

Consultation Briefing 03/06/19

About HEdNI

This briefing has been prepared on behalf of Home Education Northern Ireland (HEdNI). HEdNI is an active community network for home educating families, providing peer to peer support and a forum for organising group social and educational activities. HEdNI is an inclusive group, welcoming those of all backgrounds, religious beliefs, races and cultures. We do not promote any one method of home-educating; rather we support the right of all families to choose for themselves what suits them best. All documents published by members on behalf of HEdNI are circulated widely for comment, and we attempt to reach consensus – however HEdNI never claims to represent the views of all its members or to speak for all home educators.

In brief

- HEdNI **supports** the adoption of these Guidelines.
- The process at the heart of the guidelines is clear and legally accurate. This is the single most important factor for home educating families because it will empower them to insist on fair treatment.
- A fair and legally grounded process will protect children's rights and their access to a suitable education
- Some areas remain a concern – in particular the implied permission to misuse elements of International Law and a lack of clarity on the place of home education within the SEN Framework.

The Consultation - background

The Education Authority (EA) has opened a [consultation](#) on proposed Guidelines on Elective Home Education, all documents can be found on their website (linked). The Guidelines have been formulated by a Working Group attended by a member of HEdNI, and we support the adoption of these Guidelines.

The Working Group was formed at the close of a deeply controversial consultation in 2014, and we feel that significant steps forward have been taken since that time. Though we are not happy with every aspect of the Draft Guidelines we feel strongly that the good outweighs the bad, and that the best of it is in the most important sections.

These Guidelines are essentially an internal document for the guidance of Education Authority staff in dealing with their duties regarding Elective Home Education. They cannot place duties on home educating parents, or anyone else not employed by the EA. However, home educating families are directly impacted by the way that these guidelines inform the way that they are treated by EA officials.

The Law

Home education is a legal option in Northern Ireland equal to school; parents hold the duty to educate and can decide how to meet that duty. School is only one possible option.

Education and Libraries Northern Ireland Order 1986 SI 1986/594 - Section 45

1. The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable to his age, ability and aptitude and to any special educational needs he may have, either by regular attendance at school or otherwise.

Education is the responsibility of the parent. The majority of families choose to meet their legal obligation by having their children attend a state school, but other forms of provision are available and permissible.

The EA is not mentioned in Section 45 and has no duty to 'ensure' an education, or to do anything to provide one unless the parent registers their child with a school. The following legislation is used if it appears that a parent is not fulfilling his or her obligations:

Schedule 13, Part 1

1(1) If it appears to a board that a parent of a child of compulsory school age in its area is failing to perform the duty imposed on him by article 45(1), the board shall serve on the parent a notice requiring him, within such period not being less than fourteen days from the service of the notice, to satisfy the board that the child is, by regular attendance or otherwise, receiving efficient full-time education suitable to his age ability and aptitude, and any special educational needs he may have

The duty of the EA is purely **reactive**; unless there is an appearance of failure there is no duty imposed, no power to act. Routine state intervention in basic parenting decisions is not in the best interests of any child. Parents are in almost all cases the best and only suitable judge of the best interests of their child. They hold the duty to educate and therefore the power to make decisions about that education. The EA has no role in those decisions, other than in exceptional circumstances.

The law does not require parents to:

- Register with the EA
- Justify or explain their decision (in particular to the school at the point of deregistration)
- Meet with EA staff or invite them into their homes
- Allow EA staff to inspect their homes or interview their children
- Provide work samples, follow a curriculum, demonstrate progress, mark work, pursue academic qualifications
- Make the provision specified in a Statement of Special Educational Needs

Parents should:

- Deregister in writing to the school (if applicable)
- Provide an education which is efficient, full time and suitable to the child's age, ability, aptitude and SEN
- Respond to specific concerns which have come to the attention of the EA, in the format they find most appropriate

It is also established in case law that parents would be 'sensible' to respond to general enquiries (without a specific stated concern), though they are legally entitled to refuse to do so.

The good

Historically many home educating families have not felt able to trust EA officials. This is because many families have experienced staff with a lack of knowledge about home education, or worse have been faced with the misunderstanding or apparently deliberate misrepresentation of the law. This has sadly been particularly the case for families with children who have special educational needs.

Therefore the single most important question for home educating families regarding these guidelines is this:

“Will families be able to use these guidelines to support them in insisting on fair treatment?”

We believe that they will.

The process as described in the draft for contacting families is clear and legally accurate. The EA official is supported in meeting their duties, which are clearly stated, while good practice is put in place to keep families informed of what is happening and to help them understand what is required of them.

This process, properly implemented, will protect the rights of children and their access to a suitable education.

