



The right to education for disabled persons and religious minorities: UK report

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About ETHOS

ETHOS - Towards a European Theory Of Justice and fairness is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening knowledge on the European foundations of justice – both historically based and contemporarily envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, activists and other stakeholders on how to design and implement policies to reverse inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed ‘lived’ experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared towards giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition;
- b) legal framework;
- c) daily (bureaucratic) practice;
- d) current public debates; and
- e) the accounts of vulnerable populations in six European countries (Austria, Hungary, the Netherlands, Portugal, Turkey and the United Kingdom).

The question of drawing boundaries and redrawing the fault lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands, which coordinates the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the United Kingdom (University of Bristol). The research project lasts from January 2017 to December 2019.

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ACRONYMS

ADHD	Attention Deficit and Hyperactivity Disorder
CA	Care Act
CFA	Children and Families Act
EA 1996	Education Act 1996
EA 2010	Equality Act 2010
ECHR	European Convention on Human Rights
EHC	Education, health and care
ESA	Education and Skills Act
EWHC	England and Wales High Court
HRA	Human Rights Act
RRA	Race Relations Act
SACRE	Standing advisory council on religious education
SEN	Special educational needs
SENCO	Special educational needs co-ordinator
SSFA	School Standards and Framework Act
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UKUT	United Kingdom Upper Tribunal

INSTITUTIONAL FRAMEWORK

The United Kingdom (UK) is a monarchy with most legislative power vested in a two-chamber Parliament based in Westminster (London). One of the chambers, the House of Commons, is elected for fixed five-year terms and the other, the House of Lords, is made up of life-appointed members. Since the nearly simultaneous adoption of the Scotland Act, the Government of Wales Act and the Northern Ireland Act in 1998, elected assemblies in Scotland, Wales and Northern Ireland have shared legislative authority with Parliament in various areas, including education. However, under the so-called ‘Sewel Convention’ these regional (or ‘devolved’) legislative bodies regularly defer to Westminster legislation in their areas of competence. The demographically dominant region of England does not have a legislative body of its own, meaning it falls under the direct jurisdiction of Westminster Parliament. When addressing devolved areas of the law, this report will confine itself to the statutes, regulations and administrative guidance that apply in England, though some may extend to other regions. In the educational sphere, all legislative powers have been devolved to the Scottish Parliament and the Northern Ireland Assembly, but the Westminster Parliament has retained many competences in Wales. Devolved matters include the maintenance and governance of schools by local authorities, school attendance and discipline, teacher training and inspections.¹

Unlike its other European counterparts, the British constitution is not codified in a single legal text. Constitutional law, which can be defined as ‘conditioning the legal relationship between citizen and state in some general, overarching manner, or [enlarging or diminishing] the scope of what might be regarded as fundamental constitutional rights,’² thus finds itself scattered across a variety of sources, such as statutes, precedent, European Union (EU) law, the European Convention on Human Rights (ECHR), academic treatises and parliamentary and royal customs.³ In domestic courts, international treaties can influence the interpretation of UK law but not call into question its validity. The UK legal system has therefore traditionally been characterised as dualist. However, this position has been significantly eroded by the European Communities Act 1972 and the Human Rights Act (HRA) 1998, which respectively make the rights emanating from the EU and the ECHR directly enforceable in British courts. The HRA 1998, in particular, empowers courts to invalidate the decisions of public authorities and ‘subordinate’ legislation (created by an executive authority under the explicit mandate set out by Parliament in ‘primary’ legislation). Given the long-term shift of legislative power from Parliament to the cabinet of ministers, such prerogatives have greatly enhanced the supervisory role of the courts. This being said, the ECHR cannot invalidate a statutory Act or a subordinate regulation or administrative decision directly derived from it. Under the HRA 1998, domestic courts are only allowed to interpret such Acts so as to maximise their compatibility with the ECHR and, where this is not possible, to make a ‘declaration of incompatibility’ that enables (but does not oblige) the competent Secretary of State to make necessary changes.⁴ To reduce the likelihood of incompatible

¹ See Government of Wales Act 2006, Schedule 5, Field 5: education and training.

² Peter Leyland (2012), *The constitution of the United Kingdom*, Oxford: Hart, 2nd edition, p. 27.

³ *Ibid.*, pp. 25-32.

⁴ Human Rights Act (HRA) 1998, Sections 4 and 10.

legislation being passed in the first place, the HRA establishes an obligation for the relevant minister to make a 'declaration of compatibility'.⁵

Since the coming into force of the Tribunals Courts and Enforcement Act 2007 most claims against the decision of a public authority must be lodged in generic first tier (first instance) and upper (appellate) tribunals that are independent from the departments making the decisions under review. A limited number of specialised statutory tribunals mandated to ensure compliance with specific standards of public administration also remain in place.⁶ In England, tribunal decisions can be appealed in the Administrative Court, the Court of Appeal and finally the Supreme Court, which took over from House of Lords Appellate Committee in 2009.⁷ Claims for judicial review must meet the requirements of standing and public action. To have standing under the HRA a claimant must be a direct 'victim' of the contested measure, but in other areas of constitutional law representative organisations have frequently been allowed to bring suit. Public authorities encompass national, regional and local institutions, including lower courts. However, the boundary between public and private has been considerably blurred by the multiplication of semi-autonomous corporations and the contracting out of various public services to limited companies and charities. To determine whether an organisation falls within the scope of public law, courts have taken various and sometimes unpredictable factors into account, such as the source of the power being exercised, the statutory underpinnings of the body, the exercise of monopoly control and the reception of public funding. The main remedies available through judicial review are a quashing order, a mandatory order or a prohibitory order. Financial compensation for individual litigants is rarely available.⁸

