

Disability and Demonstrating Christian Commitment

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Community lies at the heart of both church and school life in the Church of England. In some areas, church communities are sustained by families who choose to attend a particular church based on the quality of the church school in its parish. Many Voluntary Aided Church of England schools (church schools)² give priority admission to parents on the basis of faith in the oversubscription criteria of their admission arrangements. While the Church stresses inclusiveness in its recommendations regarding admissions policies to church schools,³ where a church school is very popular and oversubscribed arguably priority must be given to parents of the faith in the school's catchment area. Otherwise parishioner children whose families regularly attend church could fail to be admitted to their local church school because of competition for places.⁴

One area where admission to church schools is highly sought after is the university area of Bournemouth and Poole, which is home to two church primary schools, St Mark's and Moordown St John's. The popularity of the area's church schools combined with booming birth rates has resulted in too many children applying for too few places. School governors, acting as admission authorities, have responded to the popularity of their schools by toughening the standards for demonstrating 'Christian commitment' under their oversubscription criteria.

1 This Comment was first delivered as a paper at the Law and Religion Scholars Network Conference at Cardiff University on 14 May 2013. *In memoriam* Nancy M. Loux and Dr Betty J. Finney.

2 On church schools generally, see P. Petchey, 'Legal issues for faith schools in England and Wales', (2008) 10 *Ecc LJ* 174–190.

3 Church of England Archbishop's Council Education Division, 'Admission to Church of England schools: Board of Education/National Society advice to diocesan boards of education' (June 2011), para 36, available at <[http://www.churchofengland.org/media/1513919/nsadmissionsguidancejune2011final%20\(3\).pdf](http://www.churchofengland.org/media/1513919/nsadmissionsguidancejune2011final%20(3).pdf)>, accessed 12 October 2013.

4 Church Schools Review Group, *The Way Ahead: Church of England schools in the new millennium* (2001), para 4.43, available at <<http://www.churchofengland.org/media/1118777/way%20ahead%20-%20whole.pdf>>, accessed 12 October 2013.

Faith-based criteria in school admissions are highly controversial because in the past determined parents have gained admission for their children by engaging in activities such as flower-arranging and serving on the parochial church council.⁵ The School Admissions Code 2012 (hereafter, the Code) and the Schools Adjudicator require the criteria for demonstrating faith to be clear and objective. Church attendance, where criteria are clearly stated and satisfactory records are kept, can be used as a criterion by church schools to give priority admission to children of the faith. The National Society recommends that church attendance be the only faith criterion.⁶ In response to their popularity, St Mark's and St John's schools have lengthened the period of time that in-catchment parents must attend church at least twice a month to qualify for priority admission from 12 to 24 months. St Mark's gives priority to those parents who, with their child(ren), attend a Christian church service where a crèche or Sunday club is available.⁷ St John's criteria only require parents to attend church, but those parents who attend St John's Church, Moordown, are given priority over other local church-going parents. This is in recognition of the school's trust deed, which states that the school was established to provide an education for the children of the parish.⁸

Church schools that have faith-based oversubscription criteria inevitably exclude children of parents from other faiths and parents of no faith at all. Communities such as St John's (church and school) are by their nature exclusive. The faith criterion of St John's minimises the number of pupils who attend the school who are 'outsiders' of the St John's community. The Code and the Equality Act 2010 make clear that such exclusiveness of schools of a religious character where a school is oversubscribed is permitted. Faith schools are exempted from the requirements of the Equality Act not to discriminate on the basis of religion or belief.⁹

Church schools must not, however, discriminate in admissions on the basis of other 'protected characteristics', to use the terminology of the Equality Act, such as disability.¹⁰ Governors who have set strict church attendance requirements presume that every parent can attend church often and over a sustained period of time. Where a parent is a 'disabled person', as defined by the act, one of the normal day-to-day activities that he or she could have significant difficulties

5 School Admissions Code 2012, para 1.9(e); Determination of the Schools Adjudicator, London Oratory School, 12 December 2012, para 14.