Special Educational Needs

This clarity will have particular benefits for families whose children have SEN. These have tended to suffer the most from poor practice and the lack of legal clarity, and because they need services from the EA they have been unable to insist on fair treatment. This has had a direct and sometimes catastrophic effect on the wellbeing of vulnerable children.

In particular it is very welcome that the Draft Guidance makes it clear that the duties of the parents and EA regarding home education are exactly the same whether or not the child has SEN, and that deregistration from a Special School is the same as from any other.

The bad

There are aspects of the Guidelines which HEdNI feel undermine the clarity and accuracy of the Draft Guidelines, and the promotion of good practice. This threatens the ability of the home educating parent to provide a suitable education and undermines the child's right to an education.

Children's Rights

It may not be immediately clear why we object to the many mentions of Children's Rights sprinkled throughout the Draft. Most home educators would say that they are actively and passionately engaged in promoting and protecting their children's rights, and specifically their right to an education. Most parents would enthusiastically endorse the many aspirations of the International Treaties, and yet have strong and valid objections to their inclusion in this draft.

The best way to promote a child's right to an education in most circumstances is to empower those who are best placed to know what the child needs and to deliver it – the parents. Misusing these treaties in this way may actively undermine the ability of parents to provide a suitable education. It has the potential to impede the child's access to the rights which it intends to promote.

1. They are legally irrelevant in the context of this guidance.

International Treaties only place obligations on States, they cannot place obligations on individual citizens. This guidance is all about how individual citizens should be treated by the EA, and therefore it is essential that the duties of individual citizens and members of EA staff are clearly understood. The UNCRC and ECHR are not directly relevant to understanding the exercise of these duties, and to imply that they are would tend to muddy the water.

UK statute is created and interpreted by the Courts in the light of International Treaty obligations. The role of the EA, and specifically the staff who will use this guidance, is not to add their own interpretation but to correctly apply domestic law.

Simply dropping quotes from the treaties without sufficient context does not promote children's rights, and indeed may undermine them. Without clear guidance EA staff may be positively encouraged to measure families against their own idiosyncratic idea of what constitutes (for example) an empowering education.

The Draft Guidance should be amended to make the legal context and application of the UNCRC and ECHR clear, or references which could be misunderstood should be removed. The duty of the EA to promote the rights enshrined in the UNCRC and ECHR is met by their scrupulous application and understanding of domestic law.

2. Their inclusion implies that they have a legal effect on families

Including these aspirations might make people forget #1 if it isn't made very clear at every mention that these are not obligations on home educating families.

This internal document will dictate the way that families are treated by EA staff. Though it cannot dictate the duties of parents it should be clear on what they are.

Many families have experience of EA officials attempting to assess home education against whatever the official personally feels is important: progress, closeness to the national curriculum, time spent on certain subjects... When the only legal requirements are that the education should be 'efficient', 'full time' and 'suitable to his or her age, ability, aptitude and any special educational needs they may have'.

To include a list of aspirations with an impressive International Law pedigree, is to imply that they are markers against which the EA can measure an education in this country. This encourages officials, who may be unclear on the law, to measure a family's provision against irrelevant and ill-defined standards (for example that education should be 'empowering') and this will have a direct effect on the wellbeing of home educated children. This leads us to the third point...

3. These aspirations have not been defined.

Parent's obligations under domestic law have been through the Courts many times and have been the subject of much debate and discussion. It is clear what 'suitable' 'efficient' and so on mean, at least relatively speaking. Terms like 'empowering' are not defined in case law (because they don't need to be, not being legal requirements). So there is the potential for families to be placed once again in the hands of officials with little understanding of home education, and far too much power of interpretation. It is not appropriate for an official to evaluate how 'empowering' a child's education is, for example – however much both the official and the family feel that empowerment is desirable.

So...

If the references to International Law cannot be removed or contextualised then it will be very important for the training that EA officials receive to make their application clear. HEdNI will produce information on this for parents and EA staff on this matter if necessary once the Guidelines pass into practice.

Special Educational Needs.

While the clarity of the process section will have considerable benefit for children with SEN, there is much to dislike in the SEN specific section of the Draft Guidance.

There is no possible way that a paragraph in general Guidance can give adequate information on the interpretation of the SEN Framework in the context of Elective Home Education. It will be essential for SEN EHE specific Guidance to be drafted – this is a legally complex and highly sensitive area. Families with children who have SEN have always been the most likely to suffer from overreaching by EA officials, and very little of the SEN Framework has been drafted with any thought of environments other than school. Sensitive and intelligent interpretation of applicable law will be necessary to avoid discrimination and harm to vulnerable children.

