

Education Otherwise Response to the Consultation on Guidance for “suitable education”

Introduction to Education Otherwise

Education Otherwise was established over 30 years ago. We are a charity with over 4,000 member families. We provide information and support to families who are home educating or who are considering home education. We publish a newsletter which is sent to members every two months and we co-ordinate several busy internet support lists and a members' forum. We run a nation-wide telephone Helpline Service which is currently receiving professional training from the Telephone Helpline Association. We have a hundred local contacts throughout the country who are the first port of call for new home educators. Education Otherwise also runs regional workshops for home educators.

Education Otherwise participates in Government consultations and attend consultation events with various Government Departments including DCSF, DIUS, DWP, DoH and BERR.

<http://www.education-otherwise.org/index.htm>

<http://www.education-otherwise.org/pconsultations.htm>

<http://www.education-otherwise.org/meetings.htm>

Position Statement from Education Otherwise

Draft Guidance is fundamentally flawed with respect to “suitable education”

Education Otherwise believes that the draft revised guidance is fundamentally flawed because it rests on a misunderstanding about the law.

Section 436A of the 1996 Education Act is headed **“Duty to make arrangements to identify children not receiving education”**.

It is not headed “duty to identify children not receiving a suitable education.”

There is no legal duty to “identify children not receiving a suitable education.”

Impossibility of limiting a “duty to identify children not receiving a suitable education” to children outside school

There could never be a “duty to identify children not receiving a suitable education” because the duty would apply equally to children in school as to children out of school and it would require primary legislation to be radically re-framed. This was categorically rejected by the Law Lords during the final debates in the Lords on the Bill which gave us the “children missing education” duty in 2006. We give more information about this in our paragraph entitled **Law Lords verdict on “the child's right to education”** and we are also enclosing the full text of the letter sent by Lord Adonis to Lord Judd in October 2006.

Education by regular attendance at school or otherwise

The majority of children and young people in this country are registered pupils at maintained schools and attend those schools regularly. A minority of children are home educated. Some children are registered pupils at a school but do not always attend school regularly. Some children have been in school the previous year but do not turn up at the start of the new school year. Some children are registered with other forms of alternative provision which they may attend more or less regularly. Some children are educated in the private sector.

Parents' duty

The law says that it is a parent's duty to cause the child to receive education either by regular attendance at school or otherwise. Education is defined as efficient full time education suitable to age aptitude ability and special educational needs.

Home education is personalised education

Home education is suitable to the child's age ability aptitude and special needs. It is not one-size-fits-all. The education which is suitable for one child will not be suitable for another. It may bear little resemblance to the education given to children in schools.

An overwhelming reason for the draft guidance to be drastically amended, apart from the reason that it is legally inaccurate, is that in placing the emphasis on the word "suitable" it risks the local authority intervening wrongly in cases where education at home looks nothing like education at school.

Education at home is the responsibility of the parent. Parents who remove their children from school in order to educate them at home have to follow the correct de-registration procedures and if the school acts in accordance with the law [Pupil Registration Regulations England 2006] these children will not simply disappear off the radar.

Celebrating diversity

An article was published in the Independent recently entitled **Big Sky Thinking: Why home schooling must be saved from the bureaucrats**

Two home educated young teenagers were profiled. At sixteen Louis is now a successful entrepreneur and Alex is a student at Oxford who won a place to read law. Neither has GCSEs.

"It is clear that Louis has turned his life around since the days when he believed he was "stupid" in school. However, what is unclear is whether spending so much time cooking would be deemed a "suitable" education under revised guidelines to local authorities being issued by the Department for Children, Schools and Families."

"University is a shock to everyone, but being home educated probably helped me settle in more quickly than some people, who felt uncomfortable initially with the change from more directed learning," he [Alex] says. "Every week we attend a tutorial. At the end, we are given a list of 20 books to read for the next week, which you have to get on with. It's great, like home education but with tutorials."

The choice between a duty to locate children or a duty to assess provision

As our barrister pointed out at the meeting with the Department, there is a straightforward choice about the reading of the duty in **section 4 of the Education and Inspection Act** : namely is it a duty to locate children or to assess provision. We were told repeatedly at the meeting that the duty was to locate children and that if children could not be located then they were “missing education” or “potentially missing education” or “at risk of missing education.” Therefore the “duty to make arrangements to identify children not receiving education” concerns the whereabouts of the child. We say more about this in our section entitled **Barrister Ian Dowty asks: duty to locate or duty to assess?**

Clear guidance: three options

Guidance on this duty needs to be clear and unequivocal. We suggest there are three options.

Option One: the 2007 Guidance is retained without alteration and the draft guidance is abandoned.
Option Two: the 2007 Guidance is retained with a few significant updates such as the 2007 Elective Home Education Guidelines (enclosed)
Option Three: The draft 2008 Guidance is edited and amended along the lines we have suggested, removing all references to “suitable” and including clear links to relevant legislation and guidance.