6 'Admission to Church of England schools', Appendix 1, para B(4).

7 St Mark's CE Aided Primary School, School Admissions Policy 2013–14, available at <<http://www.st-marks.bournemouth.sch.uk/bournemouth/primary/stmarks/site/pages/keyinformation/admissionspolicy>>, accessed 12 October 2013.

8 Moordown St John's CE Primary School Admissions Policy 2012/13, available at <[http://www.st-johns.bournemouth.sch.uk/PDFdocs/Admissions/MStj%20Admission%20Arrangements%202012-2013\[2\].pdf](http://www.st-johns.bournemouth.sch.uk/PDFdocs/Admissions/MStj%20Admission%20Arrangements%202012-2013[2].pdf)>, accessed 22 May 2013.

9 School Admissions Code 2012, para 1.9(i); Equality Act 2010, Schedule 11, s 89(5)(a).

10 Equality Act 2010, s 85.

carrying out, because of a severe, long-term physical or mental impairment, could be attending church on a regular basis.¹¹ Yet the current admissions criteria of the church schools of Bournemouth and Poole, and others like them, do not address the situation where disability would have an impact on church attendance. In so far as admission arrangements do not address disability and the duty of governors to make 'reasonable adjustments' to admissions criteria where an applicant is disabled, they are unlawful.¹²

Take for example the case of a single mother who suffers from clinical depression and is raising her son on her own with no family nearby. If her depression is long-term and severe, the public nature of worship and the community life that church attendance entails may be impossible for her to sustain. She would not be able to fulfil the church attendance criteria in the admissions arrangements of schools such as St Mark's and St John's by reason of her disability. Were her son to be denied priority admission on the basis of his mother's failure to attend church, the governors would have engaged in indirect discrimination on the basis of disability under the Equality Act. Indirect discrimination occurs when an apparently neutral criterion, such as requiring church attendance, is applied to a disabled person and disproportionately puts the disabled person at a disadvantage when compared to a person who is not disabled.¹³

Governors, acting as admission authorities, are bound under a number of different pieces of legislation, including the Code, the Equality Act and the Human Rights Act 1998, as well as common law principles of public law, not to discriminate against disabled people when drawing up admission arrangements and admitting pupils under those arrangements. They also have a positive public sector equality duty (PSED) under the Equality Act to have 'due regard to' the need to eliminate discrimination, harassment, victimisation and other conduct prohibited by the Equality Act, to advance equality of opportunity and to foster good relations between disabled and non-disabled persons.¹⁴ The Equality and Human Rights Commission's guidance explains that governors should have due regard to these objectives before and at the time that they are making policies and taking decisions.¹⁵ In order to advance equality of opportunity, the Equality Act further requires that governors have due regard to the need to remove disadvantages, take steps to meet different needs and encourage participation when it is disproportionately low. Admissions processes are the

11 Ibid, ss 6(1)–6(2).

12 For a recent case study and accompanying analysis see D Rosenberg and R Desai, 'The admissions arrangements of faith schools and the Equality Act 2010', (2013) 14 *Education Law Journal* 93–99.

13 Equality Act 2010, s 19.

14 Ibid, s 149. See S Fredman, 'The public sector equality duty', (2011) 40 *ILJ* 405–427.

15 Equality and Human Rights Commission, 'Public sector equality duty guidance for schools in England' (2012), p 5, available at <http://www.equalityhumanrights.com/uploaded_files/pdfs/public_sector_equality_duty_guidance_for_schools_in_england_final.pdf>, accessed 12 October 2013.

gateway through which disabled parents and their children must pass in order to enjoy the unique opportunities that a local church school provides. They are therefore fundamental to the fulfilment of a school's PSED. Where governors fail to have due regard to disability in their admissions arrangements and decisions, they will have acted unlawfully. Governors can be subject to judicial review for failing to fulfil their PSED, and anyone can object to the Schools Adjudicator where admission arrangements are unlawful or do not comply with the Code to the Schools Adjudicator.¹⁶