In particular the Draft Guidance references the implementation of the Special Educational Needs and Disability (N.I.) Act 2016 which calls for ‘the voice of the child’ to be heard, this is a reference to Children’s Rights in International Law which is discussed above. Many parents are concerned that their SEN children will be required to meet strangers and express an opinion, this could be very harmful. This Act was not drafted with home education in mind and assumes a school environment. It will be essential to develop specific guidance for SEN in EHE in the context of this act and in consultation and cooperation with those affected.

A note on the Easy Read Guidelines

These are wholly inadequate. It is very important that people with language or literacy issues are able to fully understand the process which they will go through if there are concerns about the education which is being provided. We do not believe that the Easy Read Guidelines will provide that clarity, or empower families to insist on fair and legal treatment.

Other concerns

“Effective Education”

The introduction to the Draft Guidelines cites an ‘effective education’ as a requirement deriving from EU case law. No such case law appears to exist, nor does any EU circular or guidance make this a requirement. The Belgian Linguistics Case¹ and the Guide to Article 2, Protocol 1 both make it clear that it is the **right** to an education which must be effective, not the education itself, and that the State is required not to impede the exercise of that right. No parent (indeed no school either) should be measured against ‘effectiveness’ on the basis of EU law. The Guidance should be modified to accurately represent the duty and to instead say that –

“EU case law makes it clear that States must do nothing to impede the effectiveness of the right to an education”.

In any case, as noted above, even if this *were* a requirement on States, it would not be a requirement on families.

The guidance directly addresses parents at several points.

This is a more minor point, but it has an important effect on the tone and possibly on practice. The EA is not able to instruct parents, we are not employees. Guidance may be issued to employees of the EA, and it should be available to the public to allow them to understand how they should be treated and to hold the EA to account. The tendency of the old Boards to treat parents as wayward employees was a serious threat to the wellbeing of children, and this Guidance should seek to avoid any suggestion that this could be acceptable. Those parts of the guidance which directly address parents (for example the ‘considerations before deregistering’) should be reworded to address EA employees.

Support, access to school facilities and exam access.

The EA is not legally required to provide any of these. It is far from clear what support will be available (especially from schools at the point of deregistration) and what the school considers to be ‘support’ may well not be welcomed

¹ [https://hudoc.echr.coe.int/eng#{"fulltext":\["belgian linguistics"\],"itemid":\["001-55398"\]}](https://hudoc.echr.coe.int/eng#{)

by the parent. The bar for access to school facilities is set so high as to make it useless and it would be better left out – or worded as a general encouragement to schools to consider community engagement. The information on exams is vague and non-specific – again it would be more useful as a general encouragement to schools to consider accepting external candidates.

Information and support to schools in opening up facilities and exam access would be welcomed by many families, but the EA has no legal duty to do this and must work within budgetary constraints.

Consultation documents - Part 4 - the question on registration

The inclusion of this question is a serious concern. It is likely that many professionals responding to the consultation, and most new home educators will reflexively support a register, with little idea of the implications or the legal context.

We object in the strongest possible terms to any form of register. Home education is not a problem to be monitored or solved, we are not a danger, we are not exercising a privilege but rather meeting a legal duty. In brief the objections are:

1. Registration in this country exists for those who are dangerous (sex offenders), in danger (child protection) or exercising a privilege (drivers). Home education falls into none of those categories.
2. Registration, even the lightest touch version, will involve the processing and storage of the most highly sensitive information.
3. This information may be used without consent. It is known that information on school children has been shared, lost or unlawfully used.
4. Voluntary registration is unlikely to offer any benefit to families, it may open them up to unwanted intervention and it may be treated as suspicious if a family does not wish to register.
5. Voluntary registration has no legal basis. No legal safeguards for parents or children. No redress or remedies for misuse.
6. Procedural issues – would one be able to remove oneself from the voluntary register?
7. Mandatory registration is impossible under current law. No penalties against parents can be created without legislation.
8. Procedural questions - by what process would a family join the register, would they need to apply? Could their registration be refused? What appeal process would be available? Would it be possible to home educate if registration was refused?
9. What control would families have over the data held on them? GDPR issues.
10. Registration in itself has no protective function against families failing to meet their legal duties. Indeed the administrative overheads are more likely to increase the size of the haystack than to help identify the needle.
11. Registration is unpopular, ineffective, unlawful.

Conclusion

We support the adoption of this Draft Guidance because the core of it is clear and accurate. If properly implemented it will provide the basis for a better relationship between the EA and home educating families. This will promote the well-being and education of home educated children and allow for the development of a more supportive relationship *if* parents require it. Those elements which we consider problematic are a real concern but we believe that if they cannot be amended or removed, then they can be overcome with good training for EA staff and the provision of information to home educating parents.