GENERAL REGULATION OF THE RIGHT TO EDUCATION

The main piece of primary legislation regulating the right to education in England and Wales is the Education Act 1996. Article 10 of the Act establishes a general duty for the Secretary of State to promote the education of the people of England and Wales and Article 7 stipulates that the parent of every child of compulsory school age shall cause her to receive efficient full-time education suitable to her age, ability, aptitude and special educational needs, either by regular attendance at school or otherwise. Schooling is compulsory for children aged 5 on a prescribed day of the academic year to the end of the academic year where they turn 16.⁹ Articles 1 and 2 of the Education and Skills Act 2008 also place a duty to participate in education or training on children under the age of 18 who have not obtained a General Certificate of Education at the advanced level in at least two subjects. The duty can be fulfilled either by participating in appropriate full-time education or training, participating in an apprenticeship or being in occupation at least 20 hours per week¹⁰ and participating in a minimum of

⁵ HRA 1998, Section 19.

⁶ Anthony Wilfred Bradley, Keith Ewing and Christopher Knight (2015), *Constitutional & Administrative Law*, Edinburgh: Pearson, 16th edition, pp. 603-607.

⁷ Constitutional Reform Act 2005, Part 3.

⁸ *Constitutional & Administrative Law*, op. cit., pp. 668-676.

⁹ Education Act (EA) 1996, Section 8.

¹⁰ Education and Skills Act (ESA) 2008, Section 5(1).

280 hours of guided learning per year.¹¹ Local authorities have a duty to identify children of compulsory school age established in their area who are neither registered pupils nor receiving suitable education otherwise than at school¹² and the power to serve a written school attendance order to parents.¹³ School staff, headteachers and governors also have a duty to promote good attendance, including through the maintenance of a school register.¹⁴ Employer duties to enable young persons over compulsory school age to comply with their obligation to participate in education or training have yet to be brought into force, as are local authority powers to issue parenting orders and attendance notices in respect of these persons.¹⁵

State-funded providers of compulsory schooling fall under two main legal regimes. 'Maintained' schools, which are partly managed by local authorities, are directly regulated by the Education Act 1996, the School Standards and Framework Act 1998 and the Education Act 2002, together with their respective regulations. 'Academies' (sometimes called 'independent' or 'free' schools) are governed by contractual agreements with the Secretary of State. However, some provisions of the aforementioned Acts apply equally to maintained schools and academies, and the Academies Act 2010 provides that others must be incorporated in the agreement with only minor adjustments. In addition, several maintained school standards appear in the model funding agreement for academies published by the Department for Education. For these reasons, the following discussion will mainly focus on maintained school regulations in matters of admissions, exclusions and the curriculum, while also highlighting relevant differences with academies.

The basic principle that governs admissions policies is that as far as compatible with efficient education and reasonable public expenditure, pupils should be educated in accordance with the wishes of their parents.¹⁶ To facilitate this, local authorities have a general duty to secure diversity in the provision of schools and increase opportunities for parental choice.¹⁷ In addition, no charge can be made for admission to a maintained school¹⁸ or for education that is required as part of a syllabus.¹⁹ Local authorities must provide free travel arrangements to pupils who cannot reasonably be expected to walk to school²⁰ and provide free school meals and milk to children of parents who make the request

¹¹ ESA 2008, Section 8(1).

¹² EA 1996, Section 436; ESA 2008, Section 12.

¹³ EA 1996, Section 437. At the time of writing the corresponding provision in the ESA 2008 (Section 41) had not yet been brought into force.

¹⁴ ESA 2008, Section 11; Department for Education (2018), *School attendance: Guidance for maintained schools, academies, independent schools and local authorities* [accessed via https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739764/Guidance_on_school_attendance_Sept_2018.pdf].

¹⁵ ESA 2008, Chapters 3-5.

¹⁶ EA 1996, Section 9.

¹⁷ EA 1996, Section 14(3A).

¹⁸ EA 1996, Section 450.

¹⁹ EA 1996, Section 451. See also Section 9 of the Academies Act 2010.

²⁰ EA 1996, Section 508B.

and receive means-tested benefits.²¹ Academy arrangements must also include specific obligations in relation to the provision of free school meals.²²

Under the School Standards and Framework Act (SSFA) 1998, local authorities must arrange for parents and pupils over compulsory school age to express their school preferences and to give reasons for these preferences.²³ Local authorities and school governing bodies must comply with these preferences unless this would prejudice the provision of efficient education or the efficient use of resources or, in schools where this is allowed, admission aims to admit only pupils with high ability or aptitude.²⁴ The only permitted forms of school selection by ability are those based on 'banding', aptitude for a particular subject or arrangements that were in force at the beginning of the 1997–1998 school year in designated 'grammar schools'.²⁵ Banding refers to admissions arrangements designed to secure that pupils admitted to a school are representative of all levels of ability among applicants.²⁶ Selection by aptitude for particular subjects has to coincide with subjects in which the school has a specialism and cannot concern more than 10% of pupils.²⁷ Grammar schools are a residual category of publicly funded establishments created in 1902 to prepare high achieving students for university.²⁸ The subjects concerned are the following: modern foreign languages, the performing arts, the visual arts, physical education, design and technology or information technology.²⁹ Undersubscribed schools must offer a place to all students who make the request, regardless of their place of residence or other criteria. Oversubscribed schools must rank applications against publicly available oversubscription criteria and send the list to the local authority. Distance from the school and residence within a designated, 'reasonable' and 'clearly defined' catchment area can be among these criteria.³⁰

