LEGAL UNDERSTANDING -TRANSCRIPTS WITH IAN DOWTY

Posted by: "tania berlow"
Wed Jun 24, 2009 10:00 am (PDT)

THE BELOW IS THE BACK AND FORTH EMAIL BETWEEN IAN AND MYSELF AND FOR ANYONE CONFUSED ABOUT HOW THE LAW STOOD BEFORE JAN 2009 WHEN SECTION 436A WAS INSERTED INTO EDUCATION ACT FROM 'CHILDREN MISSING EDUCATION ' . WHEREAS PREVIOUSLY THIS WAS STATED AS NOT APPLYING TO EHE, IT AS SIMPLY INSERTED. LEADING ME TO WONDER WHY THEY DO NOT JUST INSERT THAT REGISTRATION AND VISITS ARE COMPULSARY RATHER THAN SNEAK IN THROUGH THE BACK DOOR BY MAKING A SITUATION WHERE THE LEA NOW HAS IN LAW THAT THGEIR DUTY IS TO IDENTIFY EHE KIDS .

s7 could never be superseded by anything other than something which stated it was replacing it. s7 is the fundamental section which places the responsibility for the education of a child, any child, with her parents and not with anyone else. So far the govt has stopped short of changing that but parents I regret have allowed great in-roads to have been made into the principle, but that's what we have to argue against in Badman). Anyway back to the point to re-inforce what Mike has already said you need to show him s175 and the EHE Guidance. I've copied the bits

---------- EDUCATION ACT 2002 s175 Duties of LEAs and governing bodies in relation to welfare of children

(1) A local education authority shall make arrangements for ensuring that the functions conferred on them in their capacity as a local education authority are exercised with a view to safeguarding and promoting the welfare of children.

(4) An authority or body mentioned in any of subsections (1) to (3) shall, in considering what arrangements are required to be made by them under that subsection, have regard to any guidance given from time to time (in relation to England) by the Secretary of State or (in relation to Wales) by the National Assembly for Wales.

ELECTIVE HOME EDUCATION GUIDELINES FOR LOCAL AUTHORITIES
2.12 Local authorities also have a duty under section 175(1) of the Education

Act 2002 to safeguard and promote the welfare of children. This section states:

"A local education authority shall make arrangements for ensuring that the functions conferred upon them in their capacity as a local education authority are exercised with a view to safeguarding and promoting the welfare of children."

Section 175(1) does not extend local authorities' functions. It does not, for example, give local authorities powers to enter the homes of, or otherwise see, children for the purposes of monitoring the provision of elective home education.

Ali you need to tell him he should look at s175(4) Education Act 2002 (that's section 174 subsection 4) which requires him to consult government guidance and that guidance is to be found (at the moment at any event) in the EHE guidance which makes the position quite clear.

He's not to be blamed for confusing welfare with education, that's the governments fault and comes from their desire as Margaret Hodge said many years ago to shift the emphasis to welfare (the trouble is what she was shifting it away from was child protection)

If your ed bloke was right we would not have needed the Badman review which is contemplating the powers he thinks he has already. As yet those powers do not exist.

HTH Ian

tANIA WROTE <<in process of wrting out law, duty and guidance.

all going great till i get to section 436a para 92

so correct my thinking if neccessary please.

as far as I can see they now do have a duty to find us -section 436a jan 2009- hence wanting a compulsary registration in order to do so

and then make steps (so far as is possible)to find out about education provided

(s 7 &175) still applies.>>>

IAN WROTE <<Yes but the section of the Act which entitles them to find out about the education is s437 and s175 applies to the extent that in carrying out any education function the LA has to do so with a view to safeguarding and promoting welfare>>

TANIA WROTE <<so Ian does this mean they can only check the suitability of provision *if* they have also got safeguarding concerns and they have to accept a parents written statement of their ed phil etc without further checking unless there are safeguarding concerns?

