PROTECTING HOME EDUCATION WALES

THE CHILDREN ACT 2004 EDUCATION DATABASE (WALES) REGULATIONS 2020 (DRAFT)

BRIEF TO COUNSEL

This is a summary of the brief Protecting Home Education Wales sent to David Wolfe QC and his legal advice on The Children Act 2004 Education Database (Wales) Regulations 2020 (draft).

The questions raised by Protecting Home Education Wales in the brief to David Wolfe are in black below.

David Wolfe's responses are identified in purple.

1. The draft regulation does not specify what the purpose of legal basis for the database is (including the legal basis for the use of personal data); and it is not clear (it is not stated) what the local authorities can or have to do with such information. The regulations do not say how the data will be used. Regulation 9 is the only part of the regulations which refers to LAs functions but these functions are only referred to for the purpose of establishing who can add or read the information in the database. Does this raise data protection issues?

   Please consider whether the gathering of information for a non-specified purpose could be a breach of Data Protection law.

   "Whatever this regulation authorised would then be permitted within the Data Protection Act 2018 and the GDPR. But the regulations would still need to comply with the Human Rights Act 1998 (and its Article 8 in particular) so that becomes the focus of any legal challenge to the regulations.

   In broad terms, that means that the regulations must be justified and must be proportionate to the justification. In that regard, regulation 9 is drafted extremely widely. First off, it allows people employed in relation to the 9(2) functions to access the information, without then saying they can only use it for those functions. What happens if someone has one of those things as part of their job, but also does other things within the LA? On the face of the draft, they could then use the information for other purposes.

   Moreover, the regulation 9(2) is very widely cast, and notably so given that the regulations themselves don't say whether they relate to arrangements under section 25 or 28 of the 2004 Act or section 175 EA 2002 which, as you say, is a requisite for section 29(1) to apply. As you say, the justification given in the consultation document relates to identifying children not on a school roll and not receiving suitable education. The 9(2) list goes far beyond that. I think there is a good argument that the wider list is not and cannot be justified by the claimed purpose and so would be unlawfully wide."

2. S.29(1) states that the purposes of a database can only be arrangements under section 25 or 28 of the 2004 Act or under section 175 of the Education Act 2002, but the draft regulations does not say what the purpose of the database is. Please consider:

   "I agree that, as above, that is odd and potentially problematic including given that the consultation document makes no mention of any of those.

You should certainly push them to explain exactly which of the three and on exactly what basis and for exactly what purpose the database is being established.

And whatever the answer to that it is hard to see how they can sustain the wide formulation at regulation 9, as above."

3. The regulations do not say on what basis personal data will be shared. The consultation document does say that data will only be shared if there is a purpose, a legitimate aim such as ensuring a child's wellbeing, but this has not been included in the regulations.

   "I agree. As above, there is a good argument that the regulations are not compatible with Convention rights arising from Article 8 in that they allow for interferences which go well beyond what is even claimed as the justification."

4. Are the regulations in line with data protection (including GDPR) laws?

   "As above, the regulations, if themselves lawful, cover off the GDPR point. However to be lawful, they need (as above) to be within the powers under which they say they are made, and be compatible with Convention rights."

5. Are the regulations in line with human rights, in particular right to private and family life (art 8 ECHR) and the prohibition on interference with privacy and home (art 16 UNCRC)? There does not appear to be any justification for the regulations' interference on the right to privacy.

   a) As mentioned above, the regulations do not have an express purpose and I wonder whether this could show the lack of justification on the interference of the right to privacy and whether this could render the regulations unlawful.

      "I agree, as explained above."

   b) The consultation document does say that the government has considered any potential human rights issue but then it goes on to say that the regulations do not interfere with a parent's right to educate. I think this analysis is wrong and the government has missed the point and what they should have considered is the impact of the regulations in respect of the right to privacy (the regulations dealing mainly, if not only, with the sharing and use of personal data).

      "I agree. The consultation document says that the regulations are proportionate because they support a legitimate aim. But that gets the law wrong. There must be a legitimate aim and then the regulations must be proportionate to that aim (including in not going further than is necessary to achieve that aim). Assuming the aim relates to section 436A then the regulations should not go further than is necessary to achieve that aim. My view is that they go well beyond it, which means they are not proportionate and therefore would not be legal."

   c) The Children's Rights Impact Assessment (the **IA**) briefly touches on the interference on the right to privacy and the minister then says that "*she is of the view this is a reasonable and*

proportionate *step"* but she does not explain how she has formed such view. The IA has a section entitled "*Explain how the proposal is likely to impact on children's rights"* but it does not include an assessment on the impact on the right to privacy. Instead the IA appears to concentrate on the "benefits" of the regulation.

"As above."

6. Regulation 5 requires the local health board to disclose to <u>each</u> local authority [...]. Shouldn't this be limited to the local authority of the area of the residence of the child rather than all local authorities in Wales?

"I agree. That is another way in which they go beyond what appears to be justified."

Finally, [ ] about the archiving under regulation 8. The provisions for retaining data appear to me to go well beyond what could be justified. How, for example, might is be necessary to keep the data on a 22 year old in relation to issues around section 436A.