When elaborating their admissions arrangements, admissions authorities must consult with the local authority or the school governing body (whichever is not the admissions authority), the admissions authorities for all the other schools in the relevant area, the parents of children between the ages of two and eighteen who reside in the relevant area and other persons who may have an interest in the admissions arrangements.³¹ Consultation on admission arrangements that remain substantially the same is only required every seven years.³² Local authorities must publish on their website the proposed admission arrangements for schools and academies in their area, details of

²¹ EA 1996, Section 512ZB.

²² EA 1996, Section 512B.

²³ School Standards and Framework Act (SSFA) 1998, Sections 86 and 86(A).

²⁴ SSFA 1998, Section 86.

²⁵ SSFA 1998, Sections 99-100.

²⁶ SSFA 1998, Section 101.

²⁷ SSFA 1998, Section 102.

²⁸ Encyclopaedia Britannica, 'Grammar school' [accessed via <https://www.britannica.com/topic/grammar-school-British-education>].

²⁹ The School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012 (SAR), Section 6(1).

³⁰ Department for Education (2014), *School Admissions Code*, pp. 8, 12 [accessed via https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389388/School_Admissions_Code_2014_-_19_Dec.pdf].

³¹ SSFA 1998, Section 89 and SAR 2012, Section 12.

³² SAR 2012, Section 15.

where these arrangements can be viewed and a statement on the right to object.³³ Parents and pupils over compulsory school age have a right to object to admission arrangements and have them referred to an independent adjudicator appointed by the Secretary of State for Education.³⁴ They also have a right to appeal the decision of an admissions authority to an appeal panel consisting of three or five members appointed by the relevant local authority or governing body from independent lay members and persons who have experience in education, are acquainted with educational conditions in the local area or are parents of registered pupils.³⁵

The SSFA 1998 empowers headteachers to exclude pupils permanently or for a fixed period of maximum 45 school days in a school year.³⁶ Statutory guidance by the Department for Education indicates that exclusion can only be made on disciplinary grounds. A decision to exclude a pupil permanently should only be taken in response to a serious breach or persistent breaches of the school's behaviour policy; and where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school. A pupil who repeatedly disobeys their teachers' academic instructions could be subject to exclusion. Out-of-school behaviours can be considered grounds for an exclusion. When establishing the facts in relation to an exclusion decision the headteacher must apply the civil standard of proof, meaning they should accept that something happened if it is more likely that it happened than that it did not happen.³⁷

Before excluding a pupil, headteachers have a duty to inform her parent or another relevant person of the period and reasons of exclusion as well as the possibility and means to make representations. When an exclusion lasts for more than five school days in a term, they must also inform the local authority and the school's governing body.³⁸ The latter can overturn the decision after hearing representations. In turn, the decision of the governing body can be appealed to a panel of three or five independent members, including at least one lay member and another with education experience.³⁹ The decision of the appeal panel is binding on the school's governing body, the headteacher and the local authority.⁴⁰ Schools are not required to admit children who have been permanently excluded from two or more schools unless this decision has been reviewed by a relevant authority.⁴¹ When a child has been excluded from or refused admission to all other schools within reasonable walking distance, local authorities can order her admission to a named school after consulting the pupil's parents.⁴²

³³ SAR 2012, Section 18.

³⁴ SSFA 1998, Section 90.

³⁵ SSFA 1998, Sections 94-95 and Schedule 24. See also Schedule of SAR 2012.

³⁶ SSFA 1998, Section 64.

³⁷ Department for Education (2017), *Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion*, pp. 9-10 [accessed via https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641418/20170831_Exclusion_Stat_guidance_Web_version.pdf].

³⁸ SSFA 1998, Section 65.

³⁹ SSFA 1998, Section 66 and Schedule 18.

⁴⁰ SSFA 1998, Section 67.

⁴¹ SSFA 1998, Section 87.

⁴² SSFA 1998, Section 96.

School curricula must be broad and balanced, promote the spiritual, moral, cultural mental and physical development of pupils and prepare them for the opportunities, responsibilities and experiences of later life.⁴³ Responsibility for the curriculum is shared between the Secretary of State, local authorities and schools' governing bodies.⁴⁴ The national curriculum for all maintained schools is divided in four 'key stages' for pupils aged 5–7 (KS1), 7–11 (KS2), 11–14 (KS3) and 14–16 (KS4).⁴⁵ All key stages comprise three 'core' subjects: English, mathematics and science. Key stages 1 and 2 contain seven 'foundation' subjects: design and technology, information and communication technology, physical education, history, geography, art and design and music. Key stage 3 adds citizenship and a modern foreign language.⁴⁶ Key stage 4 comprises the following 'foundation' subjects: design and technology, information and communication technology, physical education, citizenship, and a modern foreign language.⁴⁷ Maintained secondary schools must also provide sex and religious education.⁴⁸ Academies are not bound by the national curriculum but are required to participate in national curriculum assessments and offer a broad and balanced curriculum which includes English, mathematics, sciences and religious education.⁴⁹

