Home Education and the Law

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December 1986

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HOME EDUCATION AND THE LAW

Education is compulsory. School is not. That is the simplest summary of what the law says about educating children otherwise than at school. In this article we describe the legal position of home education (in England and Wales), a matter which looms *unnecessarily large* in the minds of many people concerned with home education.

The law places upon parents the duty to cause their children to receive "efficient, full-time education suitable to the child's age, ability, and aptitude, [and to any special educational needs the child may have] either by regular attendance at school, or otherwise" (Education Act 1944, section 36). Note the last two words "*or otherwise*". School is not compulsory.

This fact comes as a surprise to most people, even to some lawyers and local education authorities (LEAs). One reason is that the number of children currently being educated otherwise than at school is still comparatively tiny -- estimates range from 5000 to over 20000 -- so in most people's experience "education" equals "schooling".

Unfortunately this ignorance of the law often extends to people in positions of power who should know better. Consequently the *de facto* position of home-educating families is in many cases distressingly different from what is should be *de jure*. *"Education Otherwise"* magazine (published by the organization of the same name, whose aim is to promote education otherwise than at school) often reports appalling tales of LEAs, and sometimes even magistrates' courts, making mistaken decisions, exceeding their legal powers, and generally harassing families who are guilty of no offence.

For example, parents are often told, erroneously, that they are obliged to inform the LEA of their decision not to send their children to school when they reach "compulsory school age", that the LEA is empowered to refuse permission, or to grant it only on condition that parents agree to specified curricula, or to regular educational testing, or to other requirements laid down by the LEA. They are told that Education Inspectors and Educational Welfare Officers have the right to enter their home to inspect and question them and their children. They are told that it is the LEA's prerogative to lay down curricula and other fixed requirements for home education, that parents cannot challenge these requirements or adhere to standards, philosophies, and educational practices that the LEA disapproves of and remain within the law. *None of this is true.*

Sometimes parents are told that if they do not comply, their children will be taken "into care", i.e. forcibly removed from their parents' care. The threat of having one's children taken away from home by force, either to school or completely, is not one that any parent can take lightly. Naturally, parents tend to be intimidated by it. For home educators it can be even more traumatic, for in many cases it will have been precisely the harmful effect that they could see school having on a particular child that impelled them to educate the child at home. In other cases they will have decided for philosophical, religious, moral, or educational reasons to take more responsibility for their children's education than is customary. But the LEA does not itself have the right to take children into care. It must apply to a juvenile court, and courts are forbidden to give *a priori* preference to the LEA's educational judgements over those of the parents or other witnesses. We shall return to this point below, but in summary, *a child cannot be taken into care solely for non-attendance at school.* A court will not make a care order unless there are extreme and unusual circumstances in addition to non-attendance at school, such as the child not being well cared for, or the parents keeping the child from school as a political protest, or for some purpose other than educating him, or in defiance of previous court orders. Children who are well cared for and are being educated, even in ways disapproved of by the LEA, cannot be taken into care.

Because they are intimidated, the majority of parents who come into conflict with LEAs decide in the end to submit or compromise with the authorities, even when they know that the latter's demands are unreasonable and without legal foundation. As a result, few home education cases are ever brought to court. And very few of them ever go to higher courts, where they could constitute legal precedents. This gives rise to a vicious circle, for the lack of precedents and well-established legal and administrative practices increases the uncertainty in the mind of any parent threatened with legal action. Any court case, even an open-and-shut winning case, upon which such an emotionally charged outcome depends, must be stressful for children. Uncertainty makes the prospect of such stress intolerable in most cases. Thus in practice the LEAs are given *carte blanche* to exceed their powers, unreasonably to control and interfere with home education, and often effectively to prevent it.

The purpose of the present article is to state as clearly as possible what the law is and to publicize the fact that it is very favourable to non-schooling education. We hope that this will contribute to improving the climate for non-schooling families.

The fundamental piece of legislation that governs education in England and Wales is the Education Act 1944. Section 36 of that Act defines the duties of parents. Here is the whole of section 36:

Education Act 1944, section 36:

Duty of parents to secure the education of their children

It shall be the duty of the parent of every child of compulsory school age to 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.

