**Submission of Centre for Personalised Education Government's Call for Evidence on the Draft EHE Guidance.**

The Government's Call for Evidence on the Draft EHE Guidance and other ideas started on 10th April and finishes on 2nd July 2018, and is here:

<https://consult.education.gov.uk/school-frameworks/home-education-call-for-evidence-and-revised-dfe-a/>

This is the submission is the agreed view from the trustees of the [Centre for Personalised Education](http://www.personalisededucationnow.org.uk/) and includes legal advice from David Wolfe QC. *Home education* is just one area of interest to CPE. Our focus on personalisation brings us to take a critical stance against rigid mass schooling systems whilst acknowledging and celebrating settings / projects / innovations where more open, self-directed, democratic and flexible approaches are employed. We have always been prepared to learn from and with home education communities. One of our founders Prof Roland Meighan was the expert witness crucially defending the rights of home educators in the Harrison v Stephenson 1982 case. The way government addresses home education is significant for all alternative approaches and highlights important issues about the nature of education, childhood, human and civil rights, the boundaries between state and family and so on.  This Call for Evidence also references *flexischooling* and so is doubly of interest to us. Flexischooling is one our current priorities.

We urge everyone to consider the Call for Evidence and make their own responses.

[Centre for Personalised Education -Facebook](https://www.facebook.com/groups/1607166472854561/)

[Flexischooling Information Sheets](http://www.personalisededucationnow.org.uk/flexischooling-info-sheets/)

[Flexischooling Families UK -Facebook](https://www.facebook.com/groups/380046592033979/)

[Flexischooling Practitioners UK -Facebook](https://www.facebook.com/groups/133020056831365/)

[Light on Ed Research Network](https://www.facebook.com/groups/767234383469198/)

[Home Ed and your LA -Facebook](https://www.facebook.com/groups/239232119524989/)

[CPE-PEN (Twitter)](https://twitter.com/cpe_pen)

Questions 1-7 relate to organisational details.

**8. How effective are the current voluntary registration schemes run by some local authorities? What would be the advantages and disadvantages of mandatory registration of children educated at home, with duties on both local authorities and parents in this regard?**

It is the experience of CPE that Local Authorities (LAs) often take a controlling stance toward parents, rather than a mutually respectful stance, which controlling stance can act to alienate and disempower parents. This of itself undermines the right of parents to parent their children in accordance with their own beliefs as the parent is put in a position of fear of reprisal by the LA, if they do not do as the LA demands.

Mandatory registration would further undermine the parents’ role by implying that the LA may act as a ‘parent’ of the actual parent in oversight of the education of the home educated child. This is of itself contrary to the UNCRC article 5.

Advice from David Wolfe QC indicates that much current behaviour by LAs could be open to judicial review.

**9. What information is needed for registration purposes, and what information is actually gathered by local authorities? Would it help the efficacy of these schemes, and the sharing of information between authorities, if there were a nationally agreed dataset or if data could be shared by national agencies, such as DWP or the NHS?**

CPE does not agree with a mandatory registration scheme. In any event, if such a scheme was created, the data required should be limited to: the name, date of birth and address of the child.

Please also see our comments on data sharing in question 32. David Wolfe QC has advised that such policies would not be lawful, as they would not meet the requirements of the GDPR and Article 8 ECHR, if such making of referral between agencies was simply because a child is home educated.

In addition, please note the comments of Dr Catherine Wills, MDU deputy head of advisory services in respect of data sharing by medical professionals:
<https://www.gponline.com/confidentiality-when-gps-disclose-information-police/article/1430705>

***‘(medical staff) will need to judge whether failure to disclose this information 'may expose others to a risk of death or serious harm' (paragraph 64). One example of when such disclosure is likely to be appropriate arises when a patient has confessed to a serious crime such as child abuse.***

***The GMC does not define serious crime in its guidance but refers to examples given in the NHS’s Confidentiality Code of Practice. These include murder, manslaughter, rape, kidnapping, and child abuse or neglect causing significant harm’***.

Clearly, in order for data sharing to be lawful, it would require that the Children Act 1989 s47 1(b) is met, which makes clear that the threshold that the LA must ‘***have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm’.***

The mere fact of home education, is not reasonable cause to suspect in terms of s47 and no lesser barrier may be used for data protection purposes.

CPE trustees are already aware of cases where parents have not registered their children with a NHS GP, through fear of unlawful data sharing. This is particularly prevalent in LAs where the education staff are considered the most unreasonable and act in a manner which is ultra vires. Fears over withdrawal from medical care recently led to the abandonment of plans to ‘discover’ illegal immigrants, as GPs rightly pointed out that they must be able to treat patients, without those parents fearing reprisal if using services. CPE believes that any attempt to data share via medical services must be robustly resisted.

**10. Does experience of flexi-schooling and similar arrangements suggest that it would be better if the scope of registration schemes included any children who do not attend a state-funded or registered independent school full-time? If so, do you think that local authorities should be able to confirm with both state-funded and independent schools whether a named child is attending that school full-time?**

David Wolfe Qc advises that once the LA has established that a child is on the roll of a school (a) s436a does not apply to that child. Consequently, flexi schooled children, being on the roll of a school, should not be included in any registration scheme, if such a scheme were introduced.

**11. Would the sanction of issuing a school attendance order for parental non-compliance with registration be effective, or is there another sanction which would be more useful?**

CPE does not agree with a mandatory registration scheme. If such a scheme were to be introduced, the serving of a SAO for parental non-compliance would sanction the child for an act of omission on the part of the parent, over which the child has no control. This would in the view of CPE, be contrary to the UNCRC article 12 which requires that the views of the child be respected, as such an order would take no account of those views.

**12. What steps might help reduce the incidence of schools reportedly pressuring parents to remove children to educate them at home?**

CPE believes that this is a problem with schools, not families. Consequently measures to regulate schools are the proper way to address this. This could be by provision of sanctions on schools where this behaviour is reported by publishing details of any school where staff have acted in this manner and by the school immediately being judged a failing institution by Ofsted.