Background to the experience of implementing the “children missing education” duty

The legislation on which this guidance is based became law at the end of 2006. DfES had been running regional workshops on “children missing education” based on earlier draft guidance for several years previously. There was a 3 month public consultation before the current guidance was published in February 2007. By the end of 2007 Education Otherwise became aware that on the ground many local authorities were still adhering to pre 2007 guidance and were not following the newly published statutory guidance.

Constant change of personnel

We asked for a meeting with the policy lead on Children Missing Education and the Elective Home Education Team to try and sort this out. The meeting finally took place on April 1st 2008 and we received assurances at the meeting that the Department would promote the 2007 guidance more widely and draw attention to the fact that it was statutory. Two of the three DCSF representatives at the meeting, Denise Hunter and Sharon Pitchford subsequently moved to different posts and we learned at the beginning of the consultation process that there was no longer a policy lead on Children Missing Education.

In August 2008 the revised draft guidance was published for consultation 18 months after publication of the first guidance.

No link between home education and forced marriage

At the meeting with the DCSF in August we were told that the **Home Affairs Select Committee** had called for the guidance to **section 4 of the Education and Inspection Act 2006** (“Children Missing Education”) to be revised because of fears expressed in some quarters that home educated

young people might be at risk of forced marriage. We have undertaken exhaustive research in this area with various Government Departments and we have submitted our findings separately to the Consultation Unit. We are able to state conclusively that there is no evidence of any link between home education and forced marriage. Furthermore we understand that there is legislation on forced marriage which has not yet been implemented and that there has been a consultation regarding guidance on forced marriage, the results of which are not yet published.

The Draft Revised “Suitable Education” Guidance versus the 2007 Home Education Guidelines

DCSF Home Education Guidelines for Local Authorities

DCSF Guidelines on Home Education for Local Authorities were published in November 2007 following a public consultation exercise which received almost 900 consultation submissions. (At the time of writing we are aware that the current “suitable education “ consultation has already exceeded this number.)

<http://www.dcsf.gov.uk/localauthorities/documents/content/7373-DCSF-Elective%20Home%20Education.pdf>

The Education Otherwise submission to the Home Education Guidelines consultation may be found here <http://www.education-otherwise.org/Legal/Consultations/HomeEducationGuidelines.pdf>

Innovative practice /moving to advisory/information and resource-based support role

Education Otherwise recommended that the Home Education Guidelines should be issued together with “Advice to Practitioners”, along the same model as Working Together to Safeguard Children DfES 2006. The Advice to Practitioners has still not been published.

“Education Otherwise recommends that the Department consider a number of innovative pilot projects aimed at promoting positive working partnerships across a range of urban, suburban, rural and metropolitan borough areas. The authority’s role in these pilot schemes will evolve from a one-to-one inspection and monitoring role, which is neither cost-effective nor equitable, and move towards an advisory, information, and resource-based support role.

Local authority duties could better be interpreted as providing an advice and support service for example a fulltime Telephone Helpline service ; establishment of informative council website pages on Elective Home Education resources ; liaising and mediating where appropriate with other children 's service departments, the extended curriculum team and extended schools provision for the wider community; fostering links between the home education community and the Further Education sector; ensuring that the home education community is included in circulars on wider community provision for children and young people

Education Otherwise believes that it is only through engagement with the local community that the authorities will discover the most cost-effective way to meet their responsibilities. Local authorities already have a duty to consult stakeholders and in the cases we outline in the Appendix the authorities have welcomed an initial approach from the local home education community to engage on a collective basis and at a policy level. “

The published Guidelines on Home Education

DCSF Guidelines recommend that local authorities should give clear legal information about home education on their websites and that local authorities should consult with local home education groups and with national support organisations. **The Home Education Guidelines** also affirm that there were many equally valid approaches to education and set out the family's rights under the **European Convention on Human Rights**.

Article 2 of Protocol 1 to the European Convention on Human Rights states that:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.”

The Home Education Guidelines set out how the duties in the **2002 Education Act (s.175)** and the duties in the **2004 Children Act (s.10, 11, 12, 53)** apply to home educated children. The Guidelines were published after the new “children missing education” duty became law and were therefore able to explain to some degree the interaction between **section 436A** and **section 437** of the **1996 Education Act**.

S436A of the 1996 Education Act states

http://www.opsi.gov.uk/Acts/acts2006/ukpga_20060040_en_2#pt1-11g4

“436A Duty to make arrangements to identify children not receiving education

(1) A local education authority must make arrangements to enable them to establish (so far as it is possible to do so) the identities of children in their area who are of compulsory school age but —

- (a) are not registered pupils at a school, and
- (b) are not receiving suitable education otherwise than at a school.

