

## Legal Briefing prepared by Sarah Dickinson for HEdNI

### Background:

#### Legal (relevant legislation included on page 2 for your reference)

**The Education and Libraries (Northern Ireland) Order 1986 (“the 1986 Order”) article 45** creates a duty for **parents** to “cause [the child] to receive efficient full time education suitable to his age” etc...

The duties of ELBs stem from **Schedule 13 – “*If it appears* to a board that a parent of a child of compulsory school age in its area is failing to perform the duty imposed on him by article 45(1), the board shall...”** (the Draft quotes the older version ‘where it appears’)

The duty is triggered by outside forces and is purely reactive, if there is no appearance of failure there is no duty. No duty to go looking for problems, no duty to monitor. Home education is not in itself a valid concern but a legally protected option.

There are no safeguarding duties under the 1986 Order; adequate duties to refer any concerns to social services apply to all who deal with children.

*The NEELB has claimed (in correspondence) that further duties* arise from **The Children (Northern Ireland) Order 1995 (“the Children Order”)**, giving a list of things that courts must have regard to when determining any question with respect to “3.(a)the upbringing of a child” including the wishes of the child, their emotional and physical needs and so on...

Article 3 of the Children Order applies only to the courts. Though it is reasonable that the ELB should consider these factors when deciding whether to bring a case, the Children Order does not place any duty on ELBs.

The ELBs **should not as a matter of course be preparing a case for a School Attendance Order on every home educated child**. Nor should there be a presumption that a home educated child is ‘in need’ as defined by article 17 of the Children Order. In any event, the duty imposed by virtue of article 18 of the Children Order (in relation to children in need) definitely does not apply to ELBs. It applies only to “an authority”, defined in article 2(2) of the Children Order as (either) a Health and Social Services Board, or a Health and Social Care Trust. An ELB is neither of these bodies.

The correct order of the ELB seeking to take action / make enquiries of a parent who is home educating is: assumption of compliance with law -> concerns raised -> informal procedures -> statutory procedures -> court proceedings.

To apply statutory procedure, before proceedings occur, is to ask for evidence of innocence from those about whom there are no concerns. **This makes a mockery of the presumption of innocence.**

**The United Nations Convention on the Rights of the Child** is, as noted in the draft, not legally binding, containing no controlling language or mandates. It cannot create powers. The government do not consider these rights of such importance to as to incorporate them into UK law.

There is no power to delay deregistration: Regulation 4 of the Registration and Attendance of Pupils Regulations (Northern Ireland) 1974 (“the 1974 Regulations”) provides that a parent shall not withdraw their child from a school at which the child is a registered pupil, before “*acquainting the principal with [their] intention to do so.*” This does not require a parent to discuss the matter with the school principal, nor does it require the parent to ensure that a suitable home education programme is in place first.

Data protection issues – the Principal passing information to the Boards on deregistration would be guilty of an offence under the **Data Protection Act**.

**With added detail, from our legal advice:**

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The duties of ELBs stem from **Schedule 13 – “If it appears to a board that a parent of a child of compulsory school age in its area is failing to perform the duty imposed on him by article 45(1), the board shall...”** (the Draft quotes the older version ‘where it appears’)

The duty is triggered by outside forces and is purely reactive, if there is no appearance of failure there is no duty. No duty to go looking for problems, no duty to monitor. Home education is not in itself a valid concern but a legally protected option.

There are no safeguarding duties under the 1986 Order; adequate duties to refer any concerns to social services apply to all who deal with children.

*Section 3(v) defines that boards have a statutory duty under schedule 13 to the Education and Libraries (Northern Ireland) Order 1986 (“the 1986 Order”), to ensure that children in the board’s area are receiving full-time education suitable to their age, aptitude, ability, any special educational needs that they have, and that parents fulfil their duty in this regard. However, schedule 13 to the 1986 Order definitely does not impose a duty upon a board as described in the draft policy. Schedule 13 empowers boards to enforce the duty that parents owe to their children under article 45 of the same legislation. Article 45 imposes a duty on parents to cause their children to receive efficient full-time education suitable to their age, ability, aptitude, and any special educational needs that they may have, either by regular school attendance or otherwise. Therefore, the duty being described as the board’s duty in this section of the draft policy, is in fact a parental duty and nothing whatsoever to do with the board. The parental duty only becomes the board’s business if it appears to the board that it is not being honoured by the parents;*

and

*... section 5 of the draft policy seeks to impose minimum standards which are superfluous to the law. The parental duty under article 45 of the 1986 Order extends only to the provision of “efficient full time education suitable to age, ability, aptitude and any special educational needs a child has”. The minimum standards in section 5 discuss requirements of an environment which is safe; that the child has access to a conducive learning environment; and that the child’s physical, social, emotional health and wellbeing needs are met. None of these requirements are written into the article 45 parental duty and are supposedly an attempt to widen the scope of the parental duty, beyond that which the law requires.*