Perhaps the most important thing to note about section 36 is that in the absence of any direct orders from a court or from an LEA under section 37 (see below), and provided that the child is not registered at a school, this is the only legal duty that a parent has under the Act. And this duty can be wholly discharged without causing the child to attend school and without obtaining permission or approval from anyone.

The term "*or otherwise*", though short, is not some idle afterthought or "loophole" in the law. It, or an equivalent form of words, has been present in every applicable piece of legislation since education was first made compulsory in this country. It appears again in section 37. It was definitely not the intention of Parliament to compel all children to attend school. It is definitely the case that parents who provide [efficient, full-time, etc.] education for their children otherwise than at school cannot legally be prevented from doing so.

Furthermore the scope for education authorities to interfere in the details (such as curriculum) of home education is severely limited by section 76 of the Act:

Education Act 1944, section 76:

Pupils to be educated in accordance with the wishes of their parents

In the exercise and performance of all powers and duties conferred and imposed on them by this Act [the Secretary of State for Education and Science] and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.

It was established in the case of Wood v Ealing London Borough ([1967] Ch 364, [1966] 3 All ER 514) that the word "educated" in this section must be taken to refer to the curriculum and that the word "parents" must be taken to refer not to parents generally but to particular parents in respect of their own particular children. [This case, like most of the cases we cite

in this article, is reported in the excellent continuously updated reference "*The Law of Education*", Liell, P. and Saunders, J.B., eds., Butterworths].

Though section 76 merely requires LEAs to "have regard to the general principle" of parental choice, and not necessarily to make it an overriding principle, it is hard to imagine any group who would satisfy the conditions of section 76 better than parents who provide [efficient, etc.] home education for their children because they are opposed to schooling as a method of education. It might even be (though the legal position is unclear) that section 76 would suffice to permit education otherwise than at school even if it were not mentioned explicitly elsewhere in the Act. In any case, the fact that it is a "general principle" of the Act that parents be allowed a role in their own children's education is further evidence that it was not merely as an afterthought that parents were allowed to provide this education themselves. Note also that section 76 conforms to (but presumably predates) article 26(3) of the Universal Declaration of Human Rights:

Universal Declaration of Human Rights 1948, article 26(3):

> Parents have a prior right to choose the kind of education that shall be given to their children.

The term "compulsory school age" in section 36 does not in any way imply that there is an age at which it is compulsory to go to school. As explained in section 35 of the Act, it is simply a technical term used as a shorthand way of referring to a range of ages, which is modified from time to time by Parliament. At present it means any age of at least five years and less than sixteen years.

Both among experts and among laymen there is no unanimous agreement about what "education" is, what "efficient" means, and what is "suitable" for a child of a given age, ability, and aptitude, and what "full-time" means. The question therefore arises how these terms in section 36, whose practical meaning Parliament has (wisely) chosen not to define, are to be interpreted in disputed cases. Who has the last word? Is it the parent? No, because in that case the legal duty to educate one's children would be vacuous, since a parent could always define *whatever* the child was doing as "efficient ... education". Is it the LEA? LEAs often claim that they are empowered to make these definitions. If that were so, the parent's right to educate otherwise than at school would in practice be worthless since a hostile LEA could always define "efficient ... education" so that it effectively meant "regular attendance at school". Happily, it has been clearly established by legal precedents that LEAs have no such right in law. The entity that has the last word in interpreting these terms, when their interpretation is in dispute, is always a *court of law.*

This means that it is always open to parents accused by an LEA of failing to fulfil their section 36 duties, to prepare evidence tnat they are fulfilling them. according to a *reasonable interpretation* of the terms in section 36, and to challenge in court any LEA decisions to the contrary. It will be the court (magistrates, or on appeal, judges) acting as "reasonable men", who will decide whether the parents' interpretation was reasonable or not. The LEA, if they interpreted the terms differently and thought that the parents were not fulfilling their duty, would have to justify to the court why the parents' interpretation was not reasonable.

