

**Letter on Welsh Government's "Supplementary Materials" for Councils on EHE.  
4<sup>th</sup> February 2024.**

**For the attention of local authority staff, Wales**

As you may well be aware, the Education Directorate of the Welsh Government have provided local authorities with a non-statutory and previously unpublished appendix of Supplementary Materials to their Guidance on EHE (published May 2023).

This appendix contains non-statutory templates and flowcharts that WG have stated local authorities may choose to use in relation to their communications and interactions with home educators.

However, of grave concern to the home educating community, is that this appendix appears to have been produced according to the tone and intentions of the draft version of the guidance and does not appear to have been subsequently amended to reflect the differences in the final guidance as published in May 2023.

Nor do the templates reflect the subsequent amendments made to the guidance in August 2023 following legal action brought against the Welsh Government by the charity Education Otherwise, on behalf of the community. As such, these templates and flowcharts are unfortunately erroneous and highly misleading - for local authorities and home educators alike - should communications and other interactions between these parties be seen to be dictated by the principles and recommendations of the templates.

As we (and, of course, Welsh Government) have stated, these templates are non-statutory, however we are certain that you will agree that this does not make it acceptable that misleading information has been provided to local authorities (and by consequence, also to home educators). The forms, template letters and flow charts in that appendix, if followed as proposed, would be likely to cause local authorities to act unlawfully according to the primary legislation of the Education Act, as well as other relevant legislation such as GDPR, UNCRC and Human Rights laws.

Unfortunately, we are already beginning to see examples of this.

We at Home Ed Cymru are 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. Over the last few months Home Ed Cymru have received a number of concerning accounts from home educators in various local authority areas in Wales who are experiencing problems with their local authority EHE officers misquoting and/or overstepping their legal remits.

These incidents of overstepping, either in conduct or in the content of communications sent by the LA to home educators, have caused distress and alarm for law abiding families, seemingly as a result of the confusion resulting from LAs either utilising parts of these templates and/or being influenced by the inaccurate and mistaken concepts they convey.

We trust that Local Authorities would not knowingly seek to overstep their legal remit nor desire to misinform or mistreat home educators, and believe that the accounts we have received are purely due to the misleading documentation provided by Welsh Government. We politely request that local authorities note the important information we are conveying here and cease using the templates, forms and flowcharts of the supplementary materials from Welsh government to avoid further issues of this nature.

## **(A) Summary of the key issues with Welsh Government Supplementary Materials on EHE**

1. There are no appropriate references in the supplementary materials to clarify how or why families' **personal data** will be collected, stored, processed, and shared to ensure compliance with **GDPR**. Moreover, much of the information requested on these forms is potentially Special category data and subject to greater data restrictions. It is important to also note that, because a prosecution for failure to comply with a School Attendance Order is a criminal matter, a decision to take parents to court would potentially mean that all information supplied by a family would subsequently be treated as Criminal offence data, which requires a higher standard of protection (and must have been collected in accordance with all relevant laws).
2. There is no reference - in tone, content or inference - to the essential issue of any engagement from home educating families needing to be part of a process that involves **fully informed consent** on part of both parents and children. Of course, consent cannot be lawfully obtained in the absence of transparent communication and a clear explanation of legal duties and responsibilities (including that of data use). Furthermore, families cannot be deemed to be giving informed consent if they have been misled as to their legal duties or even if they have complied with unclear requests or demands from LAs through fear of negative repercussions for them or their families if they do not comply, as this is, of course, not true consent.
3. There is repeated **overstepping** in both tone and content in the many references implying that **meetings/visits** between home educating families and local authorities are a requirement as part of informal enquiries. There is nothing in these templates to clarify to LAs using them or to the families receiving them that any such meetings are optional and voluntary. To the contrary, the appendices even advocate the threat of SAOs if parents refuse to meet with the LA – this would not be lawful, let alone ethical, reasonable or proportionate. We draw your attention to the fact that Welsh Government themselves, when challenged on the issue of meetings, have confirmed that there is no legal or statutory requirement for home educating families to meet with local authorities. This was also the primary focus of the legal challenge of the Welsh Government by Education Otherwise, resulting in an amendment to the

Guidance to clarify this matter. Again, we reiterate that the templates reflect the Government's previous stance on this matter rather than the true legal situation or even the current Guidance itself.