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The ELBs **should not as a matter of course be preparing a case for a School Attendance Order on every home educated child**. Nor should there be a presumption that a home educated child is ‘in need’ as defined by article 17 of the Children Order. In any event, the duty imposed by virtue of article 18 of the Children Order (in relation to children in need) definitely does not apply to ELBs. It applies only to “an

authority”, defined in article 2(2) of the Children Order as (either) a Health and Social Services Board, or a Health and Social Care Trust. An ELB is neither of these bodies. The only relevant section is that on School Attendance Orders, in the rare situation that a child under and SAO continues to be home educated with the blessing of the Supervising Officer.

The correct order of the ELB seeking to take action / make enquiries of a parent who is home educating is: assumption of compliance with law -> concerns raised -> informal procedures -> statutory procedures -> court proceedings.

To apply statutory procedure, before proceedings occur, is to ask for evidence of innocence from those about whom there are no concerns. **This makes a mockery of the presumption of innocence.**

There is no requirement to provide a programme:

*Section 3(viii) of the draft policy appears to be requiring parents to forward a copy of their home education programme to the board. But there is no legal requirement for a parent to do that, still less any legal power for the board to seek it. The board only has the power to ask for information (or means of satisfying it) that suitable education being provided, if it has cause for concern in this regard - ie. if it appears to the board that the parent is failing to perform their article 45 duty. The fact that a child is being home educated is not, in and of itself, sufficient for it to appear to the board that the parent is not answering their article 45 duty. On the contrary, if it is known to the board that the parent is home educating, then the board should presume that the parent is complying with its article 45 duty, just as much as if that parent were sending their child to school and that child were in regular school attendance;*

**The United Nations Convention on the Rights of the Child** is, as noted in the draft, not legally binding, containing no controlling language or mandates. It cannot create powers. The government do not consider these rights of such importance to as to incorporate them into UK law.

There is no power to delay deregistration: Regulation 4 of the Registration and Attendance of Pupils Regulations (Northern Ireland) 1974 (“the 1974 Regulations”) provides that a parent shall not withdraw their child from a school at which the child is a registered pupil, before “*acquainting the principal with [their] intention to do so.*” This does not require a parent to discuss the matter with the school principal, nor does it require the parent to ensure that a suitable home education programme is in place first.

*At section 3(ii) of the draft policy it is stated that it is the Board/ESAs expectation that a school should advise: “the parent that the child or young person should continue to attend his or her registered school until such times as the [elective home education] programme is in place”. However, this is to impose a burden additional to law. Regulation 4 of the Registration and Attendance of Pupils Regulations (Northern Ireland) 1974 (“the 1974 Regulations”) provides that a parent shall not withdraw their child from a school at which the child is a registered pupil, before “acquainting the principal with [their] intention to do so.” This does not require a parent to discuss the matter with the school principal, nor does it require the parent to ensure that a suitable home education programme is in place first. In fact, in the case of R v Gwent County Council, ex parte Perry [1985] 129 Sol. J 737, a case where a local education authority in Wales (Gwent County Council) insisted that a child stay on in school until a home education programme was satisfactorily established, the court considered that the parents should be given time by the local authority to set up arrangements for home education;*

Data protection issues – the Principal passing information to the Boards on deregistration would be guilty of an offence under the **Data Protection Act**.

*Section 3(iii) states that the principal of the school in question will then notify the board’s education welfare officer (EWO), using a form (EHE), that the parent has elected to home educate and to withdraw their child from school. However, the principal of the school in question would have no right to do so and, in sharing*

*such information with the EWO, the principal would, in my view, be committing some form of offence under the Data Protection Act 1998 (“the DPA 1998”) and would also (or alternatively) be acting in violation of Article 8 of the European Convention on Human Rights (the right to private and family life), consequently breaching section 6 of the Human Rights Act 1998 (“the HRA”), because the principal would be disclosing information to a third party without proper or lawful justification for doing so (see cases of JR 57’s Application [2013] NIQB 33; and also JR 54’s Application [2011] NIQB 77). Section 3(vii) of the draft policy is suspect on this basis also - as this part seems to be requiring the principal of the school to record information of equally doubtful necessity;*