The Code requires that oversubscription criteria must be 'reasonable, clear, objective, procedurally fair, and comply with all relevant legislation, including equalities legislation'.¹⁷ Under the Equality Act, governors have a duty not to discriminate against disabled people in admission arrangements and to make 'reasonable adjustments' for disabled persons where a criterion or practice puts a disabled person at a 'substantial disadvantage' when compared to other persons who are not disabled.¹⁸ The duty to make reasonable adjustments gives discretion to governors to adjust oversubscription criteria so as to support the inclusion of disabled persons where they might otherwise be excluded by reason of their disability. It would not be expected that the governors drop wholesale the requirement that an applicant demonstrate Christian commitment. This would be unreasonable. They would, however, be required to adjust the criteria for how that commitment is demonstrated. They might, for example, accept evidence of peripatetic church attendance where some attendance has been possible, evidence of baptism (of the parent or the child depending on the individual circumstances) or other indicator of Christian commitment.

Governors are ordinarily prohibited from changing their oversubscription criteria in order to guarantee that they treat all applicants 'equally'. Equality law, however, recognises that disabled people may suffer particular disadvantages in comparison with non-disabled people and in order for them achieve equality they must be treated differently from other applicants.¹⁹ In our example, if the governors were not to take account of the mother's disability and make a reasonable adjustment to the church attendance criteria, they would unlawfully discriminate against her on the basis of disability.

They may also have violated her human rights under the Human Rights Act. Section 6 of the Act makes it unlawful for governors, as public authorities, 'to act in a way which is incompatible' with a Convention right. Article 2 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides that

16 School Standards and Framework Act 1998, s 88H.

17 School Admissions Code 2012, para 1.18.

18 Equality Act 2010, s 20(3) and s 85(6).

19 See Baroness Hale, 'The quest for equal treatment', (2005) PL 571–585 at 574.

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.²⁰

The Admission Code makes clear that this article does not create a right to a place in a church school, and it is generally stated as a matter of English law that Article 2 does not confer a right to be educated at a particular institution.²¹ The European Court of Human Rights, however, has only gone so far as to state that ‘Article 2 of Protocol 1 does not necessarily entail a right of access to a particular educational institution’.²² In areas where church schools are oversubscribed and admission to those schools is controlled by school governors, denial of admission to a particular church school to an ‘in-catchment’ child by reason of disability could mean exclusion from attendance at a church school altogether. This would be a denial of the right of parents to have their child educated in accordance with their Christian beliefs on the basis of their disability where such education is made available by the educational system. Liability for this violation would arguably lie with the admission authority of the school that discriminated in its admissions policy. As Lord Bingham stated in the leading case on the parameters of Article 2, the purpose of that Article is ‘to guarantee fair and non-discriminatory access’ to the state system of education.²³

Even if a direct violation of Article 2 by the school were not to be found, the school might nevertheless have violated the rights of both the parent and the child under Article 14 of the ECHR. Article 14 requires that the enjoyment of Convention rights is secured without discrimination on any ground. Where discrimination is claimed, the substantive article – in this instance Article 2 of the First Protocol – need not be violated but merely ‘engaged’.²⁴ Denial of admission to a church school where parents are Christians engages the right of parents to ensure that their child is educated and taught in conformity with their religious beliefs. Not all discrimination is unlawful under Article 14 ECHR: Article 14 is a qualified right, so where a public authority can demonstrate that the difference in treatment pursues a legitimate aim and that there is a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’, it will not be unlawful discrimination.²⁵ So, for example, discriminating on the basis of faith by faith schools or on the

20 See also *Valsamis v Greece* App No 21787/93 (ECtHR 18 December 1996).

21 *Ali (FC) v Headteacher and Governors of Lord Grey School* [2006] UKHL 14, para 24.

22 *Ali v United Kingdom* App No 40385/06 (ECtHR 11 January 2011), para 54, emphasis added.