RELEVANT ANTI-DISCRIMINATION PROVISIONS

The Equality Act (EA) 2010 prohibits direct discrimination, indirect discrimination, harassment and victimisation. A person directly discriminates against another person if, because of a protected characteristic, she treats her less favourably than she treats or would treat others.⁵⁰ A person indirectly discriminates against another if she applies a provision, criterion or practice that is also applied to persons who do not share the protected characteristic but puts or would put persons sharing the characteristics at a particular disadvantage and is not a proportionate means of achieving a legitimate aim.⁵¹ A person harasses another if she engages in unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.⁵² A person victimises another if she subjects her to a detriment because she brings proceedings under the EA 2010, gives evidence or information in connection with proceedings under the Act, does any other thing in connection with the Act or makes an allegation that someone has contravened the Act.⁵³

⁴³ EA 2002, Section 78.

⁴⁴ EA 2002, Section 79.

⁴⁵ EA 2002, Section 82.

⁴⁶ EA 2002, Section 84.

⁴⁷ EA 2002, Section 85.

⁴⁸ EA 2002, Section 80.

⁴⁹ Nerys Roberts and Shadi Danechi (2017), *FAQs: Academies and free schools*, House of Commons Library Briefing Paper 07059, p. 20 [accessed via <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07059>].

⁵⁰ EA 2010, Section 13(1) and (3).

⁵¹ EA 2010, Section 19.

⁵² EA 2010, Section 26.

⁵³ EA 2010, Section 27.

Where a person reasonably thinks that those who share a protected characteristic suffer a disadvantage connected to the characteristic, have different needs or disproportionately low rates of participation in an activity, Section 158 allows her to take any proportionate action to meet those needs to enable or encourage persons who share the protected characteristic to overcome or minimise their disadvantage or participate in the activity.

Section 29 specifically prohibits the following forms of discrimination, harassment and victimisation by providers of services to the public or a section of the public, for payment or not: 1) not providing the person with the service, or; 2) discriminating against a person as to the terms of service provision, by terminating service provision or by any other detriment. It also imposes a duty to make reasonable adjustments on service providers and persons who exercise a public function. However, the prohibition of harassment does not cover the grounds of religion and belief. Public authorities or other persons who exercise public functions must have due regard to eliminating discrimination, harassment, victimisation and any other discriminatory conduct, advancing equality of opportunity and fostering good relations between persons who share a relevant protected characteristic and persons who do not share it.⁵⁴ Schools' responsible bodies in particular must not discriminate against a person in admissions arrangements, terms of admission or by refusing admission. Neither must they discriminate in the way they provide education, afford pupils access to benefits, facilities or services, by not providing education or providing access to benefits, facilities or services, by excluding pupils or subjecting them to any other detriment, or engage in related forms of harassment and victimisation.⁵⁵

Discrimination claims can be brought in county courts within six months after the act to which they relate, or such other period as the court thinks just and equitable.⁵⁶ County courts have the power to grant any remedy that could be granted by the High Court in proceedings in tort or on a claim for judicial review.⁵⁷ If there are facts from which the court could decide, in the absence of any other explanation, that a discrimination has occurred, the court must hold that the provision concerned has been contravened unless the defendant proves the contrary.⁵⁸ Disability discrimination claims against schools must be brought in the First tier tribunal instead of county courts.⁵⁹

SPECIFIC PROVISIONS FOR DISABLED PUPILS

Section 14(6)(b) of the Education Act (EA) 1996 establishes a general duty for local authorities to secure special educational provision for students with special educational needs (SEN). Schools that are specially organised to make special education provision for pupils with SEN are designated as 'special schools'.⁶⁰ The two main statutory laws setting out the rights of disabled children in the context of compulsory education are the EA 2010 and the Children and Families Act (CFA) 2014. These statutes

⁵⁴ EA 2010, Section 149.

⁵⁵ EA 2010, Section 85.

⁵⁶ EA 2010, Sections 114 and 118.

⁵⁷ EA 2010, Section 119.

⁵⁸ EA 2010, Section 136(1)(2)(3).

⁵⁹ EA 2010, Section 116 and Schedule 17(3).

⁶⁰ EA 1996, Section 337.

define disability in significantly different ways, partly reflecting their different purposes. Whereas the EA 2010 and its corresponding regulations provide a detailed, substantive definition of disability that can be used directly by the courts in a discrimination claim, the CFA 2014 focuses on the administrative procedures that local authorities must follow to establish the existence and nature of a child's SEN, as well as to respond to them. In terms of underlying principle, the EA 2010 seeks to ensure the participation of disabled pupils in 'mainstream' schools, whereas the CFA 2014 provides for 'special' schooling where this is in accordance with the perceived needs and interests of disabled and non-disabled children.