**Children with Special Educational Needs are not subject to the extra restrictions cited by the draft:**

*Section 4(ii) of the draft policy states that “Department of Education approval is required to name anything other than grant aided school provision in a child’s statement of special educational needs.” It states that this is in accordance with the 1974 Regulations and DENI Circular 2010/07. However, this is a complete misstatement of the law. In particular, article 10 of the Education (Northern Ireland) Order 1996, which itself is entitled “special educational provision otherwise than in a grant aided school” states that a board may arrange for the special educational provision (or any part of it) to be made in Northern Ireland otherwise than in a grant aided school (see article 10(1)(b)). It is accepted that article 10 is subject to article 12, which states the Department must consent to the child being educated at somewhere other than a grant aided school, but article 12(1A) clearly states that these provisions do not apply to a board deciding, for the purposes of article 16(5), whether a parent has made suitable arrangements. It is therefore denied that DENI approval would be needed if elective home education were to be named in a child’s statement of special educational needs;*

## Legislation

### Education and Libraries (Northern Ireland) Order 1986 SI 1986/594

#### Article 45

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

#### Schedule 13 Enforcement of duty imposed by article 45

##### Part 1

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

....

2(2) Where, at any time whilst a school attendance order is in force with respect to a child, the parent of the child makes an application to the board by whom the order was made requesting ... that the order be revoked on the ground that arrangements have been made for the child to receive otherwise than at school education suitable to his age, ability and aptitude and to any special educational needs he may have, the board shall amend or revoke the order in compliance with the request unless it is of the opinion that no satisfactory arrangements have been made for the education of the child otherwise than at school.

### The Children (Northern Ireland) Order 1995

#### Child's welfare to be paramount consideration

3. (1) Where a **court** determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) In the circumstances mentioned in paragraph (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;

(g) the range of powers available to the court under this Order in the proceedings in question.

(4) The circumstances are that—

(a) the court is considering whether to make, vary or discharge an Article 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(aa) the court is considering whether to make an order under Article 7; or

(b) the court is considering whether to make, vary or discharge an order under Part V.

(5) Where a court is considering whether or not to make one or more orders under this Order with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

**17.** For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by an authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and “family”, in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

**18.** (1) It shall be the general duty of every authority (in addition to the other duties imposed by this Part)—

(a) to safeguard and promote the welfare of children within its area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of [F2social care] appropriate to those children's needs.

(2) For the purpose principally of facilitating its general duty under this Article, every authority shall have the specific powers and duties set out in Schedule 2.

(3) Any service provided by an authority in the exercise of functions conferred on it by this Article may be provided for the family of a particular child in need or for any member of his family, if the service is provided with a view to safeguarding or promoting the child's welfare.

(4) The Department may by order amend any provision of Schedule 2 or add any further duty or power to those mentioned there.

(5) Every authority—

(a) shall facilitate the provision by others (including in particular voluntary organisations) of services which the authority has power to provide by virtue of this Article or Article 19, 21, 27,[F3 34C to 34E, 35A or 35B]; and

(b) may make such arrangements as it sees fit for any person to act on its behalf in the provision of any such service.

(6) The services provided by an authority in the exercise of functions conferred on it by this Article may include giving assistance in kind or, in exceptional circumstances, in cash.

(7) Assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part).

(8) Before giving any assistance or imposing any conditions, an authority shall have regard to the means of the child concerned and of each of his parents.

(9) No person shall be liable to make any repayment of assistance or of its value at any time when he is in receipt of income support,[F4 of any element of child tax credit other than the family element, of working tax credit][F5, of an income-based jobseeker's allowance or of an income-related employment and support allowance].

[F6(10) The Treasury may by regulations prescribe circumstances in which a person is to be treated for the purposes of this Part (or for such of those purposes as are prescribed) as in receipt of any element of child tax credit other than the family element or of working tax credit.]

The following extracts relate to home education of pupils.

**Article 3**

In all actions concerning children, whether undertaken by public, or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take appropriate legislative and administrative measures.

States Parties shall ensure that the institutions, services and facilities responsible for the care and protection of children conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision.

**Article 12**

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative of an appropriate body, in a manner consistent with the procedural rules of national law.

**Article 28**

States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular:

- Make primary education compulsory and available free to all;
  - Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance on the case of need;
  - Make higher education and vocational information and guidance available and accessible to all children;
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Take measures to encourage regular attendance at schools and the reduction of drop out rates.

States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present convention.

States Parties shall promote and encourage international cooperation on matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

**Article 29**

States Parties agree that the education of the child shall be directed to: the development of the child's personality, talents and mental and physical abilities to their fullest potential; the development of respect for human rights and fundamental freedoms, and for the principle enshrined in the Charter of the United Nations; the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; the development of respect for the natural environment.

No part of the present article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

Passed unanimously by the United Nations General Assembly on 20 November 1990 and entered into force on 2 September 1991.