OBSERVATIONS ON THE ELECTIVE HOME EDUCATION, PROTOCOL AND PROCEDURES - GUIDANCE ISSUED BY LANCASHIRE COUNTY COUNCIL

The following observations should not be taken as an exhaustive critique of the Lancashire document 'Elective Home Education, Protocol and Procedure - Guidance'. They are made to assist in identifying major issues disclosed within it.

Before I do so, it seems to me curious that, in a document setting out procedures relating to home education, Lancashire at the outset makes this statement under the heading 'Principles and Policy Statement' :

> "Lancashire believes that school-based education provides a broad and balanced curriculum, which promotes social development, moral and spiritual awareness and equal opportunities."[1]

It is true that the next sentence states that it values the plurality of educational provision "including those arrangements made by parents through Elective Home Education (EHE)" though that sentiment is qualified by the word "However" with which it commences. A reticence picked up in the last paragraph of this heading, which, after having set out what home educators do not have to provide (of which more below), starts "Nevertheless, parents are required to provide an efficient, suitable, full-time education."

Home educators could be forgiven for believing that Lancashire is reluctant in its tolerance of home education and that it is striving in the rest of the document to bring it under its control and make it look more like the model of education it understands, and is used to, namely the school-based model.

In seeking to do so, it seems that Lancashire has attempted to put into place a form of registration for home educating families of the kind envisaged by the Badman Report, albeit in a watered-down version. That Report was based upon a flawed research sample and its consequent reasoning was open to considerable adverse criticism. It did not demonstrate that there was a need for any legislative change as was recognised by Parliament when the changes Badman proposed were not enacted when the Children, Schools and Families Act 2010 was passed into law prior to the General Election in 2010.

Lacking the legislative change upon which to base a system of registration, Lancashire has attempted to found its new policy on an interpretation of s436A Education Act 1996, a section inserted into the Act in February 2007, and the revised statutory guidance upon it, which was issued in January 2009. As I shall demonstrate below, Lancashire's interpretation of this section and the guidance is in my view an erroneous one.

It seems to me that Lancashire is attempting to put in place an assessment system which is based upon a misinterpretation of s436A and the statutory guidance issued on it so that they create a different regime for a child that they decide is "missing

[1] Heading 2 on page 2

education". In assessing this, it would appear that Lancashire believes it can insist on using greater powers than the law in fact permits to them.

The effect of creating a separate regime for a "child missing education" is that there is a real danger that the statutory procedure firmly set out, together with the guidelines directed to LAs is by-passed, yet that procedure is the only lawful power that Lancashire is able to use in the assessment of a child's education.

Indeed it would appear that Lancashire's aim is to seek to avoid the statutory regime for assessing education which is firmly established by s437 and the following relevant sections of the 1996 Act. The attempt to do so relies on a misinterpretation of s436A., whereas, as I shall point out, the statutory guidance on how the LA should operate s436A makes it clear that any assessment has to take place in accordance with the procedures set out in s437.

Section 437 sets out a perfectly workable and effective way of ensuring, where there is an appearance of no suitable education, that steps are taken to ensure that a suitable education is being provided. It would appear to me, from the information with which I have been supplied, that Lancashire does not believe that the s437 procedures are sufficient for their purposes which is why they are trying to set up more stringent requirements than the law permits on the basis of a misinterpretation of s436A.

The only power in law that Lancashire has to assess a child's education is the procedure set out in s437. If they do no follow this procedure they cannot enforce any decision and they will almost inevitably make it harder for them to take effective action where they decide that no suitable education is being received by the child or young person.

What Lancashire is setting up is not only, in my view, in excess of their powers, it is by the same token, more than they are required by law to establish. It seems curious that at a time of financial constraint, Lancashire, seeks to introduce a system beyond its powers and beyond what is required of it by law with the attendant increase in expenditure.

Where the desire of Lancashire to design a different procedure than that mandated in statutory guidance conflicts with such guidance, it may be open to challenge in the courts. More importantly by confusing the ambit of s436A and the operation of s437, it is likely, in my experience, to expose any prosecution under s443 to a successful challenge and result in an acquittal which is based upon the demonstration of a failure by the LA to take each required step set out in s437 when it fell to be taken.