Section 6(1) of the EA 2010 states that a person has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Statutory guidance lists the following types of impairments from which a disability can arise: sensory impairments affecting sight or hearing; impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis, chronic fatigue syndrome, fibromyalgia, depression and epilepsy; progressive impairments such as motor neurone disease, muscular dystrophy, and forms of dementia; auto-immune conditions such as systemic lupus erythematosus; organ specific, including respiratory conditions such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease; developmental, such as autistic spectrum disorders, dyslexia and dyspraxia; learning disabilities; mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour; mental illnesses such as depression and schizophrenia; impairments produced by injury to the body, including to the brain.⁶¹ HIV, cancer and multiple sclerosis are also considered as disabilities. A person who is certified as blind, severely sight impaired, sight impaired or partially sight impaired by a consultant ophthalmologist is deemed to have a disability without having to show the effects of the impairment.⁶² Unless it was originally the result of the administration of prescribed drugs or other medical treatment, addiction to alcohol, nicotine or any other substance is not treated as an impairment.⁶³ Neither are the tendencies to set fires, steal, physically or sexually abuse other persons, exhibitionism and voyeurism. Allergic rhinitis only qualifies as an impairment if it aggravates the effect of any other condition.⁶⁴ Severe disfigurement cannot be treated as having a substantial adverse effect on day-to-day activities if it consists of a tattoo or non-medical piercing.⁶⁵ For other types of severe disfigurement, substantial adverse effects need not be demonstrated. The severity of disfigurements such as scars, birthmarks, deformation or skin diseases must be assessed through factors such as the nature, size, prominence and location of the disfigurement.⁶⁶

⁶¹ Office for Disability Issues (2010), *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, pp. 8-9 [accessed via https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf].

⁶² *Ibid.*, p. 11 and Equality Act 2010 (Disability) Regulations 2010, reg 7.

⁶³ EA 2010 (Disability) Regulations 2010, reg 3.

⁶⁴ EA 2010 (Disability) Regulations 2010, reg 4.

⁶⁵ EA 2010 (Disability) Regulations 2010, reg 5.

⁶⁶ *Equality Act 2010: Guidance*, op. cit., p. 26.

Substantial effect can be determined by considering the time taken to carry out an activity, the way in which it is carried out and the number of activities affected by the impairment, the possibility of behavioural adaptation to the impairment and the effects of the environment. Except in the cases of spectacles or contact lenses, impairments that are subject to treatment or correction must be treated as having a substantial adverse effect if they would have that effect without the treatment.⁶⁷ Progressive conditions such as dementia and motor neurone disease must be treated as having a substantial adverse effect from the moment they have some adverse effect, provided it is likely to become substantial.⁶⁸ A long-term effect is one that has lasted or is likely to last at least 12 months.⁶⁹

For the purposes of the Act, day-to-day activities are understood as things people do on a regular or daily basis such as shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.⁷⁰ Where a child under six years of age has an impairment that does not have a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities, she is deemed disabled where it would normally have that effect on a person aged six years or over.⁷¹

Under Section 15(1) and (2) of the EA 2010 a person discriminates against a disabled person if she treats her unfavourably because of something arising in consequence of her disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim. There is an exception if the former did not know, and could not reasonably be expected to know, that the person had the disability. A person also discriminates on the grounds of disability if she fails to comply with the duty to make reasonable adjustments. The duty comprises three requirements: 1) where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take reasonable steps to avoid the disadvantage;⁷² 2) where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take reasonable steps to avoid the disadvantage;⁷³ 3) where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take reasonable steps to provide the auxiliary aid.⁷⁴ Where the first or third requirement relates to the provision of information, the steps include ensuring that the

⁶⁷ *Equality Act 2010: Guidance*, op. cit., p. 21.

⁶⁸ *Equality Act 2010: Guidance*, p. 23.

⁶⁹ EA 2010, Schedule 1, rule 2.

⁷⁰ *Equality Act 2010: Guidance*, p. 34.

⁷¹ EA 2010 (Disability) Regulations 2010, reg 6.

⁷² EA 2010, Section 20(3).

⁷³ EA 2010, Section 20(4).

⁷⁴ EA 2010, Section 20(5).

information is provided in an accessible format.⁷⁵ A person is not entitled to require a disabled person in relation to whom she is required to comply with the duty to pay the costs of complying.⁷⁶ In relation to the second requirement, avoiding a substantial disadvantage includes removing the physical feature in question, altering it or providing a reasonable means of avoiding it.⁷⁷ A physical feature can be a feature arising from the design or construction of a building; a feature of an approach to, exit from or access to a building; a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises; or any other physical element or quality.⁷⁸ Schools' responsible bodies must comply with the first and third requirements of the duty to make reasonable adjustments when deciding who is offered admission as a pupil or provided education or access to a benefit, facility or service.⁷⁹ Schedule 11(8) expressly provides that selection by ability in grammar schools does not constitute disability discrimination (see above).

