

Equality, Parental Rights and Legal Requirements in Education Law

1. The following analysis provides an overview of what the law says in relation to promoting equality, the protected characteristics and parental rights. Equality law does not work in a vacuum and must always be weighed against other competing rights, including safeguarding and parental rights under the Human Rights Act 1998. While schools do enjoy some level of discretion in shaping their curriculums, schools also have a statutory obligation to respect the manner in which parents wish to raise their children in accordance with their own religious or philosophical convictions. It must be highlighted that issues surrounding sexual orientation and gender reassignment have become highly politicised and are focused on disproportionately in relation to any of the other protected characteristics. Campaign organisation and their materials have regrettably become a contentious part of education, undermining parental rights in a manner yet seen in this nation's history.

(a) Equality Duty and the Protected Characteristics

2. Central to this analysis is that nothing in a school's public sector equality duty, its obligations pursuant to Section 78 of the Education Act 2002 to have a balanced and broadly based curriculum which promotes the spiritual, moral, cultural, mental and physical development of its pupils, nor its obligation to actively promote British values justifies the material and practices of any school to overly promote LGBT issues and lifestyle or gender ideology.
3. As reiterated in the Department of Education's equality guidance, the precise equality duty owed by maintained schools has two parts: the 'general' duty and the 'specific' duty. The general duty is the overarching legal requirement for schools and means they must consider how their policies, practices and day-to-day activities impact on pupils and staff. Schools are required to have 'due regard' to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation.
 - Advance equality of opportunity.
 - Foster good relations.¹

¹ This three-fold duty is established by Section 149(1) of the Equality Act 2010.

4. To help schools meet these general duties, two further specific duties have applied to schools since 06 April 2012. They are:
 - To publish information to show how they are complying with the Equality Duty. This must be updated at least annually.
 - To prepare and publish one or more specific and measurable equality objectives at least every four years.
5. ‘Due regard’ has been defined by the Department of Education, in advice provided for school leaders and governors, as: *“The duty to have ‘due regard’ to equality considerations means that whenever significant decisions are being made or policies developed, thought must be given to the equality implications.”*²
6. In case-law, a requirement to have regard to a specified list of factors means that the authority subject to the requirement must consider each factor separately; but it does not prevent the authority from going on to consider other factors also, even if those other factors combine to outweigh the factors specifically listed.³ In relation to the protected characteristics, other objective factors that must be taken into consideration are safeguarding, the protection of the health and morals of the pupils, the protection of the rights of other students and staff, and parental rights all of which are also statutory requirements set out in Articles 8 and 9 and Protocol 1, Article 2 of the European Convention on Human Rights as read into the Human Rights Act 1998 by Section 1(1)(a-b).
7. This is the sum total of the equality duty, none of which sets any requirement to endorse, promote, proselytize, or campaign for LGBT agenda items. Importantly, as highlighted below, nothing in the equality duty is meant to discharge a school’s obligations under the Human Rights Act 1998 towards parents.
8. Furthermore, the Department of Education’s guidance on the issue of British Values defines the four British values to be promoted as democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs.⁴ The definition of

² Department of Education, *The Equality Act 2010 and schools: Departmental Advice for school staff, governing bodies and local authorities*, May 2014.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf.

³ *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36.

⁴ Department of Education, *Promoting Fundamental British Values as Part of the SMSC in Schools: Departmental Advice for Maintained Schools*, November 2014.

these values is non-statutory in nature and is meant to inform schools regarding their obligations under Section 78 of the Education Act 2002. That statutory obligation is to provide a broad and balanced curriculum which promotes the spiritual, moral, cultural, mental and physical development of pupils.

9. 'British values' does not mean proselytism towards a specific worldview, whereby certain lifestyles are promoted and celebrated in a manner which runs afoul of the school's obligations to respect the right of parents to raise their children according to their own religious and philosophical beliefs. If anything, solely promoting LGBT campaigning points is an affront to the British value of promoting mutual respect and tolerance of those with different faiths and beliefs.
10. Returning to the issue of defining British values, the 2014 guidance from the Department of Education⁵, in highlighting the new requirement that schools promote the fundamental British values, states that these values were first set out in the 'Prevent' strategy in 2011. While the guidance enumerates four values, nonetheless, no clear statutory definition of British values exists. To suggest that this guidance gives carte blanche to schools to override respect for parental rights on sensitive moral issues would, however, be a misinterpretation of the law. Again, there is no binding definition, statutory or otherwise, explaining what British values are. The promotion of British value should never be used as an excuse to engage in subject matters that should otherwise be wholly impermissible in our schools. The Department of Education should be very clear that British values are wholly separate from the promotion of the protected characteristics and cannot be used as a tool to deny parents their lawful right to withdraw their children from morally sensitive material.

(b) Statutory Duty of Respect Owed to Parents

11. Protocol 1, Article 2 of the European Convention of Human Rights, as transposed into British domestic law through the Human Rights Act 1998, states: "*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*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/380595/SMS_C_Guidance_Maintained_Schools.pdf.

⁵ <https://www.gov.uk/government/news/guidance-on-promoting-british-values-in-schools-published>.

religious and philosophical convictions.”⁶ It is therefore a legal requirement that schools in England respect, and neither undermine nor interfere with, the ability of parents to bring up their children in accordance with their own religious or philosophical worldview. This same requirement, in nearly identical language, has also been ratified by the United Kingdom in no less than five other international treaties.⁷ It is precisely this obligation that schools violate where they seek to proselytise to children in relation to sexual orientation and gender issues.

