

Clarification of understanding of the newly revised Welsh Government EHE guidance.

As sent to each LA in Wales - 19th September 2023

We are writing to you as Home Ed Cymru, a peer-to-peer Home Education support group, established to support families across Wales following the introduction of the new EHE Guidance by the Welsh Government in May 2023.

We believe LAs likely share the concerns of home educators regarding the insensitive language and discriminatory tone of the guidance, and, most importantly, the lack of clarity of the precise legal duties and responsibilities of both home educators and LAs. The document attempts to assert a huge shift of stance from the current legal status of home education, which is, of course, deeply concerning for home educators. But we are aware that LAs are also worried that the Guidance places its staff in the vulnerable position of potentially (inadvertently) acting unlawfully or overstepping in their dealings with home educators as a result of the inability to interpret exactly what is required by the confused and unclear document. In fact, we have already seen several examples within our community where LAs have unwittingly misread the requirements of the Guidance and wrongly informed home educators on key matters. In response to reports of such misreadings, the Welsh Government have established an informal reporting system for those experiencing difficulties due to their LA misinterpreting the Guidance document. The Equity in Education team (Education Directorate) have requested that any issues be addressed to them directly via email to ElectiveHomeEducation@gov.wales .

As you know, the Wales EHE Guidance is secondary legislation. That is, it sits under the primary legislation of the Education Act 1996. As secondary legislation, its intention is to interpret and (attempt to) give greater clarity on the duties of LAs and home educators in Wales. However, **it should not legally change or contradict the Education Act**. Various legal opinions sought in response to the Guidance centre around this key point – that **the inherent problem with the document is that it attempts to assert roles and responsibilities that are at odds with the Education Act and other laws**.

Following a recent legal challenge of the Welsh Government by the home education charity, Education Otherwise, **the Government have agreed to amend two sections of the May 2023 EHE Guidance to ensure that it more accurately reflects the law**. One of the key legal issues with the published Guidance was its wording of an expectation for home educating families (including children) to meet with Local Authorities in order to satisfy the authority of the suitability of education provision. **Although Welsh Government want mandatory meetings between LAs and all home educating families, this cannot be insisted on as it is not a requirement of the Education Act, is discriminatory against home educators, and contravenes the legal rights of the family/child**. The Government have been forced to amend the Guidance to properly reflect this legal right as they are aware that the demand for meetings with all home educating families required LAs to overstep and act unlawfully. We have attached the Guidance amendment as an attachment to this correspondence, as we know that Welsh Government have not

yet published the updated Guidance on their website (despite changes being agreed in early August 2023).

One of the other major concerns and points of confusion with the Guidance (seemingly for both home educators and LAs alike), is precisely what in the document is **statutory** and what **non-statutory**. You will see that the second page of the document states:

“This document contains both statutory guidance and non-statutory advice.” So, the document details both statutory obligations and “advice”. However, it is not made clear within the document, exactly what is duty and what advice. It is imperative to note that **the advice given is not legally binding** – it has been derived from the personal views of those writing the Guidance, rather than based in law, evidence and/or experience.

Home educators have contacted the Education Directorate in the Welsh Government (the authors of the Guidance) and asked for clarity on exactly which aspects of the guidance are duty and which “advice” (and thus not legally binding). The response received in August 2023 from Sian Jones, Strategy Manager in Welsh Government Education Directorate, was as follows:

“The statutory guidance are those provisions giving guidance on the exercise of a local authority’s functions under section 436A of the Education Act 1996 (the Act) i.e. the duty to make arrangements to identify children not receiving education. This is because under section 436A(2) of the Act, a local authority must have regard to any guidance given from time to time by the Welsh Ministers in exercising their functions under section 436A. The Act therefore expressly permits the guidance to be given and places a duty on the local authority to have regard to it. This is what gives the guidance its ‘statutory’ status.

Where ‘must’ is used in the Guidance, this reflects what is required by law:

e.g. Par 2.6 “..parents must cause their children to receive a full-time education and Par 3.2 “Under section 436A of the Education Act 1996 local authorities must make arrangements to enable the authority to establish, so far as it is possible to do so, the identities of children of compulsory school age in its area who are not registered pupils at a school and who are not receiving a suitable education otherwise than at a school.

These are legal requirements under statutory provisions contained in the Education Act 1996.

Where ‘should’ is used, this refers to guidance rather than what is required by law.

As stated in section 436A(2) (and reflected in the Guidance), local authorities must ‘have regard’ to the statutory guidance. This means that they must take it into account and, if they decide to depart from it, give clear reasons for doing so (R (Khatun) v Newham LBC [2005] QB37. The footnote to paragraph 4.21 specifically brings this to the local authority’s attention.”