Local authorities and school governing bodies must respectively prepare accessibility strategies and accessibility plans with the aims of 1) increasing the extent to which disabled pupils can participate in the schools' curriculums; 2) improving the physical environment of the schools for the purpose of increasing the extent to which disabled pupils are able to take advantage of education and benefits, facilities or services provided or offered by the schools; and 3) improving the delivery to disabled pupils of information that is readily accessible to pupils who are not disabled. Accessibility strategies and plans must be in writing, kept under review, revised as necessary and effectively implemented.⁸⁰

The CFA 2014 subsumes disability under the label of SEN, which also encompasses children with learning difficulties. Section 20 provides that a child or young person has SEN if she has a learning difficulty or disability that calls for special educational provision to be made for them. Children and young people with SEN may require extra or different provision in relation to thinking and understanding, as a result of physical or sensory difficulties, emotional or behavioural difficulties, difficulties with speech and language or how they relate to and behave with other people. Disabled children and young people may require extra or different provision – for example, if they are less mobile than their peers. Section 21 specifies that special educational provision is additional or different from that which would normally be provided for children or young people of the same age in mainstream schools. It might include support from a specialist teacher, access to a specialist teaching programme, specialist information and communication technology equipment or a specialist job coach. Section 22 places a duty on local authorities to identify all those children and young people in their area who have or may have SEN or disabilities. Children and young people can be brought to the attention of the local authority by their parents, their school or college, or other professionals – for example, a social worker, general practitioner, health visitor, teacher, early years professional or a further education tutor.

⁷⁵ EA 2010, Section 20(6).

⁷⁶ EA 2010, Section 20(7).

⁷⁷ EA 2010, Section 20(9).

⁷⁸ EA 2010, Section 20(10).

⁷⁹ EA 2010, Schedule 13(2).

⁸⁰ EA 2010, Schedule 10, rules 1 and 3.

A child's parent, a young person or a person acting on behalf of a school or post-16 institution have the right to request a statutory assessment of SEN. Local authorities must then consider whether an assessment is necessary. The local authority must consult with the child's parents or the young person to ensure they are involved in the process from the outset. If the local authority decides not to carry out an assessment they must inform the child's parents or the young person of their decision and their reasons for it. If they intend to carry out an assessment they must inform the child's parents or the young person and make sure that they are aware of their rights to have their views considered by the local authority, either orally or in writing. The local authority must carry out an assessment if, after taking account of any views expressed and evidence submitted, it thinks that the child or young person has or may have SEN and that it may be necessary for special educational provision to be made for a child or young person through an education, health and care (EHC) plan.⁸¹ The local authority should seek advice and information from the child's parent or the young person, educational advice and information, information from the headteacher or principal of the school that the child is attending or from a person with experience teaching children with SEN. It must also take into account the views, wishes and feelings of the child and her parents and consider whether they require any information, advice and support in order to take part effectively in the EHC needs assessment. Where this is necessary it must provide this support.⁸²

The parent or young person must be informed of the outcome of the assessment and whether the local authority intends to prepare an EHC plan. The EHC plan must specify the short- and long-term outcomes that it is designed to help the child or young person achieve along with the special educational, health and social care provision that will be made to support them. This could include, for example, access to specialist teaching, speech and language therapy provision, and short breaks.⁸³

When preparing a draft EHC plan, the local authority must consult with the child's parents or the young person, to ensure they are involved in the planning process from the outset and their views are taken into account. The local authority must send a copy of the draft EHC plan to the child's parent or the young person and make sure that they are aware of how they can express their views on the content of the draft EHC plan. The draft EHC plan must not name a specific institution or a type of institution. This is to ensure that parents or young people have the opportunity to request that a particular school is named in the EHC plan before it is finalised.⁸⁴

When the child's parent or the young person has received a draft EHC plan and requested that a particular institution is named in the EHC plan, the local authority must consult any institution that it is considering naming in the EHC plan and, where that institution is maintained by another local authority, the other authority. The local authority must comply with the parent or young person's request unless the child or young person's attendance at the school would not meet their SEN or would be incompatible with the efficient education of others or the efficient use of resources. If it believes that these circumstances apply, the local authority must name the school or other institution that the local authority considers to be most appropriate for the child or young person. A copy of the final EHC

⁸¹ Children and Families Act (CFA) 2014, Section 36.

⁸² Special Educational Needs and Disability Regulations 2014, regs 6, 7 and 9.

⁸³ CFA 2014, Section 37.

⁸⁴ CFA 2014, Section 38.

plan must then be sent to the child's parent or the young person and to the school, college or other institution that has been named in the plan.⁸⁵

Where the child's parent or young person has received a draft EHC plan but has not made a request for a particular institution, the EHC plan must provide for the child or young person to be educated in a mainstream school unless that is against the wishes of the young person or the child's parent, or would damage the efficient education of others and there are no reasonable steps that could be taken to overcome this. If one of those conditions applies, the child or young person's EHC plan can provide for them to be educated in a special school.⁸⁶ A special school is one that is specially organised to educate pupils with SEN. It can be maintained by a local authority, an academy or a non-maintained school.⁸⁷

Children with SEN but no EHC plan must be educated in mainstream schools except in particular circumstances. These are: 1) where it is agreed that they are admitted to a special school or special post-16 institution to be assessed for an EHC plan; 2) it is agreed that they are admitted to a special school or special post-16 institution following a change in their circumstances; 3) they are admitted to a special school that is established in a hospital; 4) they are admitted to a special academy whose arrangements allow it to admit children or young people with SEN who do not have an EHC plan.⁸⁸ When a child with SEN is being educated in a mainstream school, the school must enable her to take part in the activities of the school with other children as far as is reasonably practicable and so long as this ensures the child gets the special educational provision she needs, does not damage the education of the other children and does not mean an inefficient use of resources.⁸⁹ After consulting with the child's parents or the young person, a local authority may arrange for special educational provision to be made for a child or young person otherwise than in a school if it would be inappropriate for provision to be made in one of those settings.⁹⁰

Local authorities must review a child or young person's EHC plan at least every 12 months. The review is intended to consider whether the provision in the EHC plan is meeting the child or young person's assessed needs and whether they are making progress toward the outcomes identified. A re-assessment means undertaking the assessment process again – for example, when a child or young person's needs may have changed significantly.⁹¹

A local authority may only stop maintaining an EHC plan if it is no longer responsible for that child or young person – for example, if the child or young person has moved to another area, or it considers that the EHC plan no longer needs to be maintained, such as where the child or young person no longer requires the special educational provision specified in the EHC plan. When an appeal is made against a local authority's decision to cease an EHC plan, the authority must continue to maintain the

⁸⁵ CFA 2014, Section 39.