4. The **law is misquoted and misrepresented** in the templates when it is claimed, "The local authority has a legal obligation to ensure that all learners are receiving a suitable and full-time education". There is no **such legal duty of LAs**, despite such erroneous phrasing occasionally and unfortunately making its way even into Welsh Government documentation. Yet the repetition of such a mistake makes it no more accurate in the retelling. The duty of LAs is to act "*if it appears*" that education is not suitable - there is nothing in the law to say that local authorities must pre-emptively check that "every child has a suitable education".
5. There is repeated emphasis in the supplementary materials on the concept that parents need to provide **evidence** of suitability of education in response to informal enquiries, for authorities to somehow approve their provision, (for example in the initial flow charts). The Education Act places no duty on parents to evidence their educational provision. Even the Welsh Government have confirmed that there is no legal duty on parents to provide evidence on the suitability of their educational provision. To confer such an expectation on parents conflates section 436a of the Education Act with section 437, and thus is not an appropriate interpretation or use of the law.
6. **The proposed forms ask for information that parents are not legally required to provide**, such as their personal reasons for their choice of mode of education, or about future plans, without making it clear that they do not have to provide this information and that there would be no negative repercussions for not providing such sensitive and personal information. Again, in doing so, the templates lack transparency and fail to afford informed consent for information shared.
7. A **false impression** is given (for example in the conclusion of Annex 3) that there is a legal duty to not only **repeat informal enquiries**, but that evidence is required at each attempt to do so. As you will know, the legal basis for repeating informal enquiries on an annual or other basis is extremely dubious. The purpose of the informal enquiry according to the law (Education Act 436a) is to confirm that a child is not missing education, that is, that he/she is without receipt of a suitable education. Once it is known to a local authority that a child is not a child who is not in receipt of a suitable education, then the legal duty of the local authority towards that child, according to the law, has ended. Indeed, as the legal duty of the local authority to that child has ceased, then the family would be within their rights to request that data on them be no longer stored. However, should the local authority continue to hold the contact details of that family, they may legally and reasonably contact them at a future date to ask if there have been any changes to that situation (to ensure that any data they hold is not outdated). If there are no grounds to believe "it appears" the situation has

changed, that is, if there are no grounds to believe “it appears” that a child is now not in receipt of a suitable education, then there are no clear legal grounds to require evidence to prove what the local authority has previously already established. The use of the term “*required*” at the conclusion of Annex 3 is clearly inappropriate, let alone the proposed process of repeating requests for evidence in the absence of legitimate concerns in individual cases.

Not only could parents be misled and/ or coerced by the content and tone of these outdated forms and templates but **children’s rights** would also be threatened by their potential use. Personal information is being requested of children without confirming their legal rights and duties in relation to this, without explaining how any information shared would be used and without highlighting the need for informed consent before they do so. Whenever the views of the child, or any other interaction directly from the child, are requested by LAs, it should be made explicit that this is an offer and opportunity and not a requirement (when understanding and adhering to the UNCRC in its entirety). Children (and parents) should be fully informed as to the relevance and also the potential consequences of sharing or not sharing this information.

8. The threat of reverting to safeguarding measures (which could include care orders) if parents do not comply with demands to evidence education, even when there are no legitimate concerns that would suggest “it appears” that a suitable education is not in place, increases any **perception of a coercive or authoritarian approach** and therefore would not reflect respectful and appropriate practice. As such, we hope that LAs would reject such scaremongering and bullying tactics in favour of a more cooperative, lawful and respectful approach.