You will see that the ‘musts’ included in the Guidance reflect the legal responsibilities of both parents and LAs according to the Education Act 1996. **There are no new legal requirements here.** There are many ‘shoulds’ and other points Welsh Government seek to advise on in the document, but these are **not legal duties**. And,

as legal opinion has highlighted, some of this 'advice' may trample home educators' rights, and thus risks being unlawful. Of course, this has been apparent for some time, for example, in the legal reports of David Wolfe QC, commissioned by home educators in 2019 and 2020 in response to the consultations on the draft guidance and database regulations – https://familiesfirst.wales/wp-content/uploads/2021/12/Home_Education_Welsh_Draft_Guidance_Wolfe_2019.pdf and http://familiesfirst.wales/wp-content/uploads/2021/12/Home_Education_Welsh_Education_Database_summary_Wolfe_2020.pdf. Wolfe stated in his 2019 report on the draft guidance that “*should*” for things like meetings would be wrong, would be “*too strong a term*”, because it would imply “*an obligation on parents*” to have to “*respond to such requests*” and that in so doing “*the guidance goes too far and gets the law wrong*”. Indeed, even the then Education Minister, Kirsty Williams, paused progression on developing the guidance following the consultations that included those legal reports, citing as her reason: “*because a significant number of the many responses also raised complex technical, policy and legal matters which need careful consideration*”.

The present Welsh Government has confirmed that Local Authorities are not duty bound to follow the extensive non-statutory advice contained in the document where there exist “clear reasons” not to do so. We are sure that LAs, like home educators, could identify a host of “clear reasons” why some of the advice given in the Guidance could/should not be followed! We have requested that the Education Directorate make the distinction between statutory duties and advice clear, both within the document itself, and in a communication to Local Authorities, but their response was that this point is mentioned in the footnote to section 4.21 (as referenced in their response above). Thus, it appears there are no plans by the Welsh Government to directly clarify such vital matters to Local Authorities, hence us feeling the need to convey this information to you here.

Finally, home educators are extremely concerned that **the Government, both in the Guidance and in correspondence relating to it, is continuing to repeatedly misstate the actual legal duty of Local Authorities in relation to home education**. We have only this week been allowed sight of the training materials used by the Welsh Government in the LA online training day of 28th February 2023 and the further in-person training session of March 21st 2023. It is very worrying to see from the training materials, that this misrepresentation of the duty of Local Authorities was also repeatedly being 'taught' to LA officers.

The Education Act of 1996, section 436a, states the (**singular**) duty that a Local Authority has that is considered relevant to home educators:
“*A local authority must make arrangements to enable them to establish (so far as is possible to do so) the identities of children in their area who are of compulsory school age but are not registered pupils at a school, and are not receiving suitable education otherwise than at school*”.

- The purpose of this section of the Education Act is to identify children missing in education, not to legislate about home education. Indeed, when the Act was introduced, the government of the time repeatedly reassured home educators that this legislation would not apply to them. More recently, authorities have tried to

interpret Section 436a in a new way, in an attempt to find legislative basis for measures on home education.

- The clause in section 436a: “*In so far as is possible to do*” is a limiting factor which means that other laws and rights cannot be broken or infringed upon in the attempt to fulfil this duty. It is also a reminder that actions have to be reasonable and proportionate.

So, legally, when a Local Authority becomes aware that a child is not CME (a child missing education), but rather is being electively home educated, their statutory duty under the Education Act (the legislation on which the Wales EHE Guidance is based) is fulfilled. There are no other provisions in law defining an LA’s duty with regards to home education/ home educating families.

Thus, despite the misleading impression given or incorrect statements issued in the Guidance, LA training sessions, and in other communications from Welsh Government:

- **There is NO statutory duty to ensure that EVERY child has a suitable education.** The former Education Minister, Kirsty Williams, told the Senedd that she “*believed*” that the government had a “*moral duty*” to ensure every child had a suitable education, and that terminology has since been repeatedly misquoted to mistakenly state that there is a duty to ensure that every child has a suitable education as if this is a statutory duty; a 'must' when it is not. There is no statutory duty to routinely monitor or inspect home education. Indeed, this point highlights how many of the 'shoulds' in the guidance reflect ideology rather than true legal requirements.

- Likewise, **there is NO statutory duty for families to provide evidence**, in whatever form, to confirm the parent’s statement that their child is being electively home educated under section 436a. This has been confirmed in writing by the Education Directorate of the Welsh Government in acknowledgement that they had previously mistakenly stated that parents were required to evidence suitable education. Again, we have attached this communication to this email for your reference. Only if there are firm grounds that “*it appears*” that a child is not in receipt of a suitable education, does the Education Act (under section 437) provide for the LA to undertake further enquiries of the family. Absence of evidence is not evidence of absence of education. Parents, like any other members of society, are deemed innocent of any crime, including of potential educational neglect, unless there is good reason to consider otherwise in a specific case.

Once it is confirmed that a child is electively home educated, the statutory duty of the LA under the Education Act ends. In the absence of any concerns (in specific individual cases), any further engagement between families and their LA should therefore be on a voluntary basis. Additionally, all communications between LAs and home educating families should be fully transparent – to clearly state what is legal/mandatory and what optional. Moreover, there should be no negative judgement or repercussions for families who choose to exercise their lawful rights to decline any further engagement above what is statutorily required.

It is our concern that the poorly written and confusing Guidance, and associated communications, may jeopardize previously positive relations between home

educators and LA staff. We trust that Local Authorities, when rewriting their EHE policies following the May EHE Guidance, create policies which are in line with the statutory and legal requirements of both home educators/LA staff. We know that some Local Authorities have already reached out to local home educators and asked for their input and involvement in the rewriting of their policies, to ensure that policies are workable, respectful and, of course, lawful. We are confident that home educators across Wales would welcome Local Authorities adopting this respectful and co-operative approach.

We would be delighted to engage further on these matters and look forward to hearing your thoughts on the above.

Kind Regards,

Home Ed Cymru