This is a crucial bit of my understanding that i feel is missing because what i am now reading into s436a is that they *can/could* investigate all cases on education grounds without any safeguarding concerns-more so than simply asking parents to produce evidence of education in an ed phil (which means ae becomes something we have to proove ,defend and justify) ....and furthermore is see the lea must endeavor , even thru law change (hence their response to badman) to make sure as best as is possible that they find all those unregistered *cases and* then every EHE parent must show a willingness to provide evidence of suitable education in order to avoid inevitable safeguarding concerns - previous eo guidance on this is clear- send a letter with info and it's your choice if they come to your house and if they see your kids, that is enough to satisfy legal requiremtnts at present.
However , if parent does not respond they therefore have just cause to smell a rat and ask for a written 'plan ' which can show and satisfy ' suitable' .(Phillips vs Brown)>>
IAN WROTE <<yes>>
TANIA WROTE <<,They still do not have a right to see a child unless there are substantial welfare concerns .>>
IAN WROTE <<Correct>>

TANIA WROTE <<what i do not understand is the part where you wrote 'the effect of s175 2002 is that when the lea carries out its functions under s436a (and 437) it has to do so with a view to promoting the welfare of the child - and they already have adequate SI's in place for that.>>

IAN WROTE <<I am not sure what you mean by adequate SIs>>

TANIA WROTE << i mean as far as safe guarding goes there are plenty of regulations (statutory instuments) 10and 11 in Childrens act for example which allow LEAs to discharge duty. so again i ask one add the word 'only' in your above sentence ;
'*only'* with a view to promoting the welfare of the child (safeguarding not education?)
so colin briden is right- according to his duties under s 436a he HAD TO ask for compulsary registration so he can satisfy that suitabe education is taking place and also under s175, with a regard for welfare isues too have i understood this??
Insofar as the legislation and guidance tends to place some responsibility on LAs for all children in their area, one way or another, both as far as their education and their welfare is concerned, LAs argue that they cannot carry out this duty unless they are able to ascertain where the children, the subject of their duty, are located. Thus they say that without registration they cannot do their job. ContactPoint (if it ever, etc) will supply that but until it works they can't find the HE children.>>

IAN WROTE <<There is some force in the view that once s436A was enacted some form of registration was inevitable. >>

tANIA WROTE<<Ali wrote to you that Briden said s175 superceeded s7 The fact is she made him shake so much he could neither remember nor find the bit he was >looking for that backed up his assertion of his 'duty' (s436a)- i kid you not!!!! i THINK WHAT HE MEANT TO SAY WAS THAT HIS DUTY UNDER S436A HAD NOW CHANGED >>

IAN WROTE <<It's good for him to experience what others experience when he visits them!>>

TANIA WROTE<<>anyway i belive he was desperatley searching for the bit inserted in to ed act 1996 - this >436a from only January of this year.>>

IA WROTE <<you might be right, they need training>>

TANIA WROTE <<help am i right and if so , i now understand EO's position better.>>

IAN WROTE <<I am afraid you are>>

TANIA WROTE <<my point is that in january something was inserted. before that , although the ed and inspections act was preceeds january 2009, the wording was chaged to now include home education whereas before it did not

how can that happen?>>

IAN WROTE <<The wording wasn't changed, it was always what it is now. It was always capable of being interpreted as it is now, however in the first guidance the DCSF was persuaded to say it did not apply to those who HE'd. In the revised guidance issued this year, they changed their mind about that and said it did mean what it appears (to me) it could have meant all along. If we thought that their interpretation in the guidance was wrong we could challenge the guidance. However, I regret IMHO we would not succeed.

i agree that law still means that unless they have safeguarding concerns they have no right to see a child in law at the moment (but hey why no insert that in too without a review as did s436A as far as i can see)..>>

TANI WROTE <<so that after they discharge their duty to find us they must still have regard for s175 and s7-so in effect all that changes is we would all have to register but our treatment in law is no different than for those already registered despite the obvious issue that many lea's abuse their power in s175 in their own unlawful interpretations of 'suitable'>>