(2) In exercising their functions under this section a local education authority must have regard to any guidance given from time to time by the Secretary of State.

(3) In this Chapter, “suitable education”, in relation to a child, means efficient full-time education suitable to his age, ability and aptitude and to any special educational needs he may have.””

Section 436A sets out the duty to make arrangements to identify children not receiving education. **Section 437** sets out the procedure to be followed if it appears to the authority that any child is not receiving education. **The Home Education Guidelines** explain what this means for home educating families.

“3.16 If a local authority considers that a suitable education is not being provided, then a full written report of the findings should be made and copied to the parents promptly specifying the grounds for concern and any reasons for concluding that provision is unsuitable. If the authority is not satisfied that a suitable education is being provided, and the parents, having been given a reasonable opportunity to address the identified concerns

and report back to the authority have not done so, the authority should consider sending a formal notice to the parents under section 437 (see paragraph 2.7) before moving on, if needed, to the issuing of a school attendance order (section 437(1)). See paragraphs 2.9 – 2.11.” p.12

“2.9 Section 437(3) refers to the serving of school attendance orders:

“If –

(a) a parent on whom a notice has been served under subsection (1) fails to satisfy the local education authority, within the period specified in the notice, that the child is receiving suitable education, and

(b) in the opinion of the authority it is expedient that the child should attend school, the authority shall serve on the parent an order (referred to in this Act as a “school attendance order”), in such form as may be prescribed, requiring him to cause the child to become a registered pupil at a school named in the order.”

2.10 A school attendance order should be served after all reasonable steps have been taken to try to resolve the situation. At any stage following the issue of the Order, parents may present evidence to the local authority that they are now providing an appropriate education and apply to have the Order revoked. If the local authority refuses to revoke the Order, parent can choose to refer the matter to the Secretary of State. If the local authority prosecutes the parents for not complying with the Order, then it will be for a court to decide whether or not the education being provided is suitable and efficient. The court can revoke the Order if it is satisfied that the parent is fulfilling his or her duty. It can also revoke the Order where it imposes an education supervision order. Detailed information about school attendance orders is contained in Ensuring Regular School Attendance paragraphs 6 to 16.4

2.11 Where the authority imposes a time limit⁵, every effort should be made to make sure that both the parents and the named senior officer with responsibility for elective home education in the local authority are available throughout this period. In particular the Department recommends that the time limit does not expire during or near to school holidays when there may be no appropriate point of contact for parents within the local authority. “ p.6-7

<http://www.dcsf.gov.uk/localauthorities/documents/content/7373-DCSF-Elective%20Home%20Education.pdf>

Some local authorities believe they are responsible for ensuring that every child receives suitable education

Copies of all the responses to the **Home Education Guidelines** consultation were received via requests made under the **Freedom of Information Act 2000**. We are therefore aware some local authority personnel are confused by the new duties around “children missing education” and believe erroneously that the ultimate responsibility for ensuring every aspect of every child's education lies with the local authority rather than with the parent.

Local authorities fear being sued and call for “more powers”

Some local authorities tell us that since they are responsible for the child's education, they fear that the child will later be able to sue the local authority for failing the child. The local authority's understandable but misguided reaction is to call for “more powers.” Of course the authority is not responsible for the child's education.

Parents are responsible

However, as our barrister has pointed out, the first premise is false. The law says that parents are responsible, not the state.

“Duty of parents to secure education of children of compulsory school age

The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—

(a) to his age, ability and aptitude, and

(b) to any special educational needs he may have, either by regular attendance at school or otherwise.”

Section 7 1996 Education Act

http://www.opsi.gov.uk/ACTS/acts1996/ukpga_19960056_en_2#pt1-ch1-pb3-11g7

We assume that the Department does not wish to issue guidance which recommends that local authorities should assume greater responsibility, since with the assumption of responsibility comes greater exposure to liability. At the meeting with the Department in August, our barrister cited the Phelps case. More information can be found in the section entitled **Barrister Ian Dowty : duty to locate or duty to assess ?**

Law Lords verdict on “the child's right to education”

We have enclosed as part of our consultation submission a letter from **Lord Adonis** to **Lord Judd** when the latter requested that the **Education and Inspection Bill** then at its final stages in the Lords should be framed to emphasise “the child's right to education” rather than the duty of the parent to provide education.

The Law Lords had a number of relatively complex reasons why this had to be rejected, which essentially boiled down to pointing out that a child's rights bring obligations for the state rather than for the parent and that a child's “right to education” could lead to a situation where the family would have legal redress in a claim for separatist education which the state was unwilling or unable to provide. Additionally, the child's “right to education” could become very awkward legally if for example the child demanded state education when the parent had opted for home education or independent education. Moreover this is an area which could become extremely difficult for local and national government as children would take on the authorities and demand their rights and could also sue the authority if the poor quality of state schools denied them their educational rights.