Home educators might feel that if the LA wished to expend additional funds on home education in an area where there is no evidential base that there is a need to do so, Lancashire might better further the welfare and education of home educated children in arranging examination centres and offering a service which would arrange in conjunction with the parent and young person the provision of work experience instead

of limiting that to children who attend at school[2]. They could also offer parents assistance in making CRB checks[3] when they might be needed.

To return to the 'Principles and Policy Statement' section, I note that there is within it a list of things "that home educating parents are not required" to do. Eleven of the items listed have been taken, mostly verbatim, from the 13 bullets points in a similar list set out at paragraph 3.13 of the Elective Home Education Guidelines for Local Authorities issued by the then DCSF in 2007 (to which I shall refer as EHEGLA).

The Lancashire document omits 2 important items which appear in EHEGLA, they are that there is no requirement to

- provide a broad and balanced education

or

- formally assess progress or set development objectives

These are important matters which flow from the respect of the right of home educating parents to adopt a model of education which is in conformity with their own religious and philosophical convictions; a right secured, as the Lancashire document itself acknowledges by Article 2 of Protocol 1 of the European Convention on Human Rights.

The only obligation that parents have is to provide a "suitable education". Although the Lancashire document repeats what appears to have become something of a mantra in such documents that a suitable education is not defined in the Education Act[4], this is not true. It was always defined, first within s437 and then, following the introduction of s436A within that section itself. Section 436A(3) states :

> "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."

It is thus defined in identical terms to those set out in s7 of the 1996 Act.

I would in passing say that such reports as are available to me indicate that the definitions attributed to Woolf J in *R v Secretary of State for Education and Science, ex p Talmud Torah Machzikei Hadass School Trust* do not relate to 'efficient' and 'suitable' but only to the 'life within a community' quotation. The definitions quoted for 'suitable' and 'education' are in most places attributed to a Crown Court Judge's decision at Worcester Crown Court in Harrison and Harrison v Stevenson (1981). That judge was simply applying dictionary definitions as is conventional in such cases.

I do not consider that Lancashire is right in its interpretation of the effect of s436A Education Act 1996. In order to justify its departure from the relevant sections of the

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[2] Page 15

[3] Page 11

[4] see page 4, last paragraph

statutory guidance[5] specifically designed to deal with the position of those who home educate, it seeks to rely on paragraph 21. The LA cannot ignore the matters set out in paragraphs 86 to 94 and its interpretation of paragraph 21 does just that.

In particular paragraph 87 sets out in clear and plain terms what action the LA is able to take with regard to a home educated child as follows :

> "87. Section 436A of the Education Act 1996 requires local authorities to make arrangements to establish (so far as it is possible to do so) the identities of children who are not pupils at schools and who are not otherwise receiving suitable education. In order to comply with this duty local authorities need to make arrangements which will as far as possible enable them to determine whether any children who are not pupils at schools, such as those being educated at home, are receiving suitable education. In order to do this local authorities should make inquiries with parents educating children at home about the educational provision being made for them. The procedures to be followed with respect to such investigations are set out in the EHE Guidelines, 2.7-2.11 and 3.4-3.6."

It is worth pointing out that both the CME guidance and EHEGLA were issued by the same government which was promoting the Every Child Matters agenda. The statutory guidance states unequivocally that the procedures set out in the paragraphs of EHEGLA which are cited are to be followed. This does not admit of the production of a different way of proceeding based upon a interpretation Lancashire has decided to make of an earlier paragraph, paragraph21 *in the same document as paragraph 87*. The emphasis that has been added to paragraph 87 was added by the DCSF to underline how LAs should proceed, should there be any doubt about it.

EHEGLA is, as is correctly stated in Lancashire's document, not statutory guidance. However, The paragraphs of EHEGLA mentioned in paragraph 87 become statutory guidance as they are incorporated into the statutory guidance by specific reference.