23 *Ali v Headteacher*, para 24.

24 See *A v Essex CC* [2008] EWCA Civ 364, para 17.

25 *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; see also, *R v Governing Body of JFS* [2009] UKSC 15, para 210 ff (per Lord Hope of Craighead).

basis of address or catchment area does not violate human rights law. Applying a rigid criterion of church attendance to someone who is unable to attend church by reason of a disability, however, could not be said to be a reasonably proportionate means of pursuing the legitimate aim of admitting local children of the faith to a church school. This is particularly the case in the light of the other legal equality obligations of governors.

Where admissions criteria do not take account of the governors' obligations under the School Standards Framework Act 1998 (under which the Code was promulgated), the Equality Act and the Human Rights Act, or otherwise take account of disability in their admissions arrangements, governors may find it difficult, as a practical matter, to make the necessary reasonable adjustments to their admissions criteria.²⁶ In the paragraph immediately following the setting out of governors' obligations to comply with relevant equalities and human rights legislation, the Code states that admissions authorities '*must not ... place any conditions on the consideration of any application other than those in the oversubscription criteria published in their admission arrangements.*'²⁷ This requirement is aimed at ensuring fair and lawful decision-making by governors.

Oversubscription criteria go through an extensive process of consultation and approval. Once those criteria are approved, the Code requires that governors adhere to them to ensure fairness and legality in admissions. Given these restrictions, school governors may be reluctant to deviate from the school's admissions criteria – especially where they would wish to impose additional conditions (such as evidence of a disability) before doing so. As was pointed out by Lord Hoffman in another context, 'Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows.'²⁸ Given this, disabled Christian applicants whose children fail to gain admission to church schools because they did not fulfil church attendance requirements will have to seek a remedy on appeal to the Appeals Panel or ultimately by way of judicial review.

On appeal, the Appeals Panel must uphold an appeal where the panel finds that admission arrangements do not comply with the law or were incorrectly applied, and that the child would have been offered a place had the arrangements so complied or been correctly applied.²⁹ Where governors have not taken account of disability in their admission criteria and have not made a reasonable adjustment to those criteria when they applied them to a disabled

26 In the case involving the disabled widower represented by Dan Rosenberg and Raj Desai, for example, they succeeded on appeal although not on the direct application of the Equality Act. See Rosenberg and Desai, 'The admissions arrangements of faith schools', p 95.

27 School Admissions Code 2012, para 1.9, emphasis in original.

28 *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, para 68.

29 Admission Appeals Code 2012, para 1.9(a).

applicant, they will not have complied with the admissions law. Under paragraph 1.1 of the Code, the governors will not have complied with the Code or 'relevant human rights and equalities legislation'. Under the Equality Act they will have discriminated in their admissions arrangements and failed to make reasonable adjustments to the admissions criteria. They will also have failed to fulfil their PSED. The governors will not have assessed whether the church attendance criteria would have implications for disabled people and will not have considered the equality implications of those criteria before and at the time they were made and when they were applied. Finally, they will have violated the human rights of the applicant contrary to their obligations under section 6 of the Human Rights Act. Given the manifold ways in which the governors would not have acted in accordance with the relevant human rights and equalities legislation, and hence the Code, it is likely that such an appeal would succeed. Were an appeal to the Appeals Panel to fail to correct these errors of law, the decision would be judicially reviewable on grounds of illegality.

Where governors have failed to take account of disability when making and applying oversubscription criteria, it might be the case that there will be few – if any – appeals. Even where a parent such as the one in our example knows of her rights not to be discriminated against, she might not be willing to share details of her difficulties with school governors who will be drawn from her community. This will particularly be the case where there are no established arrangements for requesting a reasonable adjustment on the basis of disability. Such a parent might also forgo the stress involved in an appeal or judicial review where she has failed to be given priority admission. While it might be the case that governors need not be overly worried about appeals from disabled persons who suffer from a mental impairment, flawed admissions arrangements can be objected to by anyone to the Schools Adjudicator for failing to comply with the Admissions Code.³⁰

Governors should take immediate action to revise their admissions arrangements where church attendance is an element of the oversubscription criteria. They should do so not only to enable them to comply with the law but also to not bring into disrepute church attendance criteria, which are already controversial. How school governors choose to go about changing their admissions arrangements goes to the heart of the relationship between the Church and people with disabilities.