**[Please see Section C below for a more detailed analysis of each template provided.]**

### **(B) Suggestions from home educators to ensure appropriate communications (in place of the outdated WG EHE supplementary materials)**

1. **First and foremost, any interaction between the LA and home educating families, including all communications, EHE policies and other documentation, must be lawful.** Home education is a legal and human right and any communication between these parties should uphold and respect these rights. As we have previously highlighted, the revised EHE Guidance issued by WG in May 2023 has come under great scrutiny from the home educating community, as well as educational professionals, child psychologists and legal professionals, because much of what it attempts to dictate is misleading and/or overstates the responsibilities of local authorities and home educators

according to the law. The Guidance is just that – guidance. It cannot trump the law. The Welsh Government themselves have confirmed that the guidance document is largely non-statutory. Indeed, the Guidance places no additional legal duties or responsibilities on LAs or parents than the existing Education Act. It is vital that when LAs interact with families that they continue to act in accordance with the law.

- a. All verbal and written communications must therefore also be lawful and not overstate or misrepresent the duty of the LA or the responsibilities of parents.
- b. They should not give the impression that parents require the approval of local authorities to be lawfully home educating, nor require constant or ongoing monitoring to maintain this right. This is not in accordance with the law.

**2. Interactions between LAs and families should be respectful and transparent.**

- a. Any communications with home educators should be polite and respectful, written from a place of trust, recognising the fact that home educators are law-abiding, responsible parents. There should be no discrimination or suspicion because of parents exercising their (legal) choice to opt for a different model of education to that provided by the state. Communications should reflect the fundamental concept that, as for all members of society, home educators are innocent until proven guilty.
- b. Unlike the authoritarian, threatening and coercive tone of the WG templates, communications should also be clear and fully transparent in purpose, tone and content. Communications must not mislead, coerce or manipulate families in any way.

**3. Principles of explicit fully informed consent are integral to all communications.** This includes clarity on whether any action or information requested is truly mandatory or a voluntary option, and explanation of potential use and implications of any information disclosed.

**4. GDPR and data protection legislation should be integral to all communications,** including full explanation of precisely how the collection and handling of any requested data would be compliant with these laws, especially given how information collected may be considered as Special Category or Criminal Offence data.

**5. Respect for privacy regarding personal information.** Any communications should reflect an appreciation that personal information, such as reasons for home educating, reasons for deregistering from school, future plans, children's hopes and beliefs are just that – personal. Such information is not legally required. Whilst it is not unlawful for authorities to ask for information, it is imperative that any such requests ensure that parents and children understand before any disclosure that provision of such information is non-mandatory, that

they can lawfully decline to provide said information and that there would be no negative repercussions for choosing not to divulge this information.

**6. All communications should reflect that the role of the LA is reactionary.**

Unlike the WG templates, communications must not perpetuate any mistaken claims that authorities have a legal “*duty to ensure that every child has a suitable education*”. Rather, communications must reflect the only lawful duties of the LA - namely to

- a. “As far as possible”, establish the identities of the children who are not in receipt of a suitable education, namely established the identities of children who are not home educated or being educated at school. “*As far of possible*” of course indicating that no other laws, rights or legal principles should be infringed in any such attempts.
- b. And in relation to home educating parents, to act and request information only “*if it appears*” a child is not receiving a suitable education.

**7. Communications should reflect that the choice of mode of communication with the local authority is at the parent’s discretion.** Contrary to the inference of the outdated WG templates, meetings between families and local authority staff – or indeed, any other prescribed formats for responding to the LA’s informal enquiries, such as forms/templates – are not mandatory, compulsory or to be routinely expected. It is important to state that there would be no negative repercussions for parents choosing not to respond in a proposed format, or for parents choosing to not divulge personal information.

## **(C) More detailed analysis of the specific issues with individual templates/charts of the supplementary materials**

We appreciate that WG providing local authorities with such outdated and erroneous templates has been confusing and problematic, both for local authority staff and for those home educated families affected by their use to date. So, in addition to the summary of the mistakes and problems found in the supplementary materials, as noted above, it may also be helpful for us to provide an overview of the issues of each individual annex or template.

