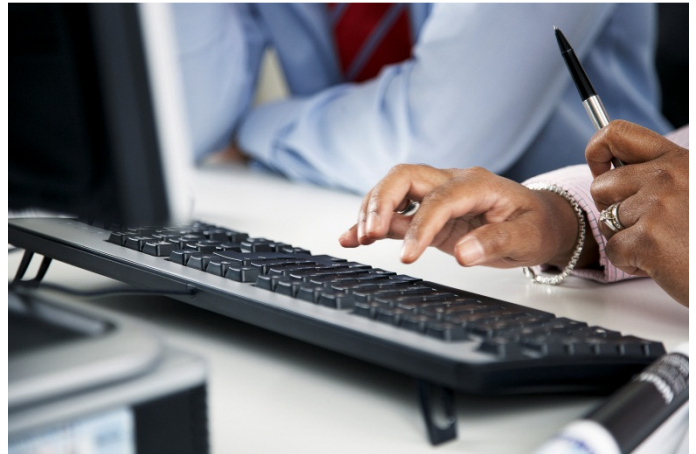


Public Benefit Briefing for Schools



The aim of this briefing is to provide both an overview and a practical guide for schools of the October 2011 decision of the Upper Tribunal Tax and Chancery Chamber's Judicial Review (JR) held as a result of the Independent Schools Council's (ISC's) challenge to the guidance issued by the Charity Commission regarding schools and public benefit. The full text can be found in <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/independent-schools-council-charity-commission.pdf> Section numbers in brackets below refer to this text.

I. Summary of findings

The key finding of the JR is summarised in paragraph 215b. "It is to look at what a trustee, acting in the interests of the community as a whole, would do in all the circumstances of the particular school under consideration and to ask what provision should be made once the threshold of benefit going beyond the de minimis or token level had been met". This is extended in 217. "The very nature of this approach means that it is not possible to be prescriptive about the nature of the benefits which a school must provide to the poor nor the extent of them. It is for the charity trustees of the school concerned to address and assess how their obligations might best be fulfilled in the context of their own particular circumstances"

In our view these are very helpful clarifications, even if all they do is back up what most charity lawyers have argued over the last few years – one cannot set comprehensive public benefit obligations or tests which should apply to all schools regardless of their wealth or circumstances. It follows that the guidance issued by the Charity Commission which suggested that it was not possible for schools to pass the public benefit test without providing means-tested bursaries at a 'reasonable' level was flawed and was issued in error and further that any arbitrary threshold, whether '5% of fees' or any specified percentage of pupils, was incorrect in principle and could not be sustained. The JR stated "The error of the approach of the Charity Commission as we read the Guidance is to view the public benefit test as satisfied if, and only if, the provision for the poor (or as it might say, for those who cannot pay fees) is reasonable" (229).

The JR also declined to enter the political arena regarding the wider issue of maintained and independent schools. "It cannot, we think, be for the Charity Commission or for us or the higher courts to carry out what is an essentially political exercise to determine whether and if so what, if any, dis-benefits there are of the private schools sector generally and then to balance the benefits and to form a view about public benefit" (96). Instead the JR states that "we repeat that provision of education to the full-fee-paying students is itself for the public benefit" (229).

The outcome of the JR is that the Charity Commission will now need to review and amend its public benefit guidance for schools, working with the ISC.

II. Practical implications for schools

The JR findings are quite clear – once they have fulfilled their basic public benefit obligation not to exclude ‘the poor’, trustees of charitable schools are free to determine how their school should aim to deliver the public benefit for which it is established a charity. However, whilst this remains the over-riding position, the JR also made a number of detailed comments which we feel that trustees would do well to note, and some of which may have been missed in the initial media headlines and commentary.