These paragraphs are as follows (with my added emphasis) :

> "2.7 **Local authorities have no statutory duties in relation to monitoring the quality of home education on a routine basis**. However, under Section 437(1) of the Education Act 1996, local authorities shall intervene if it appears that parents are not providing a suitable education. This section states that:
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> "If it appears to a local education authority that a child of compulsory school age in their area is not receiving suitable education, either by regular attendance at school or otherwise, they shall serve a notice in writing on the parent requiring him to satisfy them within the period specified in the notice that the child is receiving such education."
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> Section 437(2) of the Act provides that the period shall not be less than 15 days beginning with the day on which the notice is served.
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> 2.8 Prior to serving a notice under section 437(1), local authorities are encouraged to address the situation informally. The most obvious course of action if the local authority has information that makes it appear that parents are not providing a suitable education, would be to ask parents for further information about the

[5] Revised statutory guidance for local authorities in England to identify children not receiving a suitable education - issued by the DCSF in January 2009

education they are providing. Such a request is not the same as a notice under section 437(1), and is not necessarily a precursor for formal procedures. Parents are under no duty to respond to such enquiries, but it would be sensible for them to do so.

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, parents 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 limit, 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."

and

"3.4 Local authorities should acknowledge that learning takes place in a wide variety of environments and not only in the home. However, if it appears that a suitable education is not being provided, the local authority should seek to gather any relevant information that will assist them in reaching a properly informed judgement. This should include seeking from the parents any further information that they wish to provide which explains how they are providing a suitable education. Parents should be given the opportunity to address any specific concerns that the authority has. **The child should also be given the opportunity, but not required, to attend any meeting that may be arranged or invited to express his or her views in some other way. Parents are under no duty to respond to such requests for information or a meeting, but it would be sensible for them to do so.**

3.5 If it appears to a local authority that a child is not receiving a suitable education it may wish to contact the parents to discuss their ongoing home education provision. Contact should normally be made in writing to the parents to request further information. A written report should be made after such contact and copied to the parents stating whether the authority has any concerns about the

education provision and specifying what these are, to give the child's parents an opportunity to address them. Where concerns about the suitability of the education being provided for the child have been identified, more frequent contact may be required while those concerns are being addressed. Where concerns merit frequent contact, the authority should discuss them with the child's parents, with a view to helping them provide a suitable education that meets the best interests of the child.

3.6 Some parents may welcome the opportunity to discuss the provision that they are making for the child's education during a home visit but **parents are not legally required to give the local authority access to their home**. **They may choose to meet a local authority representative at a mutually convenient and neutral location instead, with or without the child being present, or choose not to meet at all. Where a parent elects not to allow access to their home or their child, this does not of itself constitute a ground for concern about the education provision being made**. Where local authorities are not able to visit homes, they should, in the vast majority of cases, be able to discuss and evaluate the parents' educational provision by alternative means. If they choose not to meet, parents may be asked to provide evidence that they are providing a suitable education. If a local authority asks parents for information they are under no duty to comply although it would be sensible for them to do so. Parents might prefer, for example, to write a report, provide samples of work, have their educational provision endorsed by a third party (such as an independent home tutor) or provide evidence in some other appropriate form."

In paragraph 92 of the CME Guidance, EHEGLA is referred to again, thus :

> "In order to discharge their duties in relation to children not receiving an education, local authorities should make inquiries with parents about whether their home educated children are receiving a suitable education. The Elective Home Education Guidelines for Local Authorities make clear that parents who home educate may take a number of equally valid approaches to educational provision for their children."

It is clear therefore that once a child has been identified who is home educated the CME Guidance requires that the LA proceed in the usual way using the procedures set out in the relevant sections which follow s437 Education Act 1996 and the guidance given in EHEGLA.

The procedures proposed by Lancashire seek to establish a monitoring regime in which the LA has to express itself satisfied that a suitable education is taking place. In the first place there is no duty (and therefore no power) to establish monitoring as paragraph 2.7 of EHEGLA, which has by incorporation has the force of statutory guidance, sets out in terms. Further as I shall demonstrate, the law does not require, nor empower, a LA to seek at the outset to be satisfied as to the provision but rather before this step can be taken it is required to consider if there is a need to require evidence capable of satisfying it (a failure to consider this has proved a difficulty that LAs have not overcome in subsequent prosecutions).