Just such a case arose in 1911 (Bevan v Shears [1911] 2 KB 936). A bye-law made under the Elementary Education Act 1870 as amended by the Education Acts of 1876 and 1902 used to require that "the parent of every child of not less than five years or more than fourteen shall cause such child to attend school unless there be a reasonable excuse for non-attendance", and that one reasonable excuse should be that "the child is receiving efficient instruction in some other manner".

The authorities charged that the parent had no reasonable excuse for not sending the child to school, but the parent brought evidence that he had "arranged with a lady for the education of the child". The justices decided, on the evidence they were given, that the education was in fact efficient in spite of the authorities' opinion to the contrary. On appeal, the Divisional Court upheld this decision. Lord Alverstone said:

> In the absence of anything in the bye-laws providing that a child of a given age shall receive instruction in given subjects, in my view it cannot be said that there is a standard of education by which the child must be taught ... [T]he justices have to decide whether in their opinion the child is being taught efficiently so far as that particular child is concerned.

The key words here are that "*the justices* have to decide...". Lord Alverstone overruled the education authority's opinion in favour of that of the parents. He also held that the justices could decide on the evidence before them that the child's education was "efficient" without deciding that it was the same as he would have received at school or that it was "efficient" by the standards a school would apply. In other words, neither the education authority's opinion of what is "efficient" education, nor the prevailing standards of "efficiency" in education are to be taken *a priori* as criteria of what meaning a parent must attach to "efficient" in fulfilling his duty to educate his child. If the parent can persuade the court that his interpretation is reasonable, there is an end of the matter.

What sort of evidence can a parent bring to show that he is fulfilling his legal duty? Again the relevant criterion is simply that the evidence must be such as would, under the circumstances, persuade a reasonable person.

It could include statements from the parent, samples of the child's work, reports from professionals or experts who have witnessed the education, or anything else that is relevant. On the other hand there can be no fixed rule that any one of these, or any other form of evidence, is indispensable.

Exceptionally, it can happen that *under the circumstances of a particular case,* the only way that a reasonable person would be able to satisfy himself that [efficient...] education was being provided was by being given a particular sort of evidence, and in such a case (and only in such a case) the parent would be obliged to provide that sort of evidence to win his case. For example in the case of R. v Surrey Quarter Sessions Appeals Committee, ex parte Tweedie [1963] LSR 464, Lord Parker held that under the unusual circumstances of that case only an inspection (and favourable report) by an Education Inspector could provide satisfactory evidence. The circumstances included

> ...facts such as a mother who is paralysed or, at any rate, is in a wheelchair, a father in ill health, six children of compulsory school age, ... [and] prevarication shown by the parents...

in repeatedly undertaking to allow, but then not allowing, such an inspection, and acting in a way

> ... calculated to provoke the local authority.

Though Mrs. Tweedie lost her case on the facts, it was held that (in the words of the Law Report)

> ...as a general rule an education authority should not, as a matter of policy, insist on inspection in the home as the only method of satisfying themselves that the children were receiving full time education....

The same would hold for any other particular "method of satisfying themselves".

The requirement for "full-time" education should not cause problems for most home-educating families. Again, it is not defined in the Act, and again it is not the case that education is "full-time" only if it mirrors a school timetable. Nor are the total number of hours per day, or per year, that a child would spend "being educated" if he were in school the only ones that can amount to "full-time".

It may seem odd to the reader that we are continually envisaging any conflict that may arise as being between home-educating families on the one hand, and specifically an LEA on the other. We have said that parents do not need to seek permission or approval, from the LEA or anyone else, to educate their children otherwise than at school. How does the LEA get

into the picture? The answer is, through section 37 of the Act, of which the following are the relevant parts of the first two subsections:

Education Act 1944, section 37(1) and 37(2):

School Attendance Order:

(1) If it appears to a local education authority that the parent of any child of compulsory school age in their area is failing to perform the duty imposed on him by the last foregoing section it shall be the duty of the authority to serve upon the parent a notice requiring him ... to satisfy the authority that the child is receiving 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.