### **Annex 1: School Attendance Order and Education Supervision Order flow chart**

This document lists a number of steps beginning with “Are you satisfied that the child(ren) are receiving a suitable, full-time, efficient education?” and concluding with either “yes” or eventual prosecution. However, at each step, “yes” cannot be achieved without evidence being provided, even though **the Education Act places no duty on parents to evidence their educational provision.**

In this flow chart the course of action outlined is to threaten parents with School Attendance Orders and ultimately Care Orders if a meeting does not take place, even though the Education Act only gives lawful duty to local authorities to **act “if it appears” that educational provision is not in place following any informal enquiries. There is no legal requirement for parents to meet with the local authority.**

This document thus grossly misrepresents the law.

### **Annexes 2a, b and c - a series of template letters for local authority education employees making initial contacts with home educating families**

These templates all seek to conduct the LA’s informal enquiries exclusively by means of arranging a meeting between the LA and the home educating family. Aside from the fact that these templates are both dictatorial and impolite in that they seek to arrange meetings that parents have neither requested nor consented to, none of the templates make clear that there is no legal requirement for families to meet with the LA, that parents and children are free to decline these optional meetings. Furthermore, there is no reassurance given that there would be no negative repercussions for families who (lawfully) decline such meetings. To give the impression that meetings are a requirement, and to do so without following the appropriate process of informed consent, risks authorities acting unlawfully. Moreover, the use of repeated follow up letters only reinforces the misleading appearance of a meeting being a necessary requirement. It should be further noted that these letters are to families as part of initial

enquiries, to families where there are no legitimate reasons for concern about their parenting and educational provision.

Annex 2c also contains a false claim that, “*The local authority has a legal obligation to ensure that all learners are receiving a suitable and full-time education, which is why we request a meeting and information about the education you are providing.*” The local authority has no such legal obligation, as explored in the summary above, and using such a false claim of legal duty in communications only increases the inappropriate portrayal of a position of power over parents, thus acting in a way that could readily be perceived as deceitful, manipulative and coercive. Not only is there no such legal duty on authorities to ensure all learners are receiving a suitable and full-time education (of course, local authorities would be legally liable for all children who failed to receive a suitable and full-time education through state schools or LA EOTAS provision if that were the case), but these initial letters to parents represent informal enquiries (section 436a) to establish if a child is either CME or home educated, and not part of s437 proceedings where a LA has a duty to act “if it appears” such an education is not in place (and only at this point would more detailed enquiries be appropriate). Under Section 436a enquiries, the LA only needs to be satisfied that a child is not deemed to be not in receipt of a suitable education. This statement and its demands are therefore utterly disproportionate and inappropriate.

### Annex 3 – form for parents to complete.

There are many issues with this form, the first being that it does not state that completion of the form is optional. As we know, parents can choose to respond to an LA’s informal enquiries in any way they choose. Providing a form without clarifying on that form that its completion is non-mandatory is unlawful and inappropriate. Information gathered without fully informed consent would not be valid. The form also fails to identify how the requested information would be processed, stored and shared, and therefore does not comply with GDPR.

The form also asks for information which parents are not legally required to provide, without making it clear that there is no legal duty or requirement to provide such information. These forms include an array of subjective questions, some of which are philosophical in nature, about “*hopes*” and “*opportunities for your child to... discuss personal, social, wellbeing and health issues...*”

The form also asks for the provision of “*other evidence, such as any planning, records of visits/activities, examples of your child’s work*” without clarifying that parents are not legally obliged to supply such information.

The form concludes:

*“Once we have taken into consideration the evidence you have provided, we will be contacting you:*

*(i) If we have concerns about the suitability of education provided for your child  
or*

*(ii) To arrange the next year's discussion where you will again be **required** (emphasis ours) to provide evidence of how you are delivering a suitable and efficient education in line with your child's age and ability and how you are providing for any ALN that they may have."*

The incorrect impression given throughout is that this is an official form which parents have a legal duty to complete. Furthermore, as explained in point 7 of the summary of the issues with this Appendix, the form gives a false impression that there is a legal duty to not only repeat informal enquiries but also that evidence is required each time authorities attempt to repeat this process, even when it has already been established that said child is not a child not in receipt of a suitable education, and with no reason to believe "it appears" this may have changed. There is nothing in law that requires either of these actions.

