

Consultation Questions

1 Based on your experience of local authorities implementing this duty since it was introduced in 2007, does the guidance make clear the actions which local authorities are expected to take to help them comply with the duty?

No

Comments:

Presumably the above question refers to the Feb 2007 CME guidance and if this is the case, it seems from our experience of it on the ground, that in our area at least, LAs have not got to grips with implementing this guidance at all. However, we suspect that this may not simply be because there are some areas of ambiguity that may lead to confusion in the 2007 guidance, but also because the LAs have not yet got some of the basic tools with which to implement it. For example, it was envisaged that the 2007 guidance would work along with Contactpoint which even now is far from ready to be activated.

The 2007 guidance has not yet been given a chance to work and it is therefore impossible to judge whether it would have done so.

Even though it has not been implemented in anything other than a piecemeal fashion, we are nonetheless finding that when they do try to do it, LAs struggle with interpreting the 2007 guidance, with understanding their roles and the limits of these roles. For example, they are coming down very hard on families they already know about who are being educated at home. It has, for example, been reported that some LAs would like to perform a Common Assessment Framework on all home educated children whether or not there is any indication for it. Many home educated families are rightly offended by such an implication and would regard the whole process as highly intrusive, effectively obliterating their right to privacy as enshrined in Article 8 of the European Convention on Human Rights.

By way of another example of increased heavy-handedness: in one case, a home educated child has been removed from her family in what appears to be an entirely disproportionate move. The HE community who know the family are at a loss to understand how this could have happened. All accusations that have been levelled at the family appear to be relatively trivial and certainly not of such a high level of concern as to warrant removal of a child with all the terrible consequences that this entails.

LAs need to be reminded that there is a high likelihood of trauma and poor outcomes for children who are removed or even who are threatened with intervention and removal from their families. These sorts of intervention should not happen for trivial reasons, and yet with the increased pressure upon LAs to find children missing from education and to ensure that children are safeguarded, we can expect to see more of such cases. It is very important that guidance such as this contains a reminder to LAs of the damage that intervention by them can do to families and that their actions must always be proportionate and evidence-based.

Whilst we would contend that there are some obvious areas of difficulty with the 2007 guidance, we categorically feel that introducing a completely new version of guidance which would actually exacerbate rather than resolve the difficulties of the original, is clearly not a solution. This proposed new guidance would demand yet more of the LAs whilst they still do not have the tools available to them. Furthermore, the proposed guidance continues to confuse, failing to clarify legislation, sometimes conflating separate bits of law, at other times, omitting key concepts in primary legislation, and at other times pushing one piece of legislation to the point where it then demonstrably conflicts with other key areas of legislation.

The DCSF should be aware that this proposed version will have monumental and negative consequences for primary legislation, local authorities, families and government and may well cause LAs to act in an ultra vires fashion with regard to some areas of the law. (See subsequent answers for further explanations).

The purpose of guidance should be to clarify legislation rather than to cause further confusion and it must not cause or give leeway for the authorities to act in an ultra vires fashion as it would appear to do, for example, with regard to S437 of the 1996 Education Act. (see below for explanation.)

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2 Does the guidance make clear the role that implementation of this duty has in the wider programme of work led by local authorities to improve outcomes for children and young people, including promoting their safety and well-being?

No.

Comments:

The so-called guidance is written in such a way as to be highly likely to lead to confusion with regard to LA's roles in the wider programme of work. For example, the paragraph 1.1.1.

" There is wide agreement about the outcomes we all want for every child - they should be healthy, stay safe, enjoy and achieve, make a positive contribution and achieve economic wellbeing."

does nothing to clarify that it remains the responsibility of parents to help a child to achieve these aims. In fact, when you couple the above paragraph with the general thrust of the duty to find children missing education, it could easily lead to the impression that LAs have direct duties with regard to all the above objectives. However, nowhere in primary legislation does it state that the LA should take responsibility for ensuring that a child achieves these aims. The Children's Act 2004 makes it clear that whilst LAs do have duties, these duties are to co-operate to promote these aims, or to make arrangements to meet these aims. This is categorically not the same as taking responsibility for ensuring that a child meets these aims and the above paragraph along with many others in a substantial part of the guidance, eg from 1.1.3:

"The guidance also demonstrates how implementation of this duty can help local authorities make progress towards a number of Government priorities that they have been asked to lead in order to improve outcomes for children and young people. These include:

- the ambitions described in the Children's Plan;"

by failing to make this distinction clear, are very likely to cause LAs to be led astray and to act in an ultra vires fashion, rather than to be helped by this guidance.

Clarification of the actual duties enshrined in the Children's Act is only given in the Appendices, by which time readers may well have formed the impression that LAs are entirely responsible for ensuring children's safety and well-being. This may well lead to increased heavy-handedness on the part of LAs, as evidenced in the answer to question one.