There is no power nor requirement to "seek to ensure EHE children have access to services and facilities from other agencies that would generally be delivered via school"[6] There is no power nor requirement to give "the child an opportunity to express their views regarding their education"[7] even though Lancashire might consider this important as the extracts from EHELGA incorporated into statutory guidance confirm. If the LA seeks to foster relationships with home educators it should in any event, in my opinion, reconsider its statement about this. Many home educate precisely because their educational philosophy demands that they give their children the determinative say in their home education when they see that 'right' denied to the schooled child. If a schooled child were to seek to be home educated would the LA seek to influence the parent?

The duty to ensure that a child of compulsory school age is educated is placed firmly on parents by s7 and on no other person or body including the LA. LAs would be unwise to seek to extend their powers and responsibilities into this area. If they were to take for themselves such a fundamental duty, they must appreciate that by their active, and unnecessary, assumption of this parental role, they would open themselves to the possibility of actions in negligence where otherwise none would exist.

Section 437 causes more difficulties than it needs to do. The approach of many LAs has the effect of confusing the duties and powers it gives them. I have been asked to explain what s437 requires.

Section 437 provides (insofar as is relevant)

> "(1) If it appears to a local authority that a child of compulsory school age in their area is not receiving suitable education, either by regular attendance at school or otherwise, they shall serve a notice in writing on the parent requiring him to satisfy them within the period specified in the notice that the child is receiving such education.
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> (2) That period shall not be less than 15 days beginning with the day on which the notice is served.
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> (3) If —
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> (a) a parent on whom a notice has been served under subsection (1) fails to satisfy the local authority, within the period specified in the notice, that the child is receiving suitable education, and
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> (b) in the opinion of the authority it is expedient that the child should attend school,
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> 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."

[6] Page 7, The Lancashire Context and EHE

[7] Page 13

Section 437(1) establishes that the LA must consider the adequacy of educational provision in two distinct stages, the first of which is a pre-condition for the second to come into operation.

> Stage 1 - If it appears to an LEA that a child is not receiving suitable education, then, but only then,
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> Stage 2 - the LEA shall, by written notice, require a parent to satisfy them that the child is receiving such education.

Logically and legally the 2 stages must involve different considerations in view of the wording Parliament has chosen to use. In stage 1 the word “appears” is used and the “test” is phrased negatively. In stage 2 the LA makes a direct requirement that the home educator “satisfy” the LA that a suitable education is being received.

If Parliament had intended from the outset that the LA had the duty to seek, and a home educator had the obligation to provide, evidence capable of satisfying the LA, then there would have been no need for the 2 separate stages. If the LA were to be empowered to require evidence capable of satisfying it from the outset, the first stage would be redundant. If it is to be given any meaning, as it must, it must be a form of sifting test which only places on the LA the duty, and more importantly only empowers it, to take a general look at the provision being made to see whether further enquiry is necessary. It cannot authorise a requirement, when the LA first considers the educational provision, that the home educator produce evidence capable of satisfying the LA.

In effect the section establishes that not all parents should be required to satisfy the LA of the educational provision made, only those in respect of whom the LA considers “it appears” that a child “is not receiving suitable education”. This is why I say stage 1 is a “sifting process” and only those to whom the LA can say there is an appearance of no suitable education will have any obligation to produce evidence and to have to satisfy their LA.

An analogy might assist. If you look at a clock and it tells you roughly what you expect to be the time, you accept it even though you cannot be *sure* it is showing the right time, it has an appearance of not being wrong. If however, it shows a time that surprises you, then you would open up the back and have a closer look at the workings as it has an appearance of not keeping time correctly.

Thus it is not the right approach in law for the LA from the outset to write to parents requiring them to produce evidence capable of satisfying the LA that a suitable education is present. Indeed prosecutions in my experience founder because of such misconceptions.

As I have said, in my view, the first task of the LA in “assessing” any home ed provision is to find out from the parent what is their philosophy of education, what are their educational precepts and so to discover what their model of education is like. Provided that this is worthy of respect, it is this model and not the model of education that is preferred by the LA or its individual representatives that must be used in any

“assessment”. An LA which does not carry this out risks difficulties in any future prosecution.

The LA has ample powers in the existing legislation to deal with deficient home education but equally the LA is not able nor should it immediately deploy those powers and from the outset write to a home educator demanding evidence capable of satisfying them. EHEGLA makes it quite clear that the drastic step of issuing a school attendance order is a last resort.