Barrister Ian Dowty asks: duty to locate or duty to assess ?

What follows is a series of comments made by **barrister Ian Dowty** to DCSF during the meeting at the end of August. The comments are taken from Education Otherwise notes of the meeting which were agreed by those present.

“Ian asked: is it a duty to LOCATE or to ASSESS. If a duty to LOCATE, then once located all that is needed is to state that reference should be had to EHE guidelines for further instruction about how to proceed in dealings with home educated child and family. You would assess quality as per EHE guidelines and then as per EHE guidelines you would follow s437 procedure if quality defective.”

“Ian said there's qualitative element in the consideration of “suitable”. Home educators objected to “suitable” and also to categorising home educators as vulnerable or at risk group. Ian said this would be fertile ground for LA antipathetic to home education. Ian said the principal problem is that too many of those in LAs who are involved in home education apply their own model of education instead of finding out what the parents’ model is. Before the efficiency of education provision can be assessed, it is necessary to understand and apply the parents' religious and philosophical beliefs (provided these are cogent and worthy of respect); the parents’ value system and educational philosophy should be used to assess efficiency. “

“Ian said the logic of the revised draft guidance is that everyone has to be assessed which construction places s436A in conflict with s437. The latter only requires an assessment of suitability if there is an appearance of no suitable education which does not require every case to be fully assessed. To illustrate how s437 should work, Ian gave example of clock. If you know that it is about 3pm and that is what the clock says, you don't need to have a close look at the workings to see if it is working properly, you just accept that it is three o'clock. “

DCSF said again no it's about location not about assessment.

“Ian pointed out that s437 was framed in the negative and that the interpretation being placed on the duty under s436A conflicted with this. He asked again what was the aim of s436A, was it to locate or was it to assess.”

Again it was affirmed that the sole intention was to locate not to assess the quality of education.

“Ian made important point about how LA has increased liability if it behaves as if it accepts responsibility for the outcomes for home educated children. He said that when he trains LA or takes on a court case he always points this out. DCSF interested in this and asked for it to be included in our written submission, so that the legal department could consider it.

Vicarious Liability of local authority: Phelps case

Ian cited PHELPS CASE vicarious liability of LEA. Child could sue LA if LA took on additional role and responsibility and did so negligently. <http://tinyurl.com/3c4dl>

“Does the legislation itself create an enforceable claim in damages or does a common law duty of care exist in addition to any statutory duties which the Local Authority may have? That in itself, as has been seen from X Minors, is largely a question of whether a common law duty of care would be inconsistent with the due performance of the other duty.

It is clear on principle that where a professional person gives advice, knowing, or being taken to know, that another will rely on that advice in deciding how to manage his affairs,

the adviser may owe a duty of care to that other person.

In the field of educational matters there may well exist distinct but respectable opinions upon matters of method and practice, and it may be difficult to substantiate a case of fault against the background of a variety of professional practices.

Paragraph 1.2.7 of the draft revised guidance is incorrect in terms of sections 7, 436A and 437 of the 1996 Education Act

“Ian queried paragraph 1.2.7 p.5 of the draft revised CME guidance (see below) with Denise [Hunter. Left post the week after the meeting] who said the wording had been agreed with the legal team and that lawyers would consider home educators’ concerns as part of the consultation process.

1.2.7 “Local authorities have a duty to make arrangements to enable them to establish whether a child who is being educated at home (under section 7 of the Education Act 1997) is not receiving suitable education.”

<http://tinyurl.com/5seuqv> “

“Ian outlined what SHOULD happen when information is received that a child is being home educated. Denise [Hunter. Left post the week after the meeting] explained that the wording in the EHE guidelines reflected the original statutory guidance on CME. She added that although there were no plans to update the EHE guidelines, the outcome of the current consultation will be considered. “

“Ian said very difficult to see how s436A fitted with s437 of the 1996 Act but we had to use the words in actual legislation. Not in the least helpful to MERGE as the new CME statutory guidance appeared to be trying to do. “

“Ian said this will change EHE (Elective Home Education) via CME (Children Missing Education) . Ian said the difficulty with home education law is that **s436A** actually doesn't sit properly with **s437 [1996 Education Act]** but that the aim of any statutory guidance should surely be to make things clearer and not less clear. “

Home educated children are not at risk of being at risk

“Ian made a point about unified authorities. The person with responsibility for home education might have no background in education let alone home education. May not be a local authority employee. May or may not be from social services background. This was a particular issue in cases where there were Special Educational Needs. Ian's firm has represented families where the LA has applied for children to go on At Risk register. Home educators often report that Social Services have concerns about home education per se even when, and in some cases, despite the fact that, the LEA has no such concern. “