Charitable status

The JR made clear once and for all that the charitable status of independent schools is not at risk. If a charity was not doing enough towards providing public benefit, the trustees of that charity could be removed for administering it improperly, but the charitable status remains. “Whether such a school is a charity within the meaning of the 2006 Act does not now turn on the way in which it operates any more than it did before. Its status as a charity depends on what it was established to do not on what it does” (191) This means that the Charity Commission cannot threaten schools with the loss of charitable status based on their own assessment of whether a school is doing enough to provide public benefit. This has always been the position but some press comment has sought to suggest otherwise.

Schools operating at the ‘luxury end of the market’

The JR remarked that “some of the activities and facilities revealed in the promotional material produced to us in the case of two schools might well seem astonishing to those who are not familiar with such matters” and in this context remarked that “where facilities at what we might call the luxury end of education are in fact provided, it will be even more incumbent on the school to demonstrate a real level of public benefit. This is not to impose different standards on different schools; it is simply that where such luxury provision is made, a stringent examination of how it is provided and how the public benefit is satisfied is appropriate” (219).

We believe that this is a helpful reminder to schools which are fortunate enough to be able to afford such facilities and we would encourage trustees of those schools to have particular regard to their public benefit obligations as and when major capital projects are embarked on. Our suggestion is that it might be helpful, at the same time as the capital project is being considered, that the trustee board records in its board minutes both how the project assists the school to deliver its charitable objects and to provide public benefit and also how the trustees at that time were viewing their wider public benefit obligations.

Schools with large financial endowments

Further, the JR clearly expects schools with larger endowments (presumably investments - not just the school campus, although this is not stated), to do more than schools without. It states “schools with different levels of endowment might be expected to make different types and different level of provision so that there is no right answer to what two otherwise similar schools should do” (243).

Whilst this is not prescriptive it is a helpful reminder that schools with large invested endowments might be expected to use these at least as much for delivering public benefit as in developing that school’s facilities. In practice most school invested endowments tend to be spent on bursaries/scholarships, rather than on projects, but in an era when some endowment is expendable and when total return orders can be granted, allowing trustees to spend some of their invested capital gains, this is a helpful reminder.

Schools with no financial endowment and/or only basic facilities

The corollary of the above findings must be that, where schools have no historic endowment to supplement their fee-income, little annual operating surplus and only basic facilities, their public benefit obligations, once the de-minimis threshold is exceeded, can be relatively modest, and provided only as and when the trustees are able to do so from their limited resources. Thus there can be no question, as the Charity Commission previously suggested, of charging additional fees in order to meet an externally required level of subsidy for those who can’t afford full fees. Again, in our view it might be helpful for trustees of such schools to discuss and record this in trustee minutes from time to time, to demonstrate that this is and remains their view of the school’s Public Benefit position.

Schools providing facilities for use by the local community

The review has reminded schools that, whilst allowing local schools and community groups to use their facilities for free or at discounted charges may be of merit, this would not count towards public benefit unless this was within that school’s constitutional objects and so could properly contribute towards achieving its main charitable aims. “The trustees or directors of a school would need to be satisfied that in making this provision of facilities available to the local community they were acting in furtherance of their main objects” (198). So, for many schools, whilst allowing local and/or overseas schools to use their facilities might well be within their objects and aims, allowing non-educational community groups (say of adults, rather than children) to use them would not. Trustees should examine the charitable objects of their school and decide accordingly.

Schools setting up or supporting an Academy

This is an area high on the current Government's agenda and the JR referred to Academy support in one of the hypothetical scenario questions as being 'a more substantial public benefit' (246). Indeed the JR noted that such Academy support (amounting to £1m over 5 years in the scenario question) "is probably enough to show that the school is acting fully in accordance with its obligation in giving effect to the public benefit requirement"(247). To put it another way round a school which chose to carry out their public benefit obligations through setting up or supporting an Academy, would be likely to have fulfilled its public benefit obligations solely through that one decision i.e. even without providing means-tested bursaries to its existing pupils.

