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RE: CONSULTATION ON NEW HOME EDUCATION GUIDANCE IN WALES

ADVICE FOR 'PROTECTING HOME EDUCATION WALES'

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1. I am instructed to provide advice to Protecting Home Education Wales on some legal matters arising from the Draft Statutory Guidance for Local Authorities on home education on which the Welsh Government is currently consulting.

2. I understand that this advice will be submitted as part of one or more responses to that consultation.

3. Additional legal points may arise if and when the Welsh Government makes information sharing regulations of the kind contemplated by the draft guidance. The legality of those regulations cannot be judged at this stage.

4. The points I make are in the order of the paragraphs of the Draft Guidance itself.

5. Paragraph 1.4 of the Draft Guidance explains that principles of the UNCRC guide how the rights of the child are protected. It says that "these principles are", and then lists Articles 2, 3, 6 and 12 UNCRC. However, and importantly, that list fails to include or recognise the obligations arising under Article 14 (rights and duties of parents) or Article 16 (prohibition on interference with privacy and home).

6. Paragraph 2.19 correctly notes the established legal position that local authorities may make enquiries of parents as part of discharging their legal obligations. However, paragraph 2.23 says that "Where a child has been de-registered, the local authority should meet with the family as soon as possible to determine the reasons for home education [my underlining]." That sentence goes too far in suggesting that such a meeting is mandatory (either for the local authority and/or the family), and in implying that there is some obligation on parents to give a reason for de-registering their child with a view to home education. In particular, the power to ask, does not require local authorities to ask, let alone require parents to answer.

7. While local authorities can request meetings and explanations, they cannot lawfully demand them. As drafted, the sentence gets the law wrong.

8. Similarly, in paragraph 2.31, the Draft Guidance says that "Where they can identify early signs of an intention to de-register, local authorities should contact parents to discuss their reasons." In implying an obligation on parents to respond to such requests, the guidance goes too far and gets the law wrong.

9. Paragraph 4.21 says that "In order for a local authority to satisfy itself of the suitability of education provided by the parents, the local authority **should** see and speak with the child." The word "should" is in bold in the text, and has a footnote which explains that a local authority would need a good reason not to comply with the guidance (and that refusal to comply by a family does not provide a good reason). That goes too far in suggesting that children/parents are under some sort of obligation to meet with the local authority – they are not.

10. The text also risks being read by local authorities as suggesting that they can (or indeed should) insist on seeing a child without its parents. There is no lawful basis for a local authority to behave that way simply because a child is being home educated. That must be made clear in the Guidance which currently gets the law wrong.

11. Paragraph 4.22 touches on that issue again in saying that "There may be occasions it is not in the best interests of the child for the local authority to meet with them, or in exceptional circumstances, the local authority can conclude without seeing the child they are receiving a suitable education." Two points arise: first of all the question of whether the child sees the local authority in relation to just the question of home education is entirely a matter for the child's parents and (for an older child) the child. This is not a question of "best interests", and it is entirely inappropriate for the Guidance to suggest that such a threshold or test applies.

12. Secondly, sections 436A and 437 Education Act 1996 require the local authority to reach a view on whether a child is not receiving suitable education. Unless there is positive evidence that the education is not suitable, then the local authority could not reach a rational and therefore lawful conclusion to that effect. There is certainly no proper basis to create a presumption that the education is not suitable unless the local authority has seen the child in question, let alone provide that the local authority should only "exceptionally" depart from such a conclusion. While the Welsh Government can provide guidance on how a local authority approaches its statutory obligations, it cannot distort or subvert those obligations in the way which this Draft Guidance would appear to do here.

13. Paragraph 4.24 refers to information provided by a child and to what use may be made of it. That too implies some form of entitlement on the part of local authorities to insist on seeing a child, or on the part of parents/children to agree to that. There are no such legal entitlements or obligations and the guidance gets the law wrong in suggesting the contrary.

14. The paragraph continues "If it is clear that a child does not wish to be educated at home although the education provision is satisfactory, the local authority should discuss the reasons for this with the parents and encourage them to consider whether home education is in the bests interests of the child when clearly it is not what the child wants." That is unlawful in suggesting some form of hierarchy or presumption in favour of education at schools and against home education, when the law (and Education Act 1996 section 7 in particular) is entirely agnostic as between the two: they are equal in the eyes of the law with the only issue for each being whether the education being provided is suitable.

15. That same sentence is also unlawful in implying that the local authority can insist on discussions with parents and/or children (or that the latter have to engage in such discussions); also in suggesting that the local authority has any role in questioning the parental choice to home educate in circumstances where that education is agreed suitable.

16. Those are clear interferences with, for example, Article 8 ECHR (right to respect for private and family life) which means that Article 14 ECHR (prohibition of discrimination) is engaged. That leads to the conclusion that there would be unlawful discrimination (contrary to Article 14 read in conjunction with Article 8) for a local authority to be taking the action in contemplation in that sentence of the guidance when it would not be doing the same for

other children – there is (I assume) no equivalent guidance suggesting that local authorities should ask children at school whether they would like to be educated in a different way and then challenging parents on that basis.

17. To ask about those things - and certainly to insist on answers from, and then to act on those answers - from parents and pupils involved would be incompatible with Convention rights under the Human Rights Act 1998, and so unlawful.

18. Overall, if the matters set out above are adopted in the final guidance following consultation, then that final guidance will mis-state or misunderstand the law and so be unlawful (and/or leads to illegality by local authorities acting in the light of it).

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