**13. Is there an argument for some provision which allows a child to return to the same school within a specified interval if suitable home education does not prove possible?**

 Yes

**14. How effective is local authority monitoring of provision made for children educated at home? Which current approaches by local authorities represent best practice?**

This is a serious civil rights issue. CPE believes that monitoring should not be undertaken on a routine basis.

Further, monitoring is often argued to be justified on the basis that school children are monitored by OFSTED. This is not accurate, as inspectors are specifically not permitted to investigate individual children, or their work during inspections. (*School inspection handbook p. 81.* ***Inspectors should not report separately on small numbers (typically fewer than five) where individual pupils could be identified****.)*

Trustees of CPE have analysed polices and correspondence issued by LAs in respect of home education. It proved difficult to find examples where the LA acted wholly within the legislation and guidance and in many cases the LAs actions were challengeable in judicial review, if the parent could afford such a legal challenge. See also Q34.

Examples of bad practice include but are not limited to:

* Attending uninvited at family homes and demanding access, sometimes under threat of calling the Police, or reporting to Social Services.
* Misleading parents by untruthfully stating that visits are mandatory.
* Misleading parents by stating that the LA has a duty to make a ‘safeguarding visit’.
* Demanding a meeting, or a third party endorsement from a qualified teacher directly involved with the education provision, under threat of prosecution, regardless of the quality of information provided.
* Treating initial informal enquiry as a notice to satisfy, rather than a sifting exercise and demanding evidence capable of satisfying a court at that point.
* Demanding that parents have a set timetable, set hours and ‘teach’ set subjects.
* Demanding evidence for children below compulsory school age.
* Unlawful data sharing.
* Routine referral to Social services solely on the basis that the child is home educated.
* Demanding samples of the child’s work.
* Sending of communications which are disrespectful, received as threatening and in many cases are poorly written with bad grammar and spelling.
* Employing unqualified persons.
* Treating parents as dishonest with no evidence that they are dishonest.
* Demanding evidence frequently, as often as every 3 months.

Lack of realistic access to a fair and affordable means of challenging ultra vires action on the part of the LA, is a significant barrier to fair and reasonable treatment of families by those LAs.

Where good practice is found, it reflects the fact that the majority of families are doing a good job and that the LA need do nothing more than confirm that HE is ongoing. This allows high quality resource targeting to those families where there are concerns that the HE may not be suitable. Informal enquiry is used reasonably and without threat of draconian consequences, in direct contrast to the worst LAs. This approach is cost effective, respectful and increases engagement between parents and their LA.

CPE believes that the cost of implementing the draft guidance would be unacceptably punitive for LAs, causing them to redirect funds from other areas which have considerably greater positive impact on children’s lives. Recent research based on data provided by LAs, indicates an average cost of increased staffing per LA of £69,736.13. This in a climate where Children’s services are overburdened and unable to support children at genuine risk of serious harm.

**15. If monitoring of suitability is not always effective, what changes should be made in the powers and duties of local authorities in this regard, and how could they best ensure that monitoring of suitability is proportionate?**

See also Q14 above. CPE believes that current LA powers are not only adequate, but also abused in many cases. Provision of further powers would exacerbate this situation, disenfranchising parents. Consequently, no further powers should be given. Much of the current abuse could be challenged in judicial review, if that recourse were accessible to parents.
It is essential that a cost effective facility for parents to make complaint against LA staff which overstep the mark and abuse their powers, be introduced. Judicial review is the only current redress, which is itself outside the reach of most families.

Routine and frequent blanket monitoring (which in my experience is the norm) is neither ‘proportionate’ nor ‘light touch’ (para 5.2).

Para 5.3 states that ‘***it is for each local authority to decide what is necessary and proportionate’.*** However, whilst the LA may frame its own internal procedures for informing its own actions in fulfilling is duty, only a court can be the arbiter of whether that LA has in fact acted in a reasonable and proportionate manner.

This sentence stands out in the draft as indicative of the Government reneging its responsibility to families, by framing guidance in such a way that the civil liberties of its citizens are compromised by it appearing to hand over full decision making power to each LA. Whilst the LA has powers to make local policy, CPE believes that the Government should not be making clear what constitutes ‘proportionate’ and ‘light touch’ in order to reduce the current significant incident of ultra vires action by LAs.

CPE believes that many families currently have little trust in LAs and any guidance which appears to strengthen the ability of those LAs to further disempower parents, will be greeted with fear and suspicion.

**16. Should there be specific duties on parents to comply with local authorities carrying out monitoring if such LA powers and duties were created, and what sanctions should attach to non-compliance?**

CPE does not believe that there should be a duty on parents to comply with monitoring. The parent by the very nature of having the duty to provide a suitable education under the Education Act 1996 s7, must be the arbiter in the first instance of what constitutes suitable education. The LA should not seek to undermine the parents of the child in intervening with that relationship of duty and trust, unless there is good cause to do so, as this would breach the UNCRC article 18.

CPE believes that if such mandatory duty were introduced, it would create a situation where home educating families were viewed as an underclass, which can be perceived, measured and judged in ways that the rest of society cannot be. The same standard of mandatory inspection of parental compliance with a legislative duty, is not applied to those parents or families where children are educated in school.

The LA should not be provided with powers to sanction parents, particularly as the current situation is manifestly one of LAs not acting within their remit in many cases. To provide such sanctioning powers, would leave families at greater risk of being subjected to unfair, unreasonable and disproportionate demand under threat of such sanctions.

CPE believes that this draft guidance makes an unsupportable assumption that the LA is a benign force for good, which has the interests of children and families at heart, whereas the experience of families who home educate falls very far short of this ideal. It is the role of central Government to support the rights and civil liberties of those parents to not be subjected to oppressive or unreasonable behaviour by those in positions of power, wielding that power unreasonably.

**17. Is it necessary to see the child and/or the education setting (whether that is the home or some other place), in order to assess fully the suitability of education, and if so, what level of interaction or observation is required to make this useful in assessing suitability?**

CPE believes that a competent education officer should be able to ascertain that home education is suitable in most cases, by reference to evidence provided by the parent. To create mandatory meetings with the child would be far from a ‘light touch’. Precedent has never envisaged that home visits or meetings with the child should be mandatory, save in wholly exceptional cases.