IAN WROTE<<at the moment, yes>>

TANIA WROTE<<my outrage is that the law as changed in jan 2009 with the insertion of s436a and this insertion has now been used to justify a review and probable law change so leas can uphold this new inserted duty .

and they are lying and manipulating and spreading negative propaganda in this review so that the reasons they are so intent on going through withn this make it appear to Jo Public and anyone who doe snot look to carefully, that there are real abuse issues in the underbelly of the secretive and hidden home educators.>>

IAN WROTE <<there were also unfounded fears that HE was a cover for forced marriage and the Khyra Ishaq case also precipitated the review.>>

TANIA WROTE <<ok so why does it say in bold to omit definition of 'suitable education' -is this just to aviod repeating 427 what has already been said in the newly inserted 436a>>

IAN WROTE<<yes, s436A was inserted into Part 2 of Chapter 6 of the Act and thus in front of s437. It refers to "suitable education" and so needs to define it. It was happily defined by s437(8) and they could have left it at that but effectively they moved the definition from s437 to s436A>>

Thanks Ian

you have no idea how brief i was too- i wrote it in such a hurry before school run that there are loads of spelling mistakes and grammer but not bad for off thr top of my head considering my extensive research of one week into legal aspects! however thanks for correcting me on the legal point (agin) last week I did not know the legalities and without your input i could never have understood the legalities this week.

so i still did not understand quite exactly about s436**A** :>)

1)statutory guidance to s436A originally only mentioned CME in 2007 and said it did not apply to EHE

2)there was a consultation and the statutory guidance was changed to be interpreted as CME and EHE

3) that means the implication is that EHE =CME or is it that EHE could be CME (same as EHE could =abuse?)

4)who was involved in that consultation- i heard nothing about it

5) I understand that section 436A was vague and did not mention EHE- was it that no-one remembered we existed?

6) other than now including EHE , nothing changed in what local authorities were authorised to do

7)the Badman review will at the very east put in place compulsary registration so that LEA's can discharge their duties

8) someone please post the 2009 guidance as I cannot, sorry

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

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

(a) are not registered pupils at a school, and

(b) are not receiving suitable education otherwise than at a school.

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

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

(2) In section 437 of EA 1996, in subsection (8) omit the definition of "suitable education".

(3) In section 580 of EA 1996 (index) for the entry in the second column which relates to the expression "suitable education (in Chapter 2 of Part 6)" substitute "section 436A(3)".

2007 guidance from DCSF

Children missing education are defined as children of compulsory school age who are not on a school roll, and who are not receiving a suitable education elsewhere: for example, at home, privately, or in alternative provision.

2009 guidance sorry cannot copy and paste info

http://www.dcsf.gov.uk/everychildmatters/resources-and-practice/IG00202/

blessings Tania

To: HE-UK@yahoogroups.com From: IanDowty@... Date: Wed, 24 Jun 2009 06:49:32 -0400 Subject: Re: [HE-UK] CYPNOW NEW ARTICLE -my response !

Ian wrote << hi Tania

nice letter, but (and forgive me if I am brief)

tania wrote<<<The last review in 2007 which apparently cost £78,000 \(foi request) It was also very clear on the points of law. The education act 2002 s174 \(4) also states that lea's should follow any guidance.>>>

ian wrote <<It's s175 and quoted thus s175(4) - (it says "have regard to guidance" but I quibble)>>

Tania wrote<<Then'children missing education review came out .It was very specific that electively home educated children were NOT included in its recommendation nor in the law changes So why this January 209 did an insertion suddenly appear in the law as Education Act 2002 s436a?>>