It is therefore of cardinal importance that the distinctions between the different kinds of responsibilities and who is actually responsible for what are clearly stated, and this also for the reason that if LAs do start to behave as if they have responsibility for meeting the aims for children, as stated in the Children's Act 2004, they will in effect be appropriating parental responsibility for all children in all areas of life and will be liable when these aims are not met.

3 Does the guidance accurately describe the range of circumstances that put children's safety at risk and puts them at risk of not receiving a suitable education?

No

Comments:

Although the question does not specifically request this, it is necessary, in order to answer it correctly, to be clear about what risks we are actually talking about. There is significant degree of ambiguity with regard to the phrase "at risk of not receiving a suitable education". Does the guidance suggest that the named groups are at risk of "not attending" an education or of not receiving a "suitable" education? This is not clarified in the guidance and will almost certainly lead to confusion in practice as LAs fail to understand what they are actually meant to be identifying.

For the schooled population, it appears that the CME initiative is simply about checking up on whether children are attending school, not whether the education they are receiving is suitable or not:

"Schools already have a duty to monitor attendance through the daily attendance register and to make returns to local authorities where the attendance of individual pupils gives cause for concern."

This part of the CME initiative appears to be clear on the fact that it concerns itself with the issue of identifying non-attenders at their place of education, not about spotting those whose education is proving unsuitable.

Of course, one could understand why this would be the case because if suitability of a schooled child's education were to be assessed, then tens of thousands of parents across the land could be held liable for failing to provide a suitable education under Section 7 of the 1996 Education Act, or in the situation that it could be established that the parent had called upon the school to expect that their child should be suitably educated, LAs and/or schools will become liable for a failure to cause a child to receive a suitable education. We hear from the government's own figures, that one sixth of children leave primary school unable to read and write, (one fifth are reading and writing poorly), and that a third of all 14 year old boys have a reading age of 11 or below, and yet because they attend school, they are apparently exempted from the CME initiative if it is to be about assessing for suitability of education.

Therefore, if the risk we are talking about is the risk of not receiving a "suitable" education, then NO, the range of circumstances that would put a child at risk has not been accurately or realistically described, for clearly "going to school" should in reality be considered a high risk circumstance.

It seems clear that schooled children, with regard to section 7, (1996 Ed Act) are exempted from assessment for suitability of education. Conversely, the relevant paragraph re home education states:

6.17....Where a local authority is satisfied that a parent is providing their child with a suitable full time education, the child is not the target of this duty.

This would seem to suggest that LAs have a positive duty to assess for suitability in all cases of home education. However, if we are to take the paragraph about schooled children seriously, and apply the same standards of identifying children who are missing from education, we would be talking about whether children outside school "attend" their place of education, not whether the education is "suitable". If this standard is to be applied so as to achieve parity with schooled children, then all that an LA would need to do would be to check that the child resided with the parent who has explained that they are home educating, to make a note of this and to leave the family alone.

However, it isn't simply a matter of demanding parity with the way schooled children and their families are judged under section 437. There are other extremely significant implications for primary legislation if the CME initiative is taken to mean that LAs must assess an education for suitability. If guidance allows LA personnel to infer because of ambiguous writing - and I think that it is likely that it will as a result of other difficulties as well...see *2, that all children out of school must be judged for the suitability of their education, it will create a conflict both with Section 437 of the Education Act 1996 and with Sections 7 and 9 of the same Act.

It will create a problem with s437 because this states that LAs only have a duty to act when there is a reason to believe that a suitable education is NOT being

provided. This is framed in the negative because this preserves the principle of parental responsibility for education, as enshrined in Section 7. The state only has a duty to act when parents fail to observe their duties. This is how it should be. For the state to act in every case to assess for suitability of education, (a possible but clearly pushed interpretation of s436A of the Education and Inspections Act of 2006) is to establish that in actual fact, the state is responsible for education of children. Parents, in no longer having a final say so, will have relinquished the right (as protected in section 9, Ed Act 1996) to determine the form and content of a child's education. If the state is to have the final say so in whether a child's education is suitable, it should accept that it is determining the form of education and it must now be held responsible should this chosen form of education fail a child. Home educators, who are now well versed in education law, will almost certainly demand recompense in this situation should the education prove unsuitable to the age, ability and aptitude of the child.*

Much of the guidance is written so as to lead an LA to think that they must take the role of establishing that an education is suitable, not of taking action only in the situation that the education appears unsuitable. It would help to clarify matters if the emphasis in the guidance upon suitability should be removed and it should be made clear that LAs are seeking children who are failing to attend.