**18. What can be done to better ensure that the child’s own views on being educated at home, and on the suitability of the education provided, are known to the local authority?**

The UNCRC Article 5 makes clear that the views of the child are represented on behalf of the child, by the parent. The LA has no role in seeking the child’s view unless there concerns that the child might met the CHA s47 criteria.

‘*Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern’*. (UNCRC article 18).

The inherent prejudice apparent in this proposal where school children are not asked whether they would prefer to be home educated, or attend school, is unreasonable. Further, by stigmatising home educating families in this manner, the Government would encourage the fracturing of society by present home educating families as ‘other’ than the norm.

Further, where a child is ‘Gillick competent’ that child is able to veto the sharing of their work, views and opinions by the parent and the LA should not seek to undermine the child’s autonomy in that respect.

**19. What are the advantages and disadvantages of using settings which are not registered independent or state schools, to supplement home education? How can authorities reliably obtain information on the education provided to individual children whose education ‘otherwise than at school’ includes attendance at such settings as well as, or instead of, education at home?**

CPE believes that unregistered settings are a matter for compliance regulation, which should not be conflated with home education within the guidance.

The LA must enforce registration compliance where required and Government must make clear that home education groups run by families, for families, should not be conflated with unregistered settings.

**20. What are the advantages and disadvantages of using private tutors to supplement home education? How can authorities best obtain information on the education provided to individual children whose education at home includes private tuition, or whom attend tuition away from home?**

Some parents use private tutors to supplement home education, just as some parents use private tutors to supplement school education, to provide tuition that is not otherwise readily accessed.

If the Government wishes to regulate private tutors, that is a separate matter to home education guidance. Any steps taken to obtain information direct from tutors, unless the individual circumstances of the child meet the threshold for CHA s47 enquiries, would be a breach of the GDPR and Article 8 ECHR requirements around data sharing

**21. Are there other matters which stakeholders would wish to see taken into account in this area?**

 Yes

**Monitoring: other considerations**

CPE believes that Government must make clear to LAs that all actions must be reasonable, proportionate and underpinned by legislation.

**22. What might be done to improve access to public examinations for children educated at home?**

Funding of examinations would be a positive step in achieving greater access by home educated children. Currently, LAs do not offer funding and parents have to find the cost from often limited resources. Such funding should not be at the cost of examinations being made mandatory.

**23. What good practice is there currently in local authority arrangements for supporting home-educating families? Should there be a duty on local authorities to provide advice and support, and if so how should such a duty be framed?**

When freedom of information requests were made to LAs to ask what ‘support’ they offer to home educating families, the significant majority responded to indicate that the ‘support’ they offered was to make often intrusive monitoring enquiries.

Some LAs signpost to useful services and home education groups, which is useful, one LA negotiates access and discounts for families.

**24. Should there be a financial consequence for schools if a parent withdraws a child from the school roll to educate at home?**

 No

CPE believes that there should be no financial penalty in general when a child is withdrawn to be home educated, but that stringent penalties should be applied to schools which coerce parents into removing children from the roll. If sanctions applied to all withdrawals for home education, it could increase the incidence of schools seeking to dissuade families away from home education, which is unacceptable.

**25. Should there be any changes to the provision in Regulation 8(2) of the Education (Pupil Registration) (England) Regulations 2006 requiring local authority consent to the removal of a child’s name from the roll of a maintained special school if placed there under arrangements made by the local authority?**

CPE believes that parents should not be required to seek consent for removal. If consent to remove from the roll of a maintained special school remained mandatory, the LA must be directed to provide its response within a reasonable time limit.

**26. Are there any other comments you wish to make relating to the effectiveness of current arrangements for elective home education and potential changes?**

CPE believes that LAs should be required to ensure that all of their home education staff are suitably trained and experienced to understand home education law and practice.

**27. What data are currently available on the numbers of children being educated at home in your local authority area?**

CPE holds data for all LAs which trustees update periodically. Data fluctuates widely throughout the year and allowance needs to be made for population changes, error by LAs in recording and time of year.

**28. Do you have any comments on any of the contents of the call for evidence document in relation to equality issues?**

The draft guidance is lacking in recognition that home education has equal status in law to school education. The whole document appears to be built on a wish to alienate home educating families, causing them to feel excluded from the respect and consideration shown to other families. Many home educators were understandably annoyed to discover that this consultation requires people to self-identify as social worker, university lecturer etc., but not as home educator, when they should be the primary audience.

**29. Comments on Section 1: What is elective home education?**

Flexi-schooling

**Paragraph 1.3** the proposed guidance implies that the guidance to children who are being ‘flexi-schooled’ (to use the term in paragraph 1.3).

It is not appropriate to these children in such guidance at all. In any event, it is entirely inappropriate for some parts of the guidance seemingly to appear to apply to such children. That will mislead LAs and others.

**Para. 4** splits children into those who have never attended school and those who have and gives guidance on the section 436A duty which underpins local authority enquiries of families who are home educating.

 **Para. 5** of the proposed guidance says more about that. Yet, once it is ascertained that the child is on the roll of a school, section 436A no longer applies to that child. That needs to be made clear. Specifically, it needs to be made clear that the section 436A duty and therefore nothing in sections 4 or 5 of the guidance apply to children being flexi-schooled.

**30. Comments on Section 2: Reasons for elective home education - why do parents**

CPE believes that responsible words published by Government carry weight and are accepted as fact, therefore Governments should not include rhetoric or opinion in guidance, but that statements should be factually based and supportable. Comments within this section are in several instances based on opinion or rhetoric, which stigmatises some home educating

**S2.3** states: **‘but it should not be assumed that a different approach which rejects conventional schooling is necessarily unsatisfactory or constitutes ‘unsuitable’ education**’. The use ‘necessarily’ in this statement could be read to imply that ‘most’ different approaches are unsuitable, which is not an acceptable inference to make.

**31. Comments on Section 3: The starting point for local authorities**

**Para 3.5** does not make clear and should make clear, that such policies need to be in accordance with the legal requirements and (unless there is a good reason to depart from it) the national guidance itself.