(2) If, after such a notice has been served upon a parent by a local education authority, the parent fails to satisfy the authority ... that the child is receiving efficient full-time education suitable to his age, ability, and aptitude [and to any special educational needs the child may have], if in the opinion of the authority it is expedient that he should attend school, the authority shall serve upon the parent a ... school attendance order ...

Just as section 36 places duties upon parents, section 37 places duties upon LEAs, and empowers them to take certain actions against parents of children who are not, or do not *appear* to be, receiving "efficient ... education". Precisely what these duties and actions are, we shall now discuss.

The opening words of section 37, "If it appears", and the words "satisfy the authority..." have been the subject of dispute in the courts, and have now been effectively defined by Judge Donaldson in the case of Phillips v Brown (20 June 1980, Unreported, Divisional Court). This is quite an important case for anyone concerned with home education.

Mr. Phillips was a parent of a child who was not attending school. The LEA asked him for details of the child's education. Mr. Phillips refused to comply, saying only that he was fulfilling his section 36 duties. He was then served with a notice under section 37(1) requiring him to "satisfy the authority that the child is receiving efficient ... education". He again refused to comply, saying that the LEA was not entitled to serve the notice because section 37 empowers them to do this only if "it appears to them" that section 36 was being violated and, there being absolutely no evidence of such a violation, it could not have appeared that there had been one.

This totally uncompromising position, refusing to give any information whatsoever about the child's education, was eventually rejected both by the magistrate and, in effect, by the Judicial Review of Judge Donaldson.

However, Judge Donaldson did in fact overturn the magistrate's decision on other grounds, sending the case back to him for reconsideration. In the course of his judgement, Judge Donaldson settled certain issues that had been contentious in the interpretation of section 37. These enable us to construct the following "worst case" chronology of what a hostile LEA might do to the family of a child not registered at, and not attending, any school:

The parents are not obliged to inform the LEA, or anyone else, that they intend to educate their child otherwise than at school.

The LEA is entitled to request information informally from parents of children not at school, even if there is no evidence that section 36 is being violated, and even if it does not appear that it is being violated.

The parents are under no legal duty to comply with such a request.

Whether or not the parents comply, the LEA must then consider whether "it appears" that section 36 is being violated, and in a case where the parents refuse to answer the informal request but deny that they are in breach of section 36, "there is no reason why [the LEA] should necessarily adopt the parents' view" (though it may do so) and it "could very easily conclude that prima facie the parents were in breach of their duty".

If, for whatever reason, it does not appear that section 36 is being violated, the LEA's duty is discharged, and it is not entitled to take any action against the parents. Unless there are special circumstances in the case, the practical situation is now probably that which Mr. Phillips had hoped would obtain *ab initio,* namely that it cannot now "appear" that there is a violation of section 36 unless there is positive *evidence* of such a violation. For example, the LEA cannot simply go back to stage one, demand ever more information in greater detail at shorter intervals, and eventually interpret any refusal to comply as *prima facie* evidence that a new breach of section 36 has begun.

If it *does* appear to the LEA that section 36 is being violated then its duty is to serve a notice under section 37(1), "requiring" the parents to satisfy it that the child is receiving education in accordance with section 36. The parents may, though again they have no duty to, provide the LEA with evidence that they are complying with section 36 (and as discussed above, the LEA must not, as a matter of policy, require that this evidence be in a particular form). If they can show this, then again the LEA can take no action against them.

If the parents (whether or not they reply to the section 37(1) notice) fail to satisfy the LEA, then it must decide whether "it is expedient" that the child should go to school. This is a separate decision, and again the parents may provide evidence that it is not expedient. If the LEA decides that it is expedient then it will serve a School Attendance Order, which orders the parent to cause the child to attend a particular school.

The parent may now make an application that the School Attendance Order should be revoked because now "arrangements have been made for the child to receive efficient ... education". Under section 37(4) the LEA is then obliged to revoke the order unless "they are of the opinion ... that no satisfactory arrangements have been made for the education of the child otherwise than at school".

If they are of that opinion, section 37(4) gives the parent the right to appeal to the Secretary of State for Education and Science who must then "give such direction thereon as he sees fit".