Providing for the poor

The JR declined to provide a definition of 'poor' (although it was extensively discussed) but noted that a school which did not provide at all for the poor, or which made provision at only a de minimis or token level without going beyond that in any way could not be providing public benefit. However, it noted that 'poor' under charity law did not mean destitute and 'can cover persons of modest means in certain cases' (179), and also that "a bursary of 75% would result in fees of £3,125 pa on the basis of £12,500 pa full fee. It is at least arguable that a family which could afford that reduced fee, but no more, should be seen as 'poor' in the context of this sort of educational charity." (255)

However the JR found that a hypothetical day school which charged £12,000 per annum in fees, ie, at or near the national average, but which provided no means-tested bursaries and no other widening of access to public benefit, was not operating as a school for the public benefit as it appeared to 'exclude the poor in practice' unless the position was temporary (241). This is a useful wake-up call to the few schools which have not treated their public benefit obligations seriously and made little or no means-tested or other public benefit provision.

Means-tested bursaries – as a percentage of fees or pupils

Once provision for the poor, going beyond what is de minimis or token has been made, the JR made clear that the issue of means-testing is for trustees to decide upon. "In some circumstances it may be proper to provide no further benefit for the poor whilst at the same time not restricting benefits to the full-fee-paying students; for instance bursaries may be given to persons who are not poor but are unable to pay fees" (233).

But how much should be provided? As part of the evidence to the JR the Attorney General provided a list of example scenarios, based on certain levels of means-tested bursaries as a percentage of net fee income, percentages of pupils on such remissions and school wealth. As would be clear from the key findings noted at the beginning of this briefing the JR felt unable to conclude definitely on any of the above as in each case they felt that they did not have the whole circumstances of the example school to hand. However, they did provide some general observations which we believe school trustees would want to consider in assessing their own school's public benefit provision.

- 1) A school with an endowment fund for scholarships/bursaries, able in principle to provide full fee remission to a percentage of pupils, but in practice doing so for only one (or 1%) of pupils and which provided no other public benefit was probably not acting for the public benefit (251)
- 2) The same school providing full fee remission to say 10% of pupils was however viewed as doing enough (250).
- 3) The JR was not able to specify a percentage of pupils who should be in receipt of such awards but noted that "we consider 1% remains too low" (253). Note that all the above three scenarios relate to a school with an endowment and providing no other benefits. Schools without endowment or providing other benefits are covered elsewhere.
- 4) A 75% bursary was considered by the JR as carrying the same weight as a 100% bursary (255)
- 5) Further, the JR made clear that scholarships do not have to be only to the poor to be accorded equal weight with means-tested bursaries for public benefit purposes "We see no reason why the provision of scholarships or bursaries to students who can pay some, but not all, of the fees should not be seen as for the public benefit" (217). "There is no reason why such scholarships should not be taken into account providing, of course, that it provides at least some benefit which is more than de minimis or token for the poor" (255)

And again: "Not all of the benefits which the school provides to those other than students paying full fees need to be for the poor. ... Provided that the operation of the school is seen overall as being for the public benefit, with an appropriate level of benefit for the poor, a subsidy to the not-so-well-off is to be taken account of in the public benefit." (217)

"We have focused on the payment of fees and the provision of benefits. But those are not the only questions which trustees need to consider. They need to consider the question of access more generally and how to treat all their potential beneficiaries fairly. This is not to say that trustees cannot properly make policy decisions which have the effect of ruling out of consideration large numbers of potential

beneficiaries. But such policy decisions must be rational and justifiable in the promotion of the public interest. They certainly cannot be capricious.”(218)

- 6) Finally temporary hardship funds for parents who have been paying full fees but have now fallen on harder times would also count. “It is certainly our view that in the right circumstances remission of fees for an existing student who has become unable to meet any of the fees due to changed circumstances should be seen as being not only for the public benefit but as a benefit provided to a person who has become “poor”” (217).

CCW Summary

In summary our view is that school trustees, whilst maybe released from the straight-jacket of arbitrary public benefit bursary thresholds, would do well to respond in the real spirit of providing public benefit. They should discuss it at trustee board meetings, minute such discussions, and in due course record the results in disclosures in their school’s annual accounts.

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