Some LAs are already currently operating policies or practices which do not meet that requirement, so it is essential that it is made clear.

‘**However, few people would argue today that parents should be able to exercise their right to home educate children with absolutely no independent oversight, despite their having the legal responsibility set out above’**. This is conjecture and is not based on research or data. As a Government document is accepted as authoritative we can argue that it should not contact opinion which appears to be stated simply to justify supporting the draft.

‘**The job of each local authority is therefore to find an appropriate balance between parental autonomy and its overall responsibilities for education of children in its area’**.

Parental autonomy has primacy unless there is reason to believe that the parent may be failing in their duty. The LA should be directed to treat the parent with respect and accept he information provided by the parent in good faith.

**32. Comments on Section 4: How do local authorities know that a child is being educated at home?**

See question 29, it needs to be made clear that this section does not apply to children who are being flexi-schooled because section 436A does not apply to them once the LA is aware that they are on the school roll.

CPE believes that parents are frightened of recrimination by LAs and LAs are using that fear in an oppressive manner to make demands of parents, which they are then unable to challenge for fear of greater consequences, or in the worst case, fear of losing their child if they do not comply. The draft appears to encourage LAs to make such threats in order to force parents to comply with demands, whilst also appearing to give carte blanche to those LAs to set their own self-regulation, in an atmosphere of distrust of those same LAs.

The threat of care proceedings and a criminal record, leads parents to comply with the most oppressive demands made, whilst feeling deeply aggrieved at being forced to do so. LAs then frequently cite ‘their’ families to be happy to meet with them, despite home education support groups regularly seeing those same parents stating that they complied due to fear and what they often describe as ‘bullying’.

Many LAs assume that parents are in breach of their duty to provide a suitable education and demand that the parent prove and then keep re-proving, that education is suitable, rather than to take the customary approach of assuming compliance with their legal duty, unless there are indications to the contrary. It needs to be made clear that section 4.2 is referring only the duties on LAs, and does not somehow impose an obligation on parents.

The draft guidance states that ‘until a local authority is satisfied that a home educated child is receiving suitable full-time education, then a child educated at home is potentially in the scope of [the section 436A] duty’. It should be made clear that this does not impose a duty, or an obligation on the local authority, let alone the parent. It is simply a statement of the legal reality that a child could potentially be in the scope of the section, not that the child is in the scope of that section.

CPE believes that an initial informal enquiry should only be used as a ‘sifting process’, to ascertain if the child is within the scope of s436A. Only if in each individual case, the child is found to be within the scope of s436A should the LA seek to be satisfied that the home education is suitable. This should be made clear in both CME Guidance and Home Education Guidance.

**Section 4.2** says that ‘***Some local authorities already actively encourage referrals from doctors and hospitals whom there is a reason to think may be home educated’***. The implication being that such policies are and would be appropriate and lawful when it comes to the requirements of the Education Act, the GDPR and Article 8 ECHR requirements in respect of data sharing.

David Wolfe QC advises that the seeking or the making of a referral between agencies simply by virtue of the mere fact of a child being home educated would not meet those requirements. In other words, section 4.2 needs to make clear that the bare fact of home education is not the basis for the sharing of personal data.

There are real examples of LAs which seek referrals and sharing of personal data, simply because of the fact of home education. Barking and Dagenham is one such: <https://www.whatdotheyknow.com/request/460877/response/1117148/attach/2/Elective%20Home%20Education%20policy%20January%202017.pdf?cookie_passthrough=1>

‘***Professionals working with families should check the education provision of every child in the family and liaise with the Elective Home Education Officer (EHEO) or CMEO if any of those children are not on roll at a school’***.

Wigan is another, as in a letter to all home educating parents in July 2017 Wigan said that:

‘***We also need to let you know that in future, we will check with the following agencies to understand if they have seen your children in the provision of their services: [NHS foundation trusts], the registered GP, Greater Manchester Police, Children’s Social Care*** …’

The guidance should make clear that this is not acceptable.

Further, the Children Act 1989 s47 1(b) makes clear that the threshold for assessment under that provision is that in order to make enquiries, the LA must ‘***have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm’.***

The mere fact of home education, is not reasonable cause to ‘suspect’ in terms of s47 and no lesser bar may be used for data sharing purposes.

The draft guidance goes on to state that:

‘***Reasonable cause can include the lack of any substantive information about a child’s education, so if the ‘if it appears’ test in s.437) is satisfied then there will usually be reasonable cause in terms of s.47’. (Sic, this should be s437)*** (para 7.9)

The draft further states that in such circumstances the LA may apply for a CHA s43 assessment order. CPE would challenge that assertion as taking steps to gain access to the child under s47, by way of a s43 order, only applies when s1(b) is already satisfied, that is that the LA has ‘**reasonable cause to suspect’** and the harm suspected is ‘**significant harm’**.

The Social Care Institute for Excellence guidance on gaining access in respect of mentally disabled adults, is informative in this regard, as the data protection bar applies similarly:

‘***the simple fact of access being refused should not automatically lead to consideration of the use of legal powers…. If all attempts fail then the local authority must consider whether the refusal to give access is unreasonable and whether the circumstances justify intervention. There will need to be a local authority-led discussion about what the perceived risks are, the likelihood of risk or neglect occurring and the potential outcomes of both intervening and not intervening… Any interference by the state (meaning public bodies, or sometimes private bodies*** ***carrying out functions of a public nature) must be lawful and necessary. The stipulation of necessity encompasses a requirement of proportionality – that is, not ‘taking a sledgehammer to crack a nut’. Where the use of any power of entry is thought necessary, it should be exercised proportionately, in relation to the risk and the apparent gravity of the situation’.***

CPE believes that sharing of data simply on the basis that a child is home educated, or that limited information about the education has been provided, could not be considered proportional or necessary.