Should it prove impossible to rewrite guidance so as to remove the word "suitable", it would be necessary to include regular reminders to the LAs of the legal meaning of a "suitable education". It does not refer to a form of education or a set of standards that an individual LA officer happens to prefer; rather the education must be "suitable to age, ability and aptitude and any other special educational needs the child may have" and that this education may take a number of different forms. They also should be reminded early on that it is parents who are responsible for the provision of a suitable education of children and that children are to be educated in accordance with parents' wishes. (see Section 9 Ed Act 1996). These principles need to be mentioned at an early stage in the guidance and should be regularly reiterated throughout it.

Further, the LAs should also be reminded at an early stage that they do not have to assess for suitability in all cases. They only have a duty to act where it appears that a suitable education is NOT being provided. The consequences of failing to observe this difference should also be included in the guidance.

Further on the problems of the delineation of the range of circumstances that might put a child at risk: the guidance is at times so confusingly written in this regard, that it is difficult to understand the intended messages (*2). For example, in paragraph 3.3, it states in effect that a child may be at risk of not receiving a suitable education if the parent withdraws the child from school in order to home educate but then fails to provide a suitable education. Clearly, if the child is not receiving a suitable education, he is clearly not "at risk" of not receiving one.

This kind of confusion in the writing would lead most people not to read the guidance too closely and to take the general message that all home educating families need to be checked up on to see whether or not they are providing a suitable education. If this were to happen, it would have significantly

problematic consequences for legislation, government and families, (see above for an explanation*.)

We understand that pressure for further guidance and increased monitoring has come about at least in part because of there being a perceived danger of forced marriages in the home education community. Aside from the fact that the evidence base for this assertion seems to be both sketchy and speculative, it must be acknowledged that the risk of forced marriage in a huge section of the home education community is actually negligible. Inexplicitly upping the home education community into an "at risk" group on the basis that a very small number of them may be at risk of forced marriage is both disproportionate and inaccurate in that it is not home education which creates the vulnerability to forced marriage; rather it is an entirely separate culture that permits or encourages it.

It is essential that this inaccuracy is corrected for it will otherwise result in unnecessary and frequently damaging intrusion into the lives of otherwise perfectly well-functioning families and will prove a waste public funds in the process.

Also, if government were to create a duty for LAs to assess for suitability, we can expect to see children suing their LAs when they fail to fulfill this duty.

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4 Does the guidance show effectively what steps local authorities should take when children are living in difficult circumstances that put them at more risk of not receiving a suitable education?

Answer:

No.

We think the guidance will only confuse the LAs as to what to do. Firstly there is the confusing delineation of home educated children. Are they or are they not classed as vulnerable? LAs are likely to think..."oh what the heck...class them as vulnerable. Investigate the lot. " LAs are likely to become interventionist when their help is not needed and may well be positively damaging for families and they will waste public funds in the process.

The first clear indication of what LAs may do as regards the sharp end of the implementation of CME can be found in the list at 2.3 (see below), which is intended as a brief summary of options:

- receive information about a child;
- check if place of education already known;
- log details on database;
- locate and contact family;
- determine child's needs;
- identify and access available provision and places;
- monitor attendance for all provision; and

- track and reconcile movements."

We believe that this list is likely to be very misleading for LAs. They may well read the as a prescriptive, (despite the preceding and subsequent qualifications) or may abuse parts of it, for example in thinking that they can determine every child's needs whether or not it had been established that it is likely that a suitable education is not being provided, as would be required by section 437 of 1996 Education Act. LAs do not have an automatic duty to assess the child's needs and to read such a prescription out of context in such a list is likely to lead to LAs acting outside of other sections of the law which will in turn subvert the relationship between the citizen and the state as mentioned in the answer to question 3 *.

Further, such actions as determining a child's needs would require high levels of intrusion where it is not established that such intrusiveness is a proportionate measure. This action would override any hope of any privacy for families. Home educated families would immediately, and for no clear reason, have to surrender a right to privacy as enshrined in Article 8 of the European Convention on Human Rights.

It should be noted that Home Educators are now well informed on education law and are likely to prove a litigious group. If their children are forcibly returned to school and if that schooling fails to deliver, (as it surely will since many of these children were withdrawn from schools in the first place because of a failure of education), we can expect to see many more cases such as Phelps v. the Mayor of Hillingdon:

<http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000727/phelp-1.htm>

To return the matter of whether the guidance effectively shows what LAs should do with regard to children at risk, as mentioned above, until Contactpoint is activated, it seems unlikely that LAs will be able to carry out the guidance and even when Contactpoint does start up, it is likely to present as many problems as it solves, with inaccuracy of data and high likelihood of data insecurity which could endanger children, so the first issue of identification of children at risk already seems likely to be problematic.

5 What are the key challenges local authorities could face to implementing these guidelines effectively?

Answer:

(Are they guidelines or guidance?)

