The Centre for Personalised Education

Which Code in the Attendance Register?

It is the position of The Centre for Personalised Education that the code for Approved Education Offsite (most commonly referred to as the B code) can be used for the non-school based part of flexischooling provided the conditions in The Education (Pupil Registration) (England) Regulations 2006 regulation 6(4)) are met.

Following legal advice we consider the Department for Education's (DfE) blanket advice to use only the C code to be flawed due to the following three aspects:

- The Conflation of Elective Home Education with Flexischooling
- Responsibility for Oversight
- Delegation of Responsibility for the Welfare of the Child

The Conflation of Elective Home Education with Flexischooling

Currently, and indeed for at least the last 13 years, the DfE and its predecessor the DCSF have conflated elective home education (EHE) and flexischooling. Flexischooling, in law, in England and Wales has always been a variety of schooling. Children who are flexischooled are on the roll of a school. Despite this the DfE have over several years put out confused messages regarding the status and oversight of flexischooling. The DfE seem unsure as to where they want flexischooling to sit in the spectrum of full time education provision possible to children of compulsory school age.

Either flexischooling remains where it is as a variety of schooling, becomes an option for home educators and therefore comes under home education, or England can adopt the Scottish system whereby part time school and part time EHE make up two parts of a full time education. The latter two options will require a change in both legislation and funding mechanisms.

As part of this confusion over where flexischooling sits, the DfE instructs schools to mark pupils as absent (code C) for non-school based sessions rather than using a mark which respects that they are merely obtaining their education elsewhere for that session. In the case of dual registration, where pupils attend two different establishments to receive their education, they are not marked absent but are given a mark (code D) that respects that they are elsewhere but still being educated. It is both inconsistent and disingenuous in the case of the flexischooled child to ignore that the child is receiving a full time education in the case of flexischooling. Indeed the school can be put off from allowing flexischooling by the very fact that their figures will indicate false levels of low attendance without explanation which can be damaging to the school's reputation.

Responsibility for Oversight

The DfE have issued confusing and conflicting advice in the Elective home education Departmental guidance for local authorities 2019 (EHEDGLA) regarding oversight etc of the non-school based element of flexischooling.

In paragraph 1.3 of the EHEDGLA they describe the non-school based element as subject to the same rules as EHE. Therefore they imply that should there be concerns about the education of the child, the local authority are expected to make enquiries.

In the same document, in paragraph 10.8, whilst saying that the school have no supervisory role in the non-school based element of flexischooling, they indicate that the school will be judged by Ofsted on the overall educational attainment of all pupils. If the school has no oversight then they are potentially being asked to perform the impossible. CPE have always encouraged the use of a contract, and the development of a dialogue and partnership between the school and parents, in order to ensure the overall education is as comprehensive and seamlessly delivered as possible. Such a dialogue means that the oversight is, in fact, automatic and it is a nonsense to imply that any other arrangement is sensible given the child's enrolment at school. Given that this oversight exists, it stands to reason that in fact the grounds for an "approved off-site activity" in accordance with The Education (Pupil Registration) (England) Regulations 2006 regulation 6(4)) and therefore code B can be used.

Delegation of Responsibility for the Welfare of the Child

One of the DfE's biggest objections to the use of the B code is that the school would be responsible for the welfare of the child whilst in the care of his or her parents during the non-school based sessions. To start with from a common sense point of view this is utterly preposterous. If a child's welfare is wholly the responsibility of the parents outside of school hours, and indeed when not at school for any other reason, why would the school be responsible for the welfare of the flexischooled child during the non-school based element of flexischooling *just because* the period is during the school day?

In order to unpick this we have looked at the case law *Woodland v Essex County Council [2013] UK Supreme Court*. In this case a child was morbidly injured (suffered brain damage through lack of oxygen) during a swimming lesson. The parents sued Essex County Council (ECC) as they ran the school where their daughter attended. The swimming teacher and the lifeguard did not work at the school but were contracted to provide the service on a regular basis. ECC claimed they were not liable because the teacher and lifeguard were not their employees.

The court ruled that the characteristics defining a non-delegable duty (a duty you can't pass off wholly to someone else) in *Cassidy v Ministry of Health [1951] 2KB343* and *Gold v Essex County Council [1942] 2KB293* held in this case. This means that in this case ECC still held partial responsibility for the tragedy.

By extension of course parents also have a non-delegable duty as they have an antecedent relationship with the school. This means there is a connection with the school which means that although some of the responsibility for the welfare of the child is passed to the school whilst the child is at school, the overarching responsibility for the welfare is retained by the parent. The ensuant party, ie the school, cannot delegate a duty back to the party that has given it to them. They can merely relinquish it. As the inferior of the parent in the duty of care to the child they also cannot supervise the parent's care of the child. It is an utter nonsense.

In conclusion we consider the DfE's insistence that a B code cannot be used to be the result of confused and muddled thinking. The resulting confusion of course puts schools off pursuing a perfectly legal and logical path with flexischooling and indeed puts schools off tackling flexischooling at all….which is maybe the point.