The guidance proposes use of the CHA s47 and s43 if a parent provides no information in respect of education. ***‘Reasonable cause’*** is required when applying the CHA s47 and it is hard to envisage that refusal by the parent to agree to a meeting with the LA, or indeed to provide evidence to the LA, could fulfil that criteria. This is because, whilst there is no evidence in that circumstance that the parent is fulfilling their duty under the EA 1996 s7, there is also no evidence of a failure to fulfil that duty. Consequently, whilst lack of evidence could cause the LA to argue that ‘it appears’ that education may not be suitable and that they are therefore put on enquiry through s437 as to whether education is suitable, CPE believes that the bar for triggering the EA s437 duty must by reason of proportionality be lower than the bar for triggering CHA s47 assessment, quite apart from proceedings under CHA s43, as the latter are actions that fundamentally interfere with the private life of the family.

Further, ‘**Reasonable cause’** is not simply suspicion on the part of an education officer. By appearing to encourage the use of the more serious CHA s47 and s43 in cases where the s437 bar may be met, the draft guidance is appearing to encourage LAs to take action leading to substantial intrusion into the life of the family and possibly even removal of a child from the family for assessment purposes, based on ‘***lack of any substantive information about a child’s education’.*** ‘Reasonable cause is described in precedent in criminal proceedings and, given the significant bar required for CHA s47 and s43 to apply, it is proportionate to refer to that precedent. Castorina v. Chief Constable of Surrey, The Times, 15 June 1988; (unreported), Court of Appeal (Civil Division) Transcript No. 499 of 1988, is informative in this respect, as (referring to a police officer having ‘reasonable cause to suspect that a crime had been committed)’, it explains what constitutes ‘reasonable cause’

 ***‘Suspicion by itself, however, will not justify an arrest. There must be a factual basis for it of a kind which a court would adjudge to be reasonable’.***

To justify compulsory intervention in a family's life by use of the CHA s47 or indeed s43, on nothing more than suspicion based on lack of evidence, is not reasonable; there must be something unusual, or at least something more than the common-place human failure, or inadequacy of parents. The LA already has the power under the EA s437 to require a parent to give evidence in respect of the education and to serve a School Attendance order where it believes that home education is not suitable. Those actions are ‘proportionate’; the guidance should not suggest the use of CHA s47 and s43 powers, as a ‘sledgehammer to crack a nut’ and any such application would only be lawful in wholly exceptional circumstances

**33. Comments on Section 5: Local authorities’ responsibilities for children who are, or appear to be, educated at home**

As explained in answer to question 29, it needs to be made clear that this section does not apply to children who are being flexi-schooled because section 436A does not apply to them once it is established that they are on a school roll.

**S5.2** states that ‘**However, local authorities’ policies should also make clear how the authority interacts with those families where a suitable full-time education is being provided and both parties wish to maintain a suitable level of contact and assurance’**. It should be made very clear that where there are no concerns about the education provision, the LA should not seek to force contact on a parent who does not wish to maintain that contact. It should not be for the LA to dictate what contact they will have with families and when. This is a very important issue, which if clearly stressed would go a significant way toward ameliorating the lack of trust that some families feel toward their LA.

If maintaining contact was by mutual consent where there are no concerns, that would clearly meet the concept of proportionate and light touch. A proportionate and light touch policy is one which only leads to LA enquiries let alone action where the LA has good reason to think there might be a problem. CPE trustees are aware that parents report routine and frequent blanket monitoring of home education in the majority of LAs, which is neither proportionate, nor light touch. We believe that if it is not made clear that this is unacceptable, LAs will continue policies which demand that parents demonstrate compliance on frequent intervals.

s.5.2 goes on to state: ‘**Maintaining such oversight is consistent with the local authority’s duty under s.436A’**. This is not correct, as once the LA has established that the child is in receipt of a suitable education, they have no further duty under s436, so cannot maintain oversight. S436a provides a duty to establish a fact, this is not the same as ‘maintaining oversight’, nor should it be treated as being so, as the s436 duty has a beginning (the duty to establish) and an end to it (the status is established).

**S5.3** states: ‘**it is for each local authority to decide what is necessary and proportionate’**. Again, this is not correct. Whilst the LA may frame a policy to indicate what it **considers** to be ‘necessary and proportionate’, the LA may not **decide** that fact. This is because if the LA frames such a policy which is of itself unnecessary and disproportionate, it leaves itself open to challenge under Judicial review. In European Union law there are generally acknowledged to be four stages to a proportionality test:

1. there must be a legitimate aim for a measure

b) the measure must be suitable to achieve the aim (potentially with a requirement of evidence to show it will have that effect)

c) the measure must be necessary to achieve the aim, that there cannot be any less onerous way of doing it

d) the measure must be reasonable, considering the competing interests of different groups at hand

**34. Comments on Section 6: What should local authorities do when it is not clear that home education is suitable?**

**s. 6.5** states: ‘**Parents are under no duty to respond to such enquiries, but if a parent does not respond, or responds without providing any information about the child’s education, then it will be very easy for the authority to conclude that the child does not appear to be receiving suitable education**’.

This is not correct. *Phillips v Brown* [1980] in fact states:

***‘If parents give no information or adopt the course adopted by Mr. Phillips of merely stating that they are discharging their duty without giving any details of how they are doing so, the L.E.A. will have to consider and decide whether it "appears" to it that the parents are in breach of section 36’****.*

By using the term ‘easy’ the Government is implying that it would be the normal course of events for that conclusion to be arrived at. What this section should actually do, is not use the weight of authority to encourage that decision, or fetter the LAs decision making process, but to state correctly that he LA will have to ‘consider and decide’.

**Proposed section 6.6** states: ‘**a refusal to allow a visit can in some circumstances justify service of a notice under s.437(1) or even a school attendance order’** a proposition said to be drawn from the Tweedie case.

This section of the draft guidance does not make clear that the ‘circumstances’, which might justify service of a section 437(1) notice or SAO, simply on the basis of a refusal to allow entry, would need to be **wholly exceptional**, as is seen in the particular factual circumstances of the Tweedie case (as the judge put it: ‘***a mother who is paralysed or, at any rate, is in a wheelchair, a father in ill health, six children of compulsory school age, the history to which I have referred quite shortly and the prevarication that has been shown by the parents***’).

CPE believes that this is a crucial point, as out trustees are aware of instances in which LA officers have literally ‘door stepped’ parents and threatened to call the police simply because a parent refuses to allow the officer into the house to see their child. Further, a recent media publication indicated that in Durham, police officers are apparently being used to insist on access even when there is no reason to think there is a problem with the home education being provided.