⁸⁶ CFA 2014, Section 33.

⁸⁷ EA 1996, Section 337.

⁸⁸ CFA 2014, Section 34.

⁸⁹ CFA 2014, Section 35.

⁹⁰ CFA 2014, Section 61.

⁹¹ CFA 2014, Section 44.

EHC plan until the time has passed for bringing an appeal or the appeal has been determined by the First-tier Tribunal.⁹²

An appeal in relation to assessments and EHC plans can only be made after mediation has been considered.⁹³ Where the mediation does not include health care issues but involves education and/or social care, the local authority must arrange the mediation, make sure that it is conducted by an independent person and participate in the mediation.⁹⁴ Appeals that only concern the name of a school, college or other institution specified in the EHC plan or the type of school, college or institution specified in the EHC plan or the fact that the EHC plan does not name any school, college or other institution can be made without getting mediation information or going to mediation.⁹⁵

Echoing the duty to make reasonable adjustments laid out in the EA 2010, Section 66 of the CFA 2014 places a duty on mainstream schools' responsible bodies to use their best endeavours to secure that the special educational provision that is called for by a pupil's SEN is made. To facilitate this, Section 67 requires them to designate a member of staff designated as SEN co-ordinator (SENCO). The SENCO has responsibility for co-ordinating special educational provision in their school. The SENCO must be a qualified teacher who has completed an induction period and is working as a teacher at the school or be the headteacher, as well as hold the National Award for Special Educational Needs Co-ordination awarded by a recognised body.⁹⁶ Specific duties include informing a parent of a pupil who may have SEN that this may be the case as soon as is reasonably practicable; identifying the pupil's SEN and co-ordinating the making of special educational provision to meet those special needs; monitoring the effectiveness of any special educational provision made; securing relevant services for the pupil where necessary; ensuring that records of the pupil's SEN and the special educational provision made are maintained and kept up to date; liaising with and providing information to a parent of the pupil on a regular basis about that pupil's SEN and the special educational provision being made; ensuring that, where the pupil transfers to another school or educational institution, all relevant information about her SEN and the special educational provision made is conveyed to the appropriate authority or the proprietor of that school or institution; promoting the pupil's inclusion in the school community and access to the school's curriculum, facilities and extra-curricular activities; selecting, supervising and training learning support assistants who work with pupils with SEN; advising teachers at the school about differentiated teaching methods appropriate for individual pupils with SEN; and contributing to in-service training for teachers at the school.⁹⁷

Under Section 68 CFA, schools' responsible bodies must inform a child's parent or the young person when special educational provision is made for her, unless the child or young person has an EHC plan. Schools must also prepare a report on the school's policy for students with educational needs or a disability.⁹⁸ The report must include the following information: the kinds of SEN for which provision is made at the school; the school's policies for the identification and assessment of pupils

⁹² CFA 2014, Section 45.

⁹³ CFA 2014, Section 54.

⁹⁴ CFA 2014, Section 51.

⁹⁵ CFA 2014, Section 55.

⁹⁶ Special Educational Needs and Disability Regulations 2014, Section 49.

⁹⁷ Special Educational Needs and Disability Regulations 2014, Section 50.

⁹⁸ CFA 2014, Section 69.

with SEN; how the school evaluates the effectiveness of its provision for pupils with SEN; arrangements for assessing and reviewing their progress; approach to teaching pupils with SEN; how the school adapts the curriculum and learning environment for pupils with SEN; additional support for learning that is available to pupils with SEN; how the school enables pupils with SEN to engage in the activities of the school (including physical activities) together with children who do not have SEN; support that is available for improving the emotional, mental and social development of pupils with SEN; name and contact details of the SEN co-ordinator; expertise and training of staff in relation to children and young people with SEN and about how specialist expertise will be secured; how equipment and facilities to support children and young people with SEN will be secured; arrangements for consulting parents of children with SEN about, and involving such parents in, the education of their child; arrangements for consulting young people with SEN about, and involving them in, their education; arrangements relating to the treatment of complaints from parents of pupils with SEN; how the governing body involves other bodies, including health and social services bodies, local authority support services and voluntary organisations, in meeting the needs of pupils with SEN and in supporting the families of such pupils; contact details of support services for the parents of pupils with SEN, including those for arrangements made in accordance with Section 32; arrangements for supporting pupils with SEN in a transfer between phases of education or in preparation for adulthood and independent living; and where the local authority's local offer is published.⁹⁹