At a minimum, admissions arrangements should state that admissions decisions will be taken in accordance 'with the School Standards Framework Act, 1998, the Human Rights Act, 1998, the Equality Act 2010 and the Public

30 School Standards and Framework Act 1998, s 88H.

Sector Equality Duty'.³¹ This would enable governors to make reasonable adjustments within the confines of the Code. The admission arrangements must also set out what evidence the governors require of an applicant's disability and any other evidence that the governors would require when making reasonable adjustments to their admission criteria.³² When determining what evidence needs to be presented, governors will have to ensure both that the evidence requirements themselves are not discriminatory and that the evidence required will assist them in making consistent decisions.

Once these changes are made to the admissions arrangements of the school, they could easily be implemented by amending the Supplementary Information Form (SIF) that schools currently require parents to fill out in order to qualify for priority admission on the basis of faith. The form could have tick boxes for a parent to state whether or not he or she considers him- or herself to be disabled and whether or not that disability has affected his or her ability to meet the church attendance criteria. The SIF could then set out any additional evidence that needs to be attached to the form to enable the governors to make reasonable adjustments to the admissions criteria.

Such changes would ensure that admission arrangements and admissions decisions of school governors comply with the law. It must be stressed that this would be a minimal response. In the parlance of human rights lawyers, equalities and human rights legislation and the Code form a 'floor not a ceiling' for school governors. The Church of England places great weight on the obligation of church schools to serve their local community. One way in which a school could carry out its object under its trust deed to perform that service would be to give priority admission to all children, regardless of faith, whose parent is disabled. Given recent statistics of the number of children as young as five who are acting as carers, and the consequent impact on their schooling and childhood, such a criterion would ensure that church schools support some of the most vulnerable families in their local areas.³³

A policy that treats families where a parent is disabled more favourably would be lawful under the Equality Act and contribute to the school's fulfilment of its PSED. While in general discrimination law operates symmetrically – a person cannot discriminate against believers or atheists alike on the basis of religion or belief – when it comes to disability, the law is asymmetrical. The law recognises the particular vulnerabilities and support needs of disabled people and allows

31 At present, policies such as that of Moordown St John's state only that the admissions policy has been made in accordance with these legal requirements. St Mark's admission arrangements are silent as to the governors' legal obligations.

32 See, by analogy, the Schools Admissions Code's requirement as they apply to the oversubscription criterion of 'social and medical need'. School Admissions Code 2012, para 1.16.

33 B Quinn, 'Thousands of children as young as five act as family carers, figures show', *The Guardian*, 16 May 2013, <<http://www.theguardian.com/society/2013/may/16/thousands-children-caregivers-family-data>>, accessed 12 October 2013.

and encourages schools through the PSED to treat disabled people more favourably than those who do not have a legally recognised disability. The PSED requires schools to have 'due regard to the need' to remove or minimise the disadvantages suffered by disabled people, take steps to meet different needs and encourage participation when it is disproportionately low. The support, care and community that church schools can offer disabled parents and their children would advance equality of opportunity for disabled parents, as well as their children who are disabled by association.

Revision of the admission criteria for many church schools is urgently needed if they are to comply with equalities and human rights legislation and the Code. The required revisions, however, are relatively easy to make and schools should not anticipate being inundated with requests for reasonable adjustments by genuinely disabled parents. The challenges of the Equality Act, the Human Rights Act, the PSED and the Code are a genuine opportunity for governors of church schools to consider revising their admissions arrangements so as to serve and support disabled people in their community and fulfil the object of their nineteenth-century trust deeds.

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