

CYPE(5)-31-19 – Paper to note 2

By email to: SeneddCYPE@assembly.wales

Dear committee members,

Ref: Draft guidance for elective home education

I am writing to ask that the committee consider the above referenced issue in full committee, on the following basis:

On 28th July 2019, the Minister for Education Kirsty Williams AM, published draft guidance and a consultation entitled: '*Home education: statutory guidance for local authorities and handbook for home educators*'. Clearly, if guidance is to be statutory it must accurately reflect the legislative basis upon which it is founded, yet this guidance fails in several ways.

Any consultation is required to follow the Gunning principles, which create duty to consult with home educating families and organisations, arising from the department's express promise made to do so, quite separately from any legal obligation to do so. Where such consultation is carried out it must be done fairly and following the 'Gunning principles' (*Initially set out in R v Brent London Borough Council, ex parte Gunning* [1985] 84 LGR 168):

- ***Consultation must take place when the proposal is at a formative stage. Public authorities must have an open mind during consultation and must not have already made the decision, but may have some ideas about the proposal.***
- ***Sufficient reasons must be put forward for the proposal so as to allow for intelligent consideration and response. Consultees must have enough information to be able to make an informed input to the process.***
- ***Adequate time must be given for consideration and response. The timing and environment of the consultation must be appropriate, sufficient time must be given for people to develop an informed opinion and then provide feedback, and sufficient time must be given for the results to be analysed.***
- ***The product of the consultation must be conscientiously taken into account.***

Notwithstanding, I have been advised from numerous sources that several sections of the proposed guidance were released to local authority staff in advance of

publication to other stakeholders. Furthermore, on 11th July 2019 Ms Williams wrote to Lynne Neagle AM to state that she had:

'previously stated (her) view that (she did) not believe it would be possible to make an informed judgement about whether a child is in receipt of suitable education without seeing the child. The draft statutory guidance reflects this view.'

By making this statement, Ms Williams confirmed that she had made a substantive decision about how home educating families can expect to be treated by their local authorities, at a formative stage and prior to proper consultation. This is procedurally unfair and consequently unlawful.

Ms Williams furthermore confirmed that: *'In developing the guidance (her) officials have engaged with a range of stakeholders to ensure it is as comprehensive and effective for local authorities as it can be prior to the consultation'* and *'The repercussions of not getting this right for local authorities and home educating families are too serious, and so we have been comprehensive in our engagement with local authorities and other stakeholders'*.

Home educating families and organisations, have a legitimate expectation that there would have been full consultation at a formative stage and before a decision, such as that contained in Ms Williams letter, was taken. This was not the case and 'comprehensive' engagement was had with local authorities prior to publication of the draft.

Ms Williams went on to state that:

'Consultation on the draft regulations regarding the database and the exchange of information between local health boards and independent schools to local authorities will take place separately. This is due to an extensive scoping exercise officials are undertaking with local authority, independent school and local health board representatives'.

'Rather than delay the consultation on the guidance to coincide with the regulations, which as I outlined above won't be ready till November, I consider it expedient to consult on the guidance later this month, as it will have a wider audience than the regulations, which are a technical matter and won't have as a direct impact on home educating families as the new guidance'.

This statement makes clear that home educating families are yet again expected to have no part in consultation at a formative stage, despite their right to expect such

consultation. That their input is dismissed on the basis of the issue being 'technical' is insulting of those families.

The primary point of data sharing, based on the indications in Ms Williams' letter, is that it would ride rough shod over home educating families' rights to have their data protected in accordance with the Data Protection Act 2018 and the GDPR. Data sharing without consent is a significant complaint made by home educating families to home education organisations and a matter which is considered by those families to be crucial to avoid, in order to maintaining their privacy. Again, this lack of consultation at a formative stage is procedurally unfair and therefore unlawful.

This issue was with Ms Williams, but dismissed out of hand by her and the consultation proceeded with. Please see Ms Williams' letter to Ms Neagle referred to above, attached.

Following publication of the draft guidance it was manifestly clear that several aspects of it were not only unduly draconian, but that they would breach the law if introduced. Consequently, formal legal advice was obtained by a charitable organisation 'Protecting Home Education Wales', from David Wolfe QC a well respected and eminent expert in education and public law. This advice supports the view held by home educating families and organisations, that the guidance as drafted would breach the law. A copy of that advice is attached for your convenience.

The primary areas of concern in respect of the guidance are that:

1. it suggests that meetings with families and/or the child are mandatory (either for the local authority and/or the family);
2. it suggests that seeing the child is mandatory (either for the local authority and/or the parents/child to agree to that);
3. it states that only in exceptional circumstances the local authority can conclude without seeing the child that it is receiving a suitable education;
4. it implies that local authorities can/ should insist on seeing a child without its parents;
5. it implies that there is some obligation on parents to give a reason for de-registering their child with a view to home education;

6. it implies that the local authority can insist on discussions with parents and/or children as to their decision to home educate;
7. it suggests that the local authority has any role in questioning the parental choice to home educate in circumstances where that education is suitable.
8. it suggests some form of hierarchy or presumption in favour of education at schools and against education otherwise than at school.
9. It provides for mandatory referral to the local authority, of any home educated child, by NHS staff.

As part of the consultation process a company was contracted to provide three consultation meetings which stakeholders could attend to provide their views. Numerous attendees have reported back from those meetings that they were specifically told that the issues relating to legal requirements may not be discussed. When questioned, the organisers advised attendees that the Minister had instructed that no part of the guidance relating to legal requirements would be amended following consultation and that no time would be given to discussion of same. This is not only a flagrant breach of the requirements of the Gunning principles, but also indicates a rigid refusal on the part of the Minister to consider the guidance in the light of expert legal advice.

There is very strong feeling amongst home educating families that this consultation has been conducted at least in part, as a sham. Those families have been moved to petition to have the guidance reviewed in the light of senior counsel's advice, which petition has gained in excess of 5,400 signatures.

In addition, it has come to my attention that, allegedly, local authorities are contacting home educating families and purporting to apply the current draft guidance, which is not only purely a proposal, not extant and David Wolfe QC confirmed to 'Protecting Home Education Wales' to be unlawful. Furthermore, he has confirmed that such guidance in draft form cannot be applied.

I do not believe that the committee, nor indeed the Welsh Assembly should stand idle whilst:

- there is a high risk that an unlawful draft guidance could be signed off by the Welsh Government;
- the fairness of the consultation process is in question; and

- the (alleged) unlawful activities are undertaken by Local Authorities, under the umbrella of the Welsh Government.

A full and thorough investigation should be carried out.

I am advised by Mark Isherwood AM that he raised this issue in the chamber and was instructed that the consultation had ended (which it had not as it was extended until 25 October) and that he should address his concerns to the Minister. Mr Isherwood has a significant understanding of this issue, having supported families who have been subject to inappropriate conduct by local authority staff, purely on the basis of their child being home educated. Mr Isherwood advised that I write directly to you to ask that you consider this serious and worrying issue in committee. I ask that you do so.

Both 'Protecting Home Education Wales' representative and I would very much appreciate an opportunity to give evidence to the committee in respect of this issue and ask that an opportunity be provided for us to do so.

Yours Faithfully



Wendy Charles-Warner
Trustee and Welsh Liaison for Education Otherwise