Ian wrote<<Sorry this isn't right. The insertion of s436A (and it matters that the A is a capital) did not suddenly appear in Jan 2009. It was inserted into the Education Act 1996 (not 2002) by s4 Schools and Inspection Act 2006. s436A was brought into force on 27th February 2007 (by The Education and Inspections Act 2006 (Commencement No. 2) Order 2006). The first statutory guidance on s436A was issued in February 2007 and the Revised Guidance was issued in Jan 2009 after a consultation procedure which started sometime in mid-2008. The Revised Guidance differed from the original guidance in how to interpret s436A which had always said what it says now and (I regret) arguably is better interpreted legally now than it was before.>>

<<This s436a now tell councils they have a duty to locate ALL children not in school -which now includes electively home educated children This bit of snuck in legislation changes everything and gives a validity to the Badman reviews premise. But there are perfectly good laws and guidelines regarding all chidlren when it comes to safeguarding. why start to pick on home educated families? Because now already in law , preceeding this review , the LEA must know who these families are whereas any other child at school would be seen by a professional with a duty who 'obviously' could spot any abuse or neglect going on . How does the LEA know who the families are? Isn't that the problem we have to grapple with. They don't know and can't know as the position stands at the moment and that's what a lot of people

would like it to remain. The problem is how do we argue that that position enables the LEA to carry out it's s436A duty?

so what is being said is that every child must been seen by someone connected to the DCSF-who has a professional duty regarding safeguarding Doctors are not enough as some kids only see their doctor once a year , some less. Havingnow covered safeguarding for all school age children, might the next by the DCSF be to do exactly the same for children under school age ? I wouldn't go there as from what I hear the answer is yes. Quite a lot of the published abuse is about pre-school children.

After the last health visitor appontment \(which alson incidentally are not compulsary- yet) , there is no-one in a in a position of authority with a duty to safeguarding who see the chld until school age. .Backed up by Every Child Matters All based on yet more EU and HUman rights rulings will all children under 5 have to be seen at elast once a year to make sure they are not being harmed by their parents and also to make sure that they are reciving their given right to what Every Child Matters considers gold standard? This is why the distinction in law between educational concerns and welfare concerns will also become blurred - so that all home educated chilren will have a right to have a govenment official check that his parents are providing him with a safe home and one that is educationally suitable. What abot those poor under 5's ?? The implications are enormous for ALL families.>> It Ian wrote << I could not agree more. A further massive change in the relationship between the state and the individual.BWs Ian>>

FOI SOLICITORS AND REASONS FOR FOI REJECTIONS FORM DCSF

Posted by: "tania berlow" bornjoyful@hotmail.co.uk bornjoyful
Wed Jun 24, 2009 10:00 am (PDT)

BELOW ARE THE RESPONSES TO FOI INFO ON THE STATS USED BY LEAS REGARDING SAFEGUARDING WHICH WERE IN THE REPORT FOI REQUEST TO SEE CORRESPODENCE WITH BADMAN AND ALSO ANOTHER FOR INFO FROM LOCAL AUTHORITY VIA

THE DCSF BELOW IS REASON SOMEONES REQUEST WAS REJECTED

AFTER THAT- I HAVE COPIED THE RELEVANT SECTION IN LAW

While I can confirm that the Department holds information within scope of your request it is being withheld because the following exemptions apply:

Section 35(1)(a) of the Act. This exemption is engaged in respect of all the information within scope of your request because the information relates to the formulation and development of government policy. As this is a qualified exemption under the Act the Department is required to balance the public interest in releasing the information against that in withholding the information. The Department recognises the general public interest in openness, transparency and being able to hold government to account; it accepts that release of the information could give the public insight into how such reviews are set up and conducted; and it accepts that release of the information could provide reassurance that this review is properly commissioned and constituted. Conversely it recognises that release of the information would, or would be likely to, prejudice effective policy formulation and development through inhibiting the free and frank provision of advice and exchange of views, both in this and future reviews. The Department notes that this review was at the time of the request, and is currently, still in progress. It notes that the reasons for the review and the appointment of Mr Badman have been announced publicly. It also considers that the paramount public interest lies in securing a thorough and well-conducted review which is able to take account of a wider range of views and reach and express its conclusions without distraction as swiftly as possible. In the Department's view the balance of public interest therefore falls clearly in favour of withholding the information.