12. The European Court of Human Rights has repeatedly held that “*it is in the discharge of a natural duty towards their children- parents being primarily responsible for the ‘education and teaching’ of their children- that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.*”⁸ The Court has also held that “*a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.*”⁹ Schools, being the organisers of the curriculum which children are to be taught, are therefore prohibited from abusing their dominant position to force onto pupils views and positions about sexuality, gender or family which parents may find harmful to the development of their children. To put this into Convention terms, every school in the United Kingdom is obligated to deliver an education which actively respects and compliments the ability of parents to raise their children in accordance with their own sincerely held values.

13. Again, as the Court has laid out: “*the second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue*

⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

⁷ *Convention against Discrimination in Education*, UN Educational, Scientific and Cultural Organisation (UNESCO), 14 December 1960, Article 5(1)(b); *International Covenant on Economic, Cultural and Social Rights*, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966, Article 13; *Universal Declaration of Human Rights*, United Nations, UN General Assembly, 10 December 1948, 217 A (III), Article 26(3); *International Covenant on Civil and Political Rights*, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 Article 18(4); and *Convention on the Rights of the Child*, UN General Assembly, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Articles 14 and 18.

⁸ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Judgment, Merits, App No 5095/71 (A/23), [1976] ECHR 6, IHRL 15 (ECHR 1976), 7th December 1976, European Court of Human Rights [ECtHR], § 52.

⁹ *Chassagnou and Others v. France*, 29 EHRR 615, 28331/95, § 112.

an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded."¹⁰ Consistently exposing pupils, particularly young pupils, to LGBT campaigning materials would be the very definition of exceeding the aforementioned limit.

14. Article 2 of Protocol No. 1 does not permit a distinction to be drawn among subjects or school activities. It enjoins all British schools to respect parents' convictions, be they religious or philosophical, throughout the entire education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the 'functions' assumed by a school.¹¹ The verb 'respect' means more than 'acknowledge' or 'take into account'.¹² In addition to a primarily negative undertaking, it implies some positive obligation on the part of the school to ensure that parents' wishes are duly taken into account.¹³

15. The Human Rights Act 1998 must be read in conjunction with the United Nations Convention on the Rights of the Child, where in Article 14, it clearly states that in the provision of education, schools must respect the right of parents to raise their children commensurate with their evolving capacities in accordance with the parents' religious convictions.¹⁴ The Convention also requires, pursuant to Article 18, that parents, being the ones who love their children the most, have the primary role in deciding on the education of their children. The job of a school is not to usurp this role, but to assist parents in their task.¹⁵

16. Furthermore, the central role of campaign organisations such as Stonewall, Educate and Celebrate and Metro in developing school materials breaches a school's duty of strict neutrality in relation to contentious political issues about which reasonable people may disagree. Promoting tolerance is very different than promoting affirmation or celebration of sensitive moral positions, the latter having a strong political element attached to it.

¹⁰ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, *op.cit.*, § 53.

¹¹ ECHR, *Folgero and Others v. Norway* [GC], App. No. 15472/02, judgment of 29 June 2007, § 84(c).

¹² *Id.*

¹³ *Id.*

¹⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

¹⁵ *Id.*

Section 406¹⁶ and 407¹⁷ strictly prohibit this kind of political indoctrination, which may include presenting material to impressionable young pupils premeditated to change hearts and minds about sensitive moral topics that properly belong within the sphere of parental rights. It may also include making LGBT issues a pervasive part of the curriculum. Irrespective of the form such indoctrination takes, pursuant to the Education Act 1996, it is wholly impermissible for schools to engage such teaching materials.

17. Finally, as the promotion of issues surrounding sexual orientation and gender reassignment by definition engage mature moral themes, they should be classified as sexual education and subject to a right of withdrawal pursuant to Section 405 of the Education Act 1996.¹⁸ A school may not circumvent their statutory duty towards parents by arguing that these themes belong to other areas of education which do not enjoy a similar right of withdrawal.¹⁹

(c) Conclusion

18. We live in a day and age of unprecedented tolerance. Never before have people who identify as LGBT been so celebrated by society at large, such as by the entertainment industry, corporations and even government. The premise that LGBT campaigning points must be introduced into education to remedy the historic victimisation of LGBT people is fallacious at best. Parliament has identified 8 protected characteristics, among which no hierarchy of importance was intended. The disproportionate focus by schools on sexual orientation and gender reassignment, and the oftentimes intentional disregard for religion or belief, runs afoul of education law. Importantly, it also does violence to parental rights. Programmes which go beyond promoting mutual tolerance, and rather promote affirmation or even celebration of any of the protected characteristics within maintained schools, have no part in education. Therefore, it is the position of this legal opinion, that the status quo on these issues should be to respect parental rights in adherence to obligations stemming from the Human Rights Act 1998 and the Education Act 1996.

¹⁶ <https://www.legislation.gov.uk/ukpga/1996/56/section/406>.

¹⁷ <https://www.legislation.gov.uk/ukpga/1996/56/section/407>.

¹⁸ <https://www.legislation.gov.uk/ukpga/1996/56/section/405>.

¹⁹ Cf. ECHR, *Folgero and Others v. Norway* [GC], App. No. 15472/02, judgment of 29 June 2007, § 84.