

Can a Local Authority be sued for Failing to Monitor?

This issue frequently arises during the regular workshops I run for local authorities on home education and the law. It also crops up whenever there is a consultation regarding new guidance from the DCFS. For example, Nottinghamshire's response to the guidance included the following paragraph:

In cases where a parent chooses "not to meet at all" with a representative of the Local Authority, their decision should be formally recorded. Under the draft guidance, the Local Authority remains vulnerable if the child later accuses the LA of negligence in failing to ensure their educational needs were effectively met. Although this has not yet happened there is an increasing culture of litigation in society as a whole and it is reasonable to assume that this could happen in the future.

Is this true?

The simple answer is no. only if local authorities home education.

Local Authorities can be as liable to litigation as they want to be.

The complicated answer is yes, but persist in expanding their remit for

The fear of local authorities is that they believe they have a responsibility for the education of all children in their area. Nottinghamshire County Council summed this up in response to new guidance, with the line:

the dilemma faced by Nottinghamshire Local Authority in meeting its duty to ensure all children are in receipt of a suitable education.

But where is such a responsibility made law? The truth of the matter is that it doesn't appear – not anywhere.

The only people responsible for the education of a child are the parents. This is unequivocally stated in Section 7 of the 1996 Education Act. This should hardly need quoting, but here it is:

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

So provision is the responsibility of the parents, but what about ensuring that provision through inspections?

Well there simply is no legislation or case law that requires routine monitoring. 'Inspection' of home educating parents' provision is provided for in section 437(1) of the 1996 Education Act. This has two parts to it, though from first glance it looks like one piece. Part one of the section is:

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,

And part two is:

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.

The duty of the LA to act is contained in the second part and is triggered *only* if the condition of the first part is met. In other words the LA must have prior reason to believe that there is no education taking place before needing to satisfy itself.

There simply is not any duty to do anything, even to ask for 'proof' of provision, where there are no grounds for believing that there is a problem in the first place.

They may decide they want to make enquiries and in such cases parents would, in the words of one judge, be foolish not to respond. Case law has established that if a family does not respond to enquiries then a LA may assume that no education is taking place and move on to the second part.

So when does an LA have a clear duty to inspect?

The duty to ask to be satisfied arises when an LA comes to know something that might lead a reasonable person to believe that no education is taking place. For example if a member of the public rang up the LA and said there are children not attending school who are out on the street playing all day, or perhaps when deregistration takes place and a head teacher considers that the family is uninterested in their child's education, or perhaps if social services know the family and have raised concerns about their ability to provide an education.

Of course the LEA can *choose* to ask for information at any reasonable time but they do not have a duty to do so unless they have reason to believe there is a problem with the child's education.

So, when can they be sued?

LAs might, in theory, be liable for a failure of a duty of care when (and only when) they have failed in their duty to ask to be satisfied that education is taking place when it appears to them that no such education is taking place. Even in such cases, though, being satisfied does not have to mean visiting the home or having access to the child. A LA cannot reasonably be held liable for not routinely inspecting when there is no duty for them to do so.

Moreover young people and adults have found it notoriously difficult, if not impossible, to sue LAs in the past over practically any issues relating to failures of provision, even where the person was enrolled at a school. Currently the prospects of carrying out a successful litigation against an LA on these kinds of grounds would be extremely dim.

What about the future?

If LAs want to avoid litigation in the future they should avoid expanding their duties either by extending custom and practice or introducing legislation for regular monitoring. If LAs extend such duties and fail to carry them out, they will, at some future point, be sued by some young person for whom they failed in their duty of care.

The quickest way of arriving at this point is by behaving *as though they believed* they had a duty to monitor. Eventually, if LAs generally behave as though they have a duty to monitor families, the courts might very well be convinced that such a duty actually exists through custom and practice, even though no such duty is written into legislation. Put at its most simple, LAs can be as liable to litigation as they want to be.

It seems to me that LAs, particularly those like Nottinghamshire, are well along the road to inviting liability. Not only have they no legislative duty to monitor they have no concurrent powers to do so. After all why would they have a power to monitor when they have no duty to do so? They have no right to see children or to enter the home, for example. LAs are endangering themselves by trying to assume duties for which they have no powers. If they make *ultra vires* demands for monitoring by LAs and are rebuffed by families LAs will find themselves in the worst of all worlds; building a culture in which monitoring is expected and for which they might be thought accountable, without any powers to do so.

How should LAs avoid being held liable?

LAs not wanting to be sued in the future should stop behaving as though they have duties they do not, in fact have. They should work more closely with home educators and end the confrontational

practices they too often employ. Relationships are surprisingly easy to develop. An example of good practice is Milton Keynes LA, (*HEJ issue 8 p6*) which has worked hard to develop policy alongside home educators.