Section 40 of the Act. This exemption is engaged in respect of some of the information within scope of your request which contains personal data, the release of which would contravene the data protection principles set out in the Data Protection Act 1998. As this is an absolute exemption the Department is not required to run a test to balance the public interest in withholding the information against that in release.

Section 43 of the Act. This exemption is engaged in respect of some of the information within scope of your request, the disclosure of which would, or would be likely to prejudice commercial interests, including those of the Department. As this is a qualified exemption under the Act the Department is required to balance the public interest in releasing the information against that in withholding the information. While the Department recognises the general public interest in openness, transparency and being able to hold government to account and that there is particular interest in financial matters, it takes the view that public interest is best served by being able to conduct discussions about contractual matters in a way which respects confidentiality, especially during the period of the work in question, and which does not adversely impact on future negotiations. The key public interest lies both in securing a thorough and well-conducted review which is able to take account of a wider range of views and reach and express its conclusions without distraction as swiftly as possible, and in protecting commercially sensitive information.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

If you are unhappy with the way your request has been handled, you should make a complaint to the Department by writing to me within two calendar months of the date of this letter. Your complaint will be considered by an independent review panel, who were not involved in the original consideration of your request.

If you are not content with the outcome of your complaint to the Department, you may then contact the Information Commissioner's Office.

Yours sincerely,

Josephine Bell (Mrs)Dear Ms Daley,

SECOND REFUSAL

Thank you for your email request which we received on 2 April for a copy of Birmingham local authority's response to a questionnaire sent to all local authorities in respect of the independent review of home education.

In response to your request I can now advise you that the information you have requested is being withheld under the Freedom of Information Act 2000. The exemptions which apply to this information are: sections 36 (2) (b and c) of the Freedom of Information Act. I can confirm that we hold information falling within the terms of your request.

Qualified Exemptions - requiring a public interest test

Section 36 is engaged because the disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs and inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. As required under the Act, the opinion of the Department's 'qualified person' (a Minister) has been obtained to the effect that the exemption is engaged.

The Department considers that section 36 is engaged in respect of the whole of the information received from the local authority. These exemptions require public interest balancing tests. The tests are summarised in the attached document.

The results of the public interest tests carried out by the Department are that it is not in the public interest for any of the information in respect of which the exemptions are engaged to be released.

If you have any queries about this letter, please contact me. Please remember to quote our reference number in any future communications.

If you are unhappy with the service you have received in relation to your request and wish to make a complaint or request a review of our decision, you should write to me within two calendar months of the date of this letter.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a decision. Generally, the ICO cannot make a decision unless you have exhausted our complaints/review procedure.

Yours sincerely,

Josephine Bell (Mrs)

3)

20 May 2009

35 Formulation of government policy, etc

(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications—

(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) between Assembly Secretaries, including the Assembly First Secretary,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the [1998 c. 47.] Northern Ireland Act 1998.

36 Prejudice to effective conduct of public affairs

(1) This section applies to—

(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(a) would, or would be likely to, prejudice—

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a

qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"—

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

(b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,

(c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

(d) in relation to information held by the House of Commons, means the Speaker of that House,

(e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,

(f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,

(g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,

(h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means—

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the Assembly First Secretary,

(i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,

(j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,

(k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,

(l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means—

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,

(m) in relation to information held by the Greater London Authority, means the Mayor of London,

(n) in relation to information held by a functional body within the meaning of the [1999 c. 29.] Greater London Authority Act 1999, means the chairman of that functional body, and

(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—

(i) a Minister of the Crown,

(ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

(6) Any authorisation for the purposes of this section—

(a) may relate to a specified person or to persons falling within a specified class,

(b) may be general or limited to particular classes of case, and

(c) may be granted subject to conditions.

(7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion—

(a) disclosure of information held by either House of Parliament, or

(b) compliance with section 1(1)(a) by either House,

would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

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