Local authorities must publish information about services available to children and young people with SEN, including special and other educational provision and arrangements for children to travel to school.¹⁰⁰ They must make arrangements for advice and information about SEN and disabilities to be provided for children, young people and the parents of children in its area with those needs, and to make the services provided known to those people, schools, colleges and others they consider appropriate.¹⁰¹ When there is no other way to provide education to a pupil with SEN, they must pay board and lodging at or outside school.¹⁰² They must also provide free travel arrangements.¹⁰³

SPECIFIC PROVISIONS FOR ETHNIC AND RELIGIOUS MINORITIES

Ethnic and religious minorities are explicitly protected by the EA 2010 under the grounds of 'race' and 'religion or belief'. Section 9 of the Act specifies that race includes colour, nationality and ethnic or national origins. Section 10 states that religion means any religion as well as lack of religion. Belief means any religious or philosophical belief as well as lack of belief. Legally speaking, the regulation of religion and belief is more much complex than that of ethnicity. Whereas the former is generally covered by the same anti-discrimination standards as other grounds, the latter is connected to a series of exceptions and exemptions that simultaneously limit the protection of believers and the subjection

⁹⁹ Special Educational Needs and Disability Regulations 2014, Schedule 1.

¹⁰⁰ CFA 2014, Section 30.

¹⁰¹ CFA 2014, Section 32.

¹⁰² EA 1996, Sections 458 and 514.

¹⁰³ EA 1996, Section 508B.

of religious institutions to equality laws. Due to this legal complexity, the following discussion will mainly focus on the grounds of religion and belief.

Section 85(10)(b) of the EA 2010 excludes religion and belief from the prohibition of harassment by schools' responsible bodies. In addition, Schedule 3 para 6 removes local authorities' general duty to secure diversity in the provision of schools from the prohibition on religion and belief discrimination by service providers. Para 11 extends the exception to anything done by a local authority in connection with the curriculum of a school; admission to a school that has a religious ethos; acts of worship or other religious observance organised by or on behalf of a school; the responsible body of a school that has a religious ethos; transport to or from a school; and the establishment, alteration or closure of schools. Schedule 11 para 6 disapplies the prohibition of discrimination by schools' responsible bodies in relation to acts of worship or other religious observance organised by the school. Para 5, which simultaneously constitutes an exception and an exemption, disapplies the prohibition on religion and belief discrimination in all schools with a religious character in relation to nearly all matters except pupil exclusions. Faith-based admissions criteria are thus allowed in oversubscribed (but not undersubscribed) schools with a religious character, although new ones must allocate at least half of their places without taking these into account.¹⁰⁴ When making admissions arrangements, maintained schools with a religious character must consult the body or person representing the religion or religious denomination in question, as listed in the regulations.¹⁰⁵ When constructing faith-based criteria, they must have regard to its guidance to the extent that it complies with mandatory state provisions and guidelines. They must also ensure that parents can easily understand how any faith-based criteria will be reasonably satisfied.¹⁰⁶

As mentioned above, religious education is mandatory in all state-funded schools.¹⁰⁷ Responsibility to ensure compliance with this requirement is shared between local authorities, schools' responsible bodies and headteachers.¹⁰⁸ They must also secure an act of collective worship on each school day.¹⁰⁹ However, pupils' parents have a right to request total or partial exemption from religious education or collective worship for their child. Pupils over compulsory school age can also exercise this right.¹¹⁰ All pupils have a right to withdraw from school to receive religious education or take part in collective worship.¹¹¹

Religious education in maintained schools without a religious character must be provided in accordance with a locally agreed syllabus that reflects the fact that the religious traditions in the United Kingdom are in the main Christian while taking into account the teaching and practices of the other principal religions represented in the country.¹¹² Local authorities must appoint standing advisory councils on religious education (SACREs) to advise them on religious education and religious worship,

¹⁰⁴ *School Admissions Code*, op. cit., pp. 11, 16.

¹⁰⁵ SAR 2012, reg 12 and Schedule 3.

¹⁰⁶ *School Admissions Code*, op. cit., p. 16.

¹⁰⁷ EA 2002, Section 80.

¹⁰⁸ SSFA 1998, Section 69.

¹⁰⁹ SSFA 1998, Section 70.

¹¹⁰ Education and Inspections Act 2006, Section 55.

¹¹¹ SSFA, Section 71.

¹¹² SSFA 1998, Schedule 19, rule 2(1)(2); EA 1996, Section 375.

including method of teaching, choice of materials and teacher training. The SACREs may at any time require a review of the agreed religious education syllabus.¹¹³ The council must consist of representatives of Christian denominations and other religions reflecting the principal religious traditions in the area, the Church of England and the local authority.¹¹⁴ Local authorities must 'take reasonable steps' to ensure members are representative of their religion and may remove them if they cease to be.¹¹⁵ Agreed syllabuses cannot provide for religious education to be given by means of any catechism or formulary that is distinctive of a particular religious denomination, except if such catechisms or formularies are the object of study.¹¹⁶ In secondary schools whose situation makes it inconvenient for pupils to withdraw or receive religious education elsewhere, schools must make arrangements for religious education in accordance with the tenets of a particular religion or denomination, unless this would be unreasonable.

In schools with a religious character, parents have a right to receive religious education in accordance with the tenets of the religion or religious denomination specified in relation to the school.¹¹⁷ If they cannot conveniently send their child to a school where the locally agreed