If a parent refuses to comply with a School Attendance Order, and the LEA (or, as the case may be, the Secretary of State) refuses to revoke it, then legal action will result. This can be initiated either by the parent or by the LEA:

The parent can ask a court to strike down any of the decisions of the LEA or of the Secretary of State on grounds that we shall explain. The LEA may prosecute the parent under the Education Act. It is also under a duty (Education Act 1944, section 40) to

> consider whether it would be appropriate, instead of or as well as instituting the proceedings, ... [under the Education Act] ... to bring the child in question before a juvenile court under section 1 of the Children and Young Persons Act 1969.

The Children and Young Persons Act is the one under which a child may be taken into "care". The power to bring proceedings under this Act at this point in the story is, as we have mentioned, sometimes abused by LEAs. Instead of "considering whether it would be appropriate" for the child to be taken into care, they deliberately opt for juvenile court proceedings, or the threat thereof, solely as a means of intimidating the parent and discouraging him from taking further legal action. The point is that a parent who is convicted of an offence under the Education Act may be fined or even imprisoned; he may appeal, he may compromise with the authorities, or he may give in. But until the case is settled one way or the other, his *child* cannot be touched. By contrast, a parent who fails to prevent a care order from being made may immediately have his child forcibly removed from home. Throughout any subsequent proceedings, the

child will be in effect a hostage, imprisoned by a hostile LEA in order to coerce the parent into abandoning his case, no matter how justified.

This is clearly an improper use of care proceedings, and is not "appropriate" in the sense of section 40. As far as we know, no parent has ever challenged in court an LEA's right to apply for a care order in "inappropriate" cases, which include those where its only intention is to enforce the Education Act while other methods are available. But it is clear that in law an LEA has no such right.

Furthermore, if care proceedings are instituted, the range of defences available to the parent is actually greater than if he had been prosecuted under the Education Act. Psychologically, for the reasons we have discussed, he must feel more vulnerable, but his purely legal position under the Children and Young Persons Act is stronger, for in order to succeed in obtaining a care order the LEA must prove *both* that the child is not receiving "efficient ... education" *and* that he is "in need of care or control which he is unlikely to receive unless the court makes" [a care] "order..." (Children and Young Persons Act 1969, section 1(2)).

In the rarest of cases, a court may be entitled to regard a persistent refusal by parents to send a child to school as in itself evidence that the child will not receive proper "care" within the meaning of the Children and Young Persons Act, even when the child is "being well cared for" according to the everyday meaning of these words. Thus the Court of Appeal ruled in the case of "DJMS (a minor)" ([1977] 3 All ER 582; sub nom re S (a minor) [1978] QB 120, 1977 3 WLR 575) that

> ... a child who was not being sent to school or was not receiving a proper education was in need of "care" within section 1(2) of the 1969 Act. The word "care" applied not only to the physical well-being of the child but also to his proper education; if a child was not being properly educated he was not being properly cared for. Accordingly the court had jurisdiction to make a care order under s1 of the 1969 Act.

But we wish to stress that this decision does not show that the second requirement in the Act (that the child be "in need of care or control") is vacuous in home education cases. The "DJMS" case was decided very much on its own facts. The parents did not claim to be educating their child at home, but were keeping him away from school because of their implacable opposition to "comprehensive" schools. The Court of Appeal emphasized that it was the apparent indifference of the parents to the penal sanctions already imposed upon them by other courts that led to the necessity for the imposition of a care order.

The "DJMS" case may increase further the psychological pressure to give in to the LEA's coercion, on parents who both care for *and* efficiently educate their children, and would therefore win on both counts if they contested the matter. Since these are the very parents whom we are primarily addressing, we wish to repeat that notwithstanding this case, the Juvenile Court will always adjudicate on whether a care order is appropriate on the basis of the two separate requirements of the Children and Young Persons Act, so that non-attendance at school, even in defiance of an LEA, will not in itself suffice.