#### Annexes 4a and b "Template[s] to secure child's view"

In these forms, personal information is being required of children without them being informed that they do not have to supply such information – this does not adhere with principles of informed consent. UNCRC Article 12 affords children with the right to a voice (something parents and local authorities would both seek to promote, of course), however the UNCRC is also very clear that these views should only be given freely and without coercion.

Moreover, there is no explanation of the potential implications or possible repercussions of any information a child may provide. This is particularly concerning given that these are documents that could be used in legal proceedings against the family in issuing of School Attendance Orders, based on what a local authority employee may interpret the child to be saying.

There is no reference to why the data is being collected, nor how it will be processed, stored or shared, and thus breaches data protection laws.

#### Annex 5 entitled "local authority report"

This form in its entirety is confusing and misleading for local authority employees as it conveys an expectation that they should elicit a series of information (including, but not limited to reasons for home educating, "evidence", "plans" and planning documents, future aspirations of the child) that parents are not legally obliged to provide.

This form is assumed to be intended for completion following section 436a informal enquiries where the only legal remit of the authority is to identify if a child is missing education. Thus, the content and expectation here is disproportionate and inappropriate. The majority of the information on the report is not necessary for the local authority to fulfil its duty, especially where there is no reason to believe "it appears" that a child is missing education.

In essence, only two fundamental questions are needed – (1) has the parent stated that the child is receiving a suitable education and (2) is there any reasonable cause to not believe the parent’s assertion that their child is receiving a suitable education?

If local authority employees are led to believe that they are expected to elicit all of the information noted in this report, this risks them feeling a sense of pressure to ensure that this information is provided and further risks them placing undue pressure on parents to (unnecessarily) divulge personal and private information. The yes/no format of this form also risks increasing a sense of concern in a local authority employee if they feel unable to give either answer accurately.

Of course, if parents do decide to divulge such information, this should be only on a purely voluntary basis and as part of a process of fully informed consent, where parents are made fully aware of the potential implications of any information they may or may not provide.

Furthermore, the validity of requiring parents and children to sign such a document is highly dubious. Parents and children do not require permission from or approval of local authorities to home educate, authorities are not there to be inspecting suitability, they are simply present in a reactive role to act “if it appears” a suitable education is not in place.

#### Annex 6 - bears the dubious title “annual EHE discussion contact letter”

This appears to be intended as a follow-up to a meeting which has already taken place, though it goes on to press for initial information about the education being provided. Once again, there is evidence of overstep in both the tone and assumption that, even if annual contact were a requirement, that this should be in the form of meetings, without suggesting any alternative forms of communication.

Furthermore, there is considerable overstepping in the concept that parents have to continually re-evidence their innocence of educational neglect in the absence of any concerns raised to suggest this, as addressed in point 7 of the summary of issues with the appendix, provided above.

#### Annexes 7, 8 and 9

The final three documents lead incrementally to the issuing of a School Attendance Order. Amongst other concerns, these documents mistakenly deem a (lawful) refusal to agree to a meeting between families and the local authority an automatic escalation to section 437 and even to subsequent legal proceedings against parents. As we have repeatedly highlighted, there is no legal obligation for home educating families to meet with the LA, and certainly not at the informal enquiry stage. Therefore, these templates are highly misleading for LA staff and parents alike and any attempts to implement such pathways and rationale for legal proceedings would cause the LA to act unlawfully.

We appreciate your time in reading our communication. We acknowledge that we have conveyed a significant amount of information here, however, we trust this will help ensure that local authorities use only appropriate, respectful and lawful correspondence if and when engaging with local home educators, rather than utilising these outdated and, at best, inappropriate and misleading supplementary materials.

We look forward to your response to these issues, including any questions on the points we have raised.

Kind regards,

Home Ed Cymru