The key challenges include the fact that the guidance appears to override the rights of parents to educate their children as they see fit and creates a conflict between various parts of primary legislation, setting s436a of 2006 Education and Inspections Act in conflict with s437 of the 1996 Education Act.

The proposed guidance also creates a conflict with the Guidelines on Elective Home Education, the general thrust of which respected the primacy of parental responsibility for education. These guidelines (which came into effect only last year) would have to be re-written all over again, with all the attendant costs.

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6 Does the guidance make clear the duties and powers that local authorities have in relation to home educated children when parents are not providing them with a suitable education?

No

Comments:

See reasons stated above ie: the general thrust of the guidance creates conflicts between section 436a (2006) and s437 (1996) and in giving section 436a precedence, it overrides the right of a family to privacy as enshrined in European law.

The guidance generally suggests that LAs should automatically determine a child's needs and whether an education is suitable, eg:

6.35. In order to discharge their duties in relation to children not receiving an education, local authorities should make inquiries with parents about whether their home educated children are receiving a suitable education."

when in fact, there is only reason to do so when there is a suggestion that the educational provision is not suitable. Home Education should not be a prime facie reason for such investigation.

In effect, the state thereby becomes responsible for determining a child's needs and in determining whether the education is suitable it thereby becomes the ultimately responsible for determining the form of education and thus overrides section 9 of the 1996 Education Act. Further, this lays the state open to litigation when its preferred form of education fails a child.

The CME guidelines create a conflict with the Elective Home Education Guidelines on the above points which could only generate further confusion for LAs.

In encouraging LAs to take such a proactive stance with regard to seeking out children, we are likely to find that they become very heavy-handed and make more mistakes with their assessments, thereby damaging children and families.

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7 Does the guidance contain all the 'signposts' to other relevant guidance; sources of support and advice for local authorities that will enable them to implement this duty effectively?

No

By conflicting with other relevant guidance and guidelines such as the EHE Guidelines, signposts, even where they are included, can only serve to confuse.

There is no mention of Section 9 of the 1996 Education Act and the qualified nature of "suitability" of education (ie: appropriate to age, ability and aptitude and any SENs) is not sufficiently stressed.

There is insufficient reference to Data Protection legislation concerning proportionate reasons for sharing of information and the need for consent with regard to sharing information.

There is also no mention of home education support groups such as Action for Home Education, or Education Otherwise.

8 Beyond the publication of the guidance, what would be the most effective means of communicating the importance of implementing the new duty, and the processes that will help its implementation, to professionals working with children?

Answer:

Training for LAs in the nature of home education and the importance, not only for home educators but also for the LAs themselves, of the nuances of the legislation that concerns it. This training could be offered by various home education organisations and individuals.

9 Have you any details of good practice that would be useful to include in the final version of the 'guidance'?

No

Comments:

Given that LAs have not yet been given the chance to implement the 2007 Guidance on CME, it is hard to find evidence of good practice in this regard. Generally, however, LAs who observe the thrust of the Guidelines on Elective Home Education have established good working relationships with their home educators.

10 Did you find the draft guidance clear, unambiguous and easy to follow?

No

Comments:

Absolutely not, for the multitude of reasons stated above.

11 a) We have developed standard data definitions at Appendix 1 of the guidance. These were developed in consultation with several local authorities. Do you agree with these definitions?

Disagree

Comments:

11 b) If not, what amendments would you suggest and why?

Answer: I would suggest you stick with the Feb 2007 version, with due regard for the EHE Guidelines and wait to see if this works when LAs have the tools they need at their disposal. To go ahead with this version would cause far more problems than it solves. See arguments above.

However, even with the Feb 2007 version of guidance, various paragraphs should be further clarified, eg: Section 3.3.16:

"If it becomes known that a child identified as not receiving education is being home educated, this should be recorded on the local authority's database and no further action should be taken unless there is cause for concern about the child's safety and welfare. Monitoring arrangements already exist for children being educated at home. Where there are concerns about the child's safety and welfare, Local Safeguarding Children Board procedures must be followed."

It should be clarified here that monitoring of home education is only necessary when there is due cause to suspect that a suitable education (according to AAA and SEN of child and according to parental wishes) is not being provided.

There are also sufficient safeguarding roles written into the EHE guidelines. If an LA has reason to suspect that a home educating family has a problem either with educational provision or with another kind of welfare issue, (such as a risk of forced marriage), they do already have perfectly sufficient legal powers to intervene. There is no need to tinker further with guidance, but rather need to sort out the methods for implementing the 2007 guidance.

The DCSF should not implement the above proposed guidance for many reasons, but perhaps most importantly because in pushing one piece of legislation to its extreme interpretation, (ie: section 436A 2006 Education Act), the guidance will, in the process, override the principle of parental responsibility for the education (Section 7 1996 Education Act).