In any event, whatever the route may be by which the case finally comes to court, i.e. whether by

> Judicial Review of the LEA's (or Secretary of State's) decisions, instigated by the parent, or
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> Prosecution of the parent by the LEA under the Education Act 1944, or
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> Care proceedings instigated by the LEA under the Children and Young Persons Act 1969 (assuming that it cannot be shown, as we believe it could if the parents are *bona fide* home educators, that these are not "appropriate"),

the most important matter at issue will be the same, namely, *is the child receiving "efficient, full-time education suitable to the child's age, ability, and aptitude [and to any special educational needs the child may have]"?* In all cases, the parent is permitted, as we have discussed, to bring evidence that this is so, and in all cases, if such evidence convinces the court, he will win the case. Then, regardless of the opinion of the LEA, the School Attendance Order will be struck down, and the parent will be allowed to continue to educate his child at home.

The parent also has an additional range of defences (or complaints, as the case may be) available, namely to show that the LEA acted unfairly, beyond its powers, or contrary to natural justice, in making any of its decisions (e.g. in making the School Attendance Order). But relying solely on these defences is unlikely to suffice, for the following reason: In the words of Judge Donaldson (referring in this case to Mr. Phillips who had been prosecuted under the Education Act; but the conclusions would hold however the case had come to court):

> ... in my judgement it is open to the defendant parent to place evidence before the court designed to show that it could not have appeared to a reasonable LEA, correctly directing itself as to what matters were relevant, that the parent was in breach of his s36 duty, or, as the case may be, that it was expedient that the child should attend school and that the making of the School Attendance Order was therefore unauthorized and a nullity. But Courts should not readily accede to such an argument in the absence of evidence that in fact the parents are discharging their s36 duty and, if this is once proved, the defendant [parent] would in any event be entitled to be acquitted and the Court may make an order under s37(6) of the Education Act 1944 that the School Attendance Order shall cease to be in force.

In other words, the LEA's decision to force the parent to send the child to school will be struck down if the parent can provide evidence to prove *any one* of the following propositions:

> (1) That it could not reasonably have appeared that section 36 was being violated.
>
> (2) That it could not reasonably have appeared expedient to send the child to school.
>
> (3) That the parent was in fact discharging his section 36 duty.

But Judge Donaldson made the point that it will usually be difficult to prove points (1) or (2) without evidence that (3) is true also. He therefore advised parents to concentrate, in these circumstances, on point (3).

If the parent wins the court case, section 37(6) comes into play:

Education Act 1944, section 37(6):

> If in proceedings against any person for failure to comply with a school attendance order that person is acquitted, the court may direct that the school attendance order shall cease to be in force, but without prejudice to the duty of the local education authority to take further action under this section if at any time the authority are of the opinion that having regard to any change of circumstances it is expedient to do so.

Thus the School Attendance Order will be withdrawn, and the LEA will then be legally prevented from taking further action, provided the circumstances do not change.

If an LEA decides that there has been a "change of circumstances" and that "it is expedient" to "take further action", then we are presumably back at square one, except that two additional defences will be open to the parent, namely to provide evidence that the circumstances have not changed, or evidence that it could not reasonably appear that it was expedient to take further action. It seems unlikely, though, that even the

most hostile LEA would take their harassment of a home educating family that far.

Please note that all our comments apply, strictly speaking, only to cases in England and Wales in which the *only* dispute with the authorities is the matter of non-attendance at school of a child who is not registered at any school. We believe, though we have not seriously investigated the matter, that the Scottish law is substantially the same. If there are disputes over issues other than home education then the case may be beyond the scope of this article. If the child is registered at a school, he will have to be de-registered before what we say in this article applies. The process of de-registration involves the LEA and is by no means a mere formality. We would advise parents who are even considering home education that the decision to register one's child at a school should not be taken lightly.

We hope that home educating families who are experiencing any difficulty with their LEA will not compromise their principles and their children's education by giving in to unreasonable demands, but will stand on their rights. We would strongly advise them to *seek legal advice immediately.* Each individual case is different, and it may take a lawyer to determine whether or not a particular case has special features that might qualify what we have said. We also hope that it might save both time and money if the solicitors they engage (and the LEA) are given copies of this article, since we ourselves have taken legal advice and all our statements of law and procedure have been carefully verified by our solicitor and by Counsel's Opinion.