<https://www.thetimes.co.uk/article/police-track-hundreds-of-invisible-home-schoolers-f37dmf8vj>

Other LAs take a similar stance, with Cornwall asking the police to do ‘safe and well’ checks simply because they have not seen the home educated child.

CPE has grave concerns in respect of the current approach taken by some LAs, specifically Westminster, where the policy states:

 ‘***If you prefer not to meet with the HEA we are able to consider an endorsement from an education professional involved in the delivery of the programme who would be able to confirm that the education provided, in their view, is suitable’***.

David Wolfe QC advises that this is an unlawful policy (in offering only those two alternatives and in linking the second to information from a particular kind of person). The guidance needs to be clear that LAs must treat each case on an individual basis, properly consider information provided by parent as and do so from the position of acceptance that parents are honest and compliant with their duty under the EA 1996 s7, unless there are concerns to the contrary. .

Kent LA is another example where problems frequently arise currently and the policy states: ‘***Where one or more of the conditions set out below are met, expect every child whose parent(s) elect to home educate to participate in a meeting with an EHE officer and the child at a mutually convenient time and place in order to satisfy KCC of the suitability of the education provision proposed***.

The stated conditions mostly relate to the child’s previous school experience, which is nothing to do with their current situation, yet Kent insists on a meeting, when it has no right or basis to do so.

The new guidance needs to make clear in that regard (as did the existing guidance in its section 3.6) that ‘where a parent elects not to allow access to their home or child this does not in itself constitute a ground for concern about the education provision being made.’

In addition, some LAs such as West Berkshire’s, routinely refer a child to social care where the parent declines a visit, even where the parent has provided information:

“***If, following contact with a family, there are any concerns the EHE Team will share this information with Children’s (Social Care) Services or other relevant agencies, this could be ‘Help for Families’, or the ‘Contact, Advice and Assessment Service’. Examples of safeguarding concerns may include, but are not limited to:***

 ***Where a child is not seen by the Elective Home Education Team***

 ***Where a family refuses to engage with the Elective Home Education Team***.”

Newham’s standard letters to parents say that:

‘***Although parents are not obliged to cooperate with these visits, if the child is not seen for whatever reason, the Child Missing from Education (CME) will be notified in line with Newham’s safeguarding procedures. Other agencies may be involved as necessary.’***

Whilst Redbridge policy states:

‘***Under the law, we have monitoring and welfare responsibilities to your child. It will be necessary to meet with you and your child/ren at least once a year’***.

David Wolfe QC has advised that that these are unlawfully rigid approaches: the LA should not be threatening raising (let alone actually raising) welfare concerns unless there is a proper basis for such concerns and should certainly be taking into account the content of the information provided by a parent in doing so rather than ignoring that information.

CPE believes that the guidance needs to make clear that LAs should not respond to refusals to of home visits by using the threat of safeguarding action, as not only does refusal of a home visit of itself, not constitute a ground for concern about education provision (as in 3.6 of the current guidance) it also does not of itself constitute a concern about welfare.

The guidance also needs to make clear that it does not apply to children below compulsory school age. This is important as CPE is aware of numerous parents of children under compulsory school age receiving demands for evidence. Whilst this has mainly been for children aged 4 years, most recently parents have begun to repot demands for evidence where their child is still only 3 years old in some LAs. That is wholly unacceptable.

**6.10 states:** ‘**This is because in the absence of other information that suggests that the child is being suitably educated and that the parents’ refusal to answer is for some unrelated reason, the only conclusion which an authority can reasonably come to, if it has no information about the home education provision being made, is that the home education does not appear to be suitable’**.

CPE believes that it must be made clearer that there may be good reason for the parent to refuse to provide information. We are aware for example, of cases where an education officer, against whom a serious complaint has been made by the parent, including successfully, has sought evidence from the parent who made the complaint. It is CPE’s view that in such circumstances it would be unreasonable to conclude that the education is not suitable.

**6.16:** It is the experience of CPE trustees, that current applications to the Secretary of State for Education, most usually result in the appellant simply being referred back to the LA policy when making such an appeal, then being advised that the DfE cannot intervene as it is up to the LA to decide what evidence is sufficient and for the court to decide thereafter. This negates the whole purpose of such an appeal and the DfE should reconsider its approach in that light.

Further, recent appeals to the LGO have resulted in the same response, that is that the LGO will not interfere with local policy, effectively negating any accessible means for the parent to address ultra vires or unreasonable behaviour on the part of their LA. Parents need an accessible and effective means of appeal.

**6.17** states: ‘**the circumstances point to seeking an Education Supervision Order instead (see below) - for example, the family might have few resources and fines would have less relevance’**.

CPE believes that the guidance should not differentiate between poorer and better of parents. This is socially divisive and would stigmatise the children of poorer parents.

**35. Comments on Section 7: Safeguarding: the interface with home education**

**Safeguarding**

**s.7.2** states: ‘**However, it must be acknowledged that a child being educated at home is not necessarily being seen on a regular basis by professionals such as teachers and this increases the chances that any parents who are using home education to avoid independent oversight may be more successful by doing so’**.

CPE believes that it should be made clear that there is no requirement for a child to be seen regularly by professionals, or to have ‘independent oversight’, as this statement implies that there is. This is akin to stating that the ‘named person’ scheme is operating in England, which it is not and should not. The guidance should also acknowledge that no evidence exists to suggest that home educated children are ‘unseen’ and not seek to imply that it does so.

**S 7.7** states ‘in other cases a local authority may need expert advice from teachers or educational psychologists’.

CPE is aware that whilst some teachers and educational psychologists may have experience of home education, they are in the minority. This is particularly the case with teachers, who have only experience of school-based education and are unlikely to be in a position to provide appropriate expert input. The guidance should make this very clear.

**s. 7.9:** states: ‘**if the ‘if it appears’ test in s.437 is satisfied then there will usually be reasonable cause in terms of s.47. These enquiries can include taking steps to gain access to the child’**.

Please see CPE’s response to question 32.

