Special Educational Needs (Personal Budgets) Regulations 2014 (S.I. 2014/ 1652)
- The Special Educational Needs and Disability (Detained Persons) Regulations 2015 (S.I. 2015/62)
- The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 (S.I. 2017/1306)

[1] https://www.gov.uk/government/publications/send-code-of-practice-0-to-25

6.2 The amendments to these four sets of Regulations are time-limited and are due to expire on 25th September 2020. The Secretary of State has a duty to review the effectiveness of the changes to the Regulations.

6.3 In addition to the amendments being made by this instrument, the Secretary of State has taken emergency powers in the Coronavirus Act 2020 which allow him, by notice, temporarily to disapply or modify aspects of the law on EHC plans. This instrument is not, however, made under the powers contained in the Coronavirus Act 2020.

7. Policy background

What is being done and why?

7.1 EHC plans are for children and young people (up to the age of 25) with complex special educational needs (SEN). These plans set out the provision that a local authority (in relation both to education and social care needs) and health commissioning bodies (in relation to health needs) must secure or arrange for the individual to meet their SEN. The processes for applying for EHC needs assessments, preparing and issuing EHC plans for those who are eligible and then keeping those plans up to date are set out in detail in legislation. In those processes local authorities, health bodies, education settings, educational psychologists and a range of other public sector bodies are required to take various actions within a prescribed timescale. For example, a local authority must decide whether to issue an EHC plan within six weeks of a request for an assessment; and must issue a plan to a child or young person who is eligible for one within twenty weeks from that initial request.

7.2 To give an indication of the scale of EHC needs assessment and plan processes, in 2018 local authorities made 17,890 decisions not to conduct an EHC needs assessment and conducted 51,594 EHC needs assessments. These processes require formal input from health professionals, social workers, education settings, educational psychologists and others. We estimate that local authorities, working with education settings, would also have conducted around 300,000 annual reviews of EHC plans in 2018. There is also a range of other EHC processes, such as those relating to mediation and appeals.

7.3 Local authorities are also required to publish a Local Offer, setting out in one place information about provision they expect to be available across education, health and social care for children and young people in their area who have SEND, including those who do not have EHC plans. One of the specific duties on local authorities is annually to publish their response to comments on their Local Offer received from those with SEND and their parents.

7.4 The outbreak of coronavirus (COVID-19) has put significant extra pressure on local authorities, health bodies, education settings and other bodies involved in the EHC needs assessment and plan processes. Some of the resource usually dedicated to these processes and maintaining the Local Offer has been redeployed to work relating to the outbreak. Stay at home rules and social distancing have also affected how services can be delivered. Education settings remain open for vulnerable children and young people and although those with EHC plans are classed as 'vulnerable' for this purpose, many are at home. Local authorities, in particular, have been pressing for urgent changes to the timescales to the EHC needs assessment and plan processes because of the amount of time involved in this work and the difficulties in undertaking it during the outbreak. The feedback we have received from families of

those with SEND is that they want greater certainty on what they can expect from local authorities and others involved in these processes.

7.5 Therefore, as part of the response to the current national public health emergency, this instrument modifies statutory timescales relating to the SEND system, principally those that relate to EHC needs assessment and plan processes.

7.6 Detail of the changes to Regulations is set out in the remainder of this section.

The Special Educational Needs and Disability Regulations 2014

The Special Educational Needs and Disability (Detained Persons) Regulations 2015

7.7 These Regulations set out how requests are made for EHC needs assessments, how local authorities must make decisions over whether to conduct an assessment or issue a plan, how to keep those plans under review and the processes for making appeals against decisions. Many of these processes have statutory time limits.

7.8 The Special Educational Needs and Disability Regulations 2014 also require local authorities to publish responses annually to comments from those with SEND and their parents on their published Local Offer of SEND services.

The Special Educational Needs (Personal Budgets) Regulations 2014

7.9 These Regulations set out a requirement for local authorities within three months of direct payments being made from a Personal Budget that is part of an EHC plan to review the making and use of those direct payments.

The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017

7.10 These Regulations require local authorities and health commissioning bodies to take various actions within a statutory time period when the First-tier Tribunal (SEND) makes non-binding recommendations in respect of certain types of health and social care matters within an EHC plan. (This is part of a National Trial that is in progress.) The Tribunal is responsible for handling appeals against local authority decisions regarding EHC needs assessments and plans.

Temporary amendment of the timescales contained in these Regulations

7.11 This instrument modifies various of the deadlines in these Regulations where coronavirus (COVID-19) has affected the ability of local authorities (SEND and social care services), health commissioning bodies and others (such as those who provide advice and information for EHC needs assessments) to meet them. In these circumstances, rather than having to complete a process within a specific timescale (for example, providing advice and information for an EHC assessment within 6 weeks), the bodies subject to the duty will be subject to different requirements as set out in the relevant regulations (such as 'as soon as is reasonably practicable') over when to complete the process. This will allow local authorities, health bodies and the other bodies subject to duties over the timing of their actions to have more flexibility in deciding how their priorities should change as a result of the outbreak. It will not always be in the public interest for health professionals, for example, to prioritise their input to an EHC plan if clinical work were a more immediate need during the emergency. The instrument allows those decisions to be made without the driver of the specific statutory deadlines that are designed for more normal circumstances.

7.12 However, crucially, the duties on these bodies are not lifted entirely: they must complete the processes required of them to a modified timescale. There are already various permissible exceptions to timescales in the existing Regulations, such as when a child is away from the local area for four weeks or more, so these changes build on that principle. Once the instrument ceases to be in force (due on 25th September 2020), the usual timing requirements will resume.

7.13 These amendments are also in the wider context of how Government is providing support to the most vulnerable children and young people during the outbreak. Notably, education settings remain open for vulnerable children and young people. We have published guidance that offers practical support to parents, education settings and local authorities to help them support children with complex needs. We have also published a list of online educational resources that includes materials for teaching children with SEND and supporting mental and physical wellbeing. For all these reasons, the Government considers that the changes are appropriate as part of the response to the current national public health emergency.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans for consolidation. This instrument amends four sets of existing Regulations. The amendments will have temporary effect and expire on 25th September 2020.

10. Consultation outcome

10.1 Given the importance of acting swiftly to change the law so as to free up local authorities, health commissioning bodies and the other public bodies concerned to respond to the current national public health emergency, no formal consultation was conducted. There is no legal requirement to consult on changes to the timescales covered in this instrument.

10.2 We have, however, discussed the principle of amending the timescales and why urgent action is needed with a range of stakeholders, including representative bodies for local authorities and parents of children with SEND and a number of specialist SEND organisations. Local authority representatives expressed strong support for the principle of changing the statutory deadlines to give greater flexibility over the deployment of resources. Representatives of the families of those with SEND and SEND organisations recognised the need for changes to the law during the coronavirus (COVID-19) outbreak, provided that those changes were proportionate. There was strong consensus among all stakeholders about the need for clear guidance to support implementation.

11. Guidance

11.1 The Government has published non-statutory guidance, available at gov.uk. This guidance is intended to support local authorities, health commissioning bodies and all those involved in EHC needs assessment and plan processes to meet their modified duties, whilst ensuring that they understand the flexibility they now have to prioritise

their work in a national public health emergency. The guidance is also a response to calls by bodies representing the parents of children with SEND for greater clarity about the level of service over EHC needs assessment and plan processes that they can reasonably expect of local authorities and health commissioning bodies during the outbreak of coronavirus (COVID-19).

11.2 We have sought the views of a wide range of stakeholders in preparing the guidance, notably representatives of families of those with SEND and of the public sector bodies involved in EHC needs assessment and plan processes.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is that this instrument will give local authorities, health commissioning bodies and other public sector bodies greater flexibility over the timing of completing statutory EHC needs assessment and plan processes. The flexibility is in certain instances where the incidence or transmission of coronavirus (COVID-19) affects the time needed to complete a process. The instrument allows these bodies more flexibility to prioritise other work that is essential because of coronavirus (COVID-19).

12.3 An Impact Assessment has not been prepared for this instrument because it has effect for a temporary period up to and including 25th September 2020.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The instrument places an obligation on the Secretary of State to review the effectiveness of the amendments to Regulations, during the period for which they have effect.

14.2 The Government will be continuing to monitor closely the operation of the EHC needs assessment and plan processes and other SEND services. The Government will do that principally through systematic engagement with representatives of local authorities, the families of those with SEND, health bodies, education settings and other bodies involved in the EHC needs assessment and plan processes.

14.3 The instrument has effect for a temporary period up to and including 25th September 2020, to align with the date for Parliamentary renewal of the Coronavirus Act 2020. Depending on the findings of the ongoing monitoring and developments over the coronavirus (COVID-19) outbreak, the Government may need to lay an instrument to revoke this instrument early. Equally, if there is evidence that the effects of coronavirus (COVID-19) will last for longer then it may be necessary to extend the period for which the instrument is in force.

15. Contact

15.1 Chris Eridani Ball at the Department for Education, Telephone: 07469 031757 or email: christopher.eridani-ball@education.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Suzanne Lunn, Deputy Director for the Special Educational Needs and Disability Division, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Vicky Ford MP, Parliamentary Under Secretary of State for Children and Families at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.