It needs to be made very clear that this does not mean that LAs can insist on a home visits or that, other than in **wholly exceptional circumstances**, a parent who refused to allow the LA to enter their home risks section 47 action being taken.

CPE believes that the bar for triggering the EA s437 duty must by reason of proportionality be lower than the bar for triggering CHA s47 assessment, quite apart from proceedings under CHA s43, as the latter are actions that fundamentally interfere with the private life of the family.

**s 7.10** states that if parents refuse access to a child then the LA can apply to the court for an order under section 43; and that, for such an order to be made ‘there must be reasonable cause to suspect that the significant harm threshold is met’.

LAs should not be threatening, let alone initiating, such applications simply because a parent refuses access to their home, or child. It needs to be made very clear that only in wholly exceptional circumstances should an assessment order under the CHA s43 be applied for. Simple refusal of a visit is not enough to justify such action.

**s7.11.** This guidance is issued by the Government, will carry weight and must be paid regard to. S.7.11 appears to encourage the use of ESOs in place of the usual SAO procedure, which is in the view of CPE, ‘taking a sledgehammer to crack a nut.

The guidance should make clear that only where a SAO might not address the situation should a more draconian order be sought.

**s.7.12** states: ‘**As noted previously, the use of an ESO should in any case be considered as an alternative to, or as well as, prosecution for non-compliance with a school attendance order…… Applying for an ESO will often be the proportionate response when parents are not complying with a school attendance order**.’

CPE does not accept that an ESO should be considered proportionate in most cases, as it is a far more serious order than a SAO, giving as it does, much greater control to the LA over the child’s education. This is not proportionate, as it effectively removes the rights of the parent to a greater degree than does a SAO.

In the view of CPE, S7.13 appears to encourage the use of threats of care orders to obtain cooperation with ESOs. This should stress that only in **wholly exceptional** **circumstances** should a care order be applied for. ESOs should not be routine tools for LAs, further, threats of proceedings without good cause, or if made to coerce a parent into agreeing home visits, where no wholly exceptional circumstances exist could be harassment. See Worthington And Anor v Metropolitan Housing Trust Ltd [2018] EWCA Civ 1125

**36. Comments on Section 8: Home-educated children with special educational needs (SEN)**

It is the view of CPE that children with SEN should be treated no differently to those without SEN, as they are no different in terms of the legal requirement to provide a suitable education.

**S 3.8** states: ‘**The authority will of course continue to check the suitability of the home education as required by sections 436A and 437 of the 1996 Act’**.

This is not correct as there is no provision within either s436a nor s437 to routinely monitor home education. Specifically, s436a may only be used if the LA believes that the child is a child potentially missing education. It would be unreasonable to suggest that the LA could form the view that this is the case on a continuum.

**37. Comments on Section 9: What do the s.7 requirements mean?**

**Proposed section 9.4(d)** says that ‘***the first sentence of ECHR Article 2 of Protocol 1 quoted above confers the fundamental right to an effective education, and relevant case law confers very broad discretion on the state in regulating that law. For example, a local authority may specify minimum requirements as to effectiveness in such matters as literacy and numeracy, in deciding whether education is suitable***.’

This goes onto cite ‘eg’: ***Konrad v Germany (2006) European Court of Human Rights app. 35504/03***, a case which rests on the ‘Basic Law’ in Germany and stresses the need, in Germany, to not allow the emergence of parallel societies.

CPE believes that this precedent is not ‘relevant case law’ as it derives from very different circumstances to those which pertain in England. It is important to note that a primary purpose of the Basic Law was to ensure that a potential dictator would never again be able to come to power in the country, a distinction that does not apply to England. The Basic law, in order to meet the requirement in Germany that ‘parallel societies’ do not create a dictator, provides that the State shall supervise the parents’ care and upbringing of their children (Article 6) and the Constitution of Baden Wurttemberg provides that school attendance is compulsory and exemptions only made in ‘exceptional circumstances’ (article 14). This position is very different to the legal position in England.

It appears that the draft guidance is using a German case, which does not relate to the situation in England, in order to imply a threat that LAs can dictate the content of home education. This is somewhat incongruous, given the purpose of the Basic law upon which the German precedent lies and CPE believes that it is divisive and untenable to make this statement.

Whilst the LA may set out some general guidelines, it should not set rigid requirements. David Wolfe QC advises that a local authority which set rigid requirements would be acting unlawfully. That needs to be made clear in the guidance.

**9.6:** The guidance should make clear that any LA policy is only a guide for the LA to use to frame their own actions in fulfilling their duties. David Wolfe QC advises that a local authority which set rigid requirements would be acting unlawfully. That needs to be made clear in the guidance

CPE believes that guidance should provide an overview of what the LA can expect when assessing suitability of home education. The EHEGLA sections 3.13 to 3.16 make clear that home education should not be measured by reference to a list of requirements which replicate school provision and should stress the need for flexibility. CPE believes that sections 3.13 to 3.16 should be retained in new guidance as if they are not, LAs will see this guidance as encouraging, or legitimising a less flexible approach.

CPE believes that it must be made clear that whatever approach LAs take to suitability and effectiveness, that simply relates to how they exercise their powers, as their view is not determinative of what a parent can and cannot actually do. The parent is the arbiter of first instance of what constitutes suitable education and then, if it comes to it, the Court.

It is for the parent to satisfy themselves that they are meeting their obligation under the Education Act 1996 s7, they do not need to persuade the LA of anything. The LA can then form a view for the purposes of discharging its obligations around notices and SAOs, but, contrary to what some LAs seem to think, that does not actually determine whether the parent is discharging the section 7 obligation or acting unlawfully. That question only actually arises in the determination by a court of whether the parent is committing a section 443(1) offence and, in particular, whether the parent persuades (or not) the court that the statutory defence is made out.

It is CPE’s experience LAs often seek to convince parents that it is for the LA to make that decision and that the parent is breaking the law by not meeting the LAs requirements, resulting in oppressive behaviour by some LAs. The guidance should, make clear that the LA should not behave toward parents as if those parents are breaking the law, or are somehow not to be trusted.

Section 9.9 appears to inform LAs that they can stipulate, or insist on a particular minimum number of hours. The guidance should make clear that whatever the LA opinion and statements are, these only inform its actions and cannot determine whether the parents are acting lawfully.

It should also be made clear that LAs cannot adopt rigid policies.

Should LAs seek to give guidance to parents in respect of hours dedicated to home education, the guidance must be consistent with the LAs own provision for EOTAS children.

CPE believes that it cannot be stressed enough that any education officer dealing with home education, must have training in the law and practice relating to home education and be of sufficient educational standard to inspire confidence in their capability. Recent advertisements seen by CPE, for LA staff responsible for home education, have stipulated only NVQ level 3 qualification. This is simply not acceptable.

**38. Comments on Section 10: Further information**

**S 10.2** needs to make clear that the Children Act 1989 s (17) does not allow LAs to seek to interview the child to obtain their wishes and feelings, as it is the duty of the parent to mediate the child’s wishes.

S10.3 states: ‘**If the local authority believes that the education being provided is not suitable it should take action in relation to that parent but keep the other parent informed of what is happening’**.
CPE finds this a very concerning statement, as there are many cases where the parent and/or child may be the victim of domestic abuse and to keep the other parent informed would provide at least some information to allow that parent to trace the victim of abuse. It is crucial that this section makes clear that prior to contacting the other parent, the LA must ascertain if such contact could constitute a risk to the parent with care of the child, or to the child.

CPE believes that s 10.4 should not be included as matters of dispute between parents are not the remit of the LA, but the remit of the court and the LA should not seek to intervene in matters which are settled by the court.

**s.10.6** states in respect of ‘off rolling’ that: ‘**In many cases it is likely that the parent will be unable to provide proper home education, even if willing to attempt this’**. CPE believes that this comment is pure conjecture. Government guidance carries weight and this conjecture will be read as fact. This should not be stated as fact and should not be included in the guidance.

**S 10.8** states in respect of flexi schooling: ‘**time spent by children being educated at home should be authorised as absence in the usual way and marked in attendance registers accordingly. It is not appropriate to mark this time as ‘approved off-site activity’ as the school has no supervisory role in the child’s education at such times and also no responsibility for the welfare of the child while he or she is at home’**.

David Wolfe QC advises that this not correct, as it cannot follow: Just because a school may have no supervisory role or responsibility for welfare does not mean that a school is not necessarily in a position to ‘approve’ of the home part of the education being provided by a parent as part of a flexi-school arrangement. The school may be in a position to do that and can do it without taking a specific supervisory role, or responsibility for the child’s welfare out of school. It is for the head teacher to assess this and the guidance should not seek to fetter the discretion of the head teacher. It should clear and not mislead over this point.

**S10.10**: Conflation of unregistered settings and home education appears to stem from media attention given to purported connection. The claim has been investigated at length by a CPE trustee, including by sending freedom of information requests to every LA in England, asking whether they had any evidence to suggest that any home educated child in their area had been radicalised. All but 6 LAs responded and every one, without exception, stated that they had no evidence to suggest that any home educated child had been radicalised. Further investigation with the DfE, Ministers and Government contacts, elicited the information that the only ’evidence’ connecting radicalisation with home educated children, was a letter written by Sir Michael Wilsher to Government Ministers and offices, in which he stated his opinion that there was a risk of such radicalisation in unregulated settings. In short, the ‘call’ for new guidance comes at least in part, from fears that home educated children are being radicalised, which fear comes from media hyperbole following a letter being written by one individual voicing an opinion, which has no basis in research or fact.

Information published on 15 May 2108 states that 218 OFSTED inspections had taken place, resulting in 52 warning notices being issued to settings that were found to be operating as unregistered schools. As a result, 46 settings either closed or

ceased operating illegally. Clearly, unregistered settings are an OFSTED matter which can be addressed with willingness to do so.

CPE believes that unregistered settings are not a home education issue, but a compliance issue and these settings should not form part of this guidance.

<https://www.whatdotheyknow.com/request/known_and_suspected_unregistered?nocache=incoming-1168359#incoming-1168359>

**S 10.22** states: ‘**Home education should not necessarily be regarded as less appropriate than in other communities.**’

CPE trustees were shocked to see this comment, as he word ‘necessarily’ implies that home education provided by traveller parents could well be less appropriate than for other families. His implication could well breach the Equalities Act.

**Draft revised DfE guidance on home education: for parents**

**This section invites comments on different sections of the draft revised guidance document about the current framework for home education, which DfE proposes to publish for parents. Copies of the draft document can be downloaded from the Overview page.**

**39. Comments on Section 1: What is elective home education (EHE)?**

CPE does not consider it to be acceptable, or reasonable, to have separate sets of guidance for LAs and parents.

**40. Comments on Section 2: What is the legal position of parents who wish to home educate children?**

CPE does not consider it to be acceptable, nor reasonable, to have separate sets of guidance for LAs and parents.

The section 7 obligation is one which is imposed on the parent themselves. It is for them to satisfy themselves that they are meeting that obligation. In other words, the duty is the parents and the parents alone, the local authority may have a view on ‘suitability’ but the decision as to what is suitable for children is the decision of the parent.

**41. Comments on Section 3: So what do I need to think about before deciding to educate my child at home?**

CPE would state that any parent should think about exactly what they would think about for any decision relating to their child: which education provision is in his or her best interests.

**42. Comments on Section 4: If I choose to educate my child at home, what must I do before I start?**

Legally, the parent must notify the school (if on roll), if not on roll, they must do as any other parent must do, act as a responsible parent. The LA and Government must assume that parents are honest and responsible.

**43. Comments on Section 5: What are the responsibilities of your local authority?**

**LA responsibilities**

CPE does not consider it to be acceptable, or reasonable, to have separate sets of guidance for LAs and parents. Please see comments in paragraphs above.

**44. Comments on Section 6: Further information**

The guidance for parents and LAs should be in the one document.

**45. Do you think that anything in the revised guidance documents could have a disproportionate impact, positive or negative, on those with 'relevant protected characteristics' (including disability, gender, race and religion or belief) - and if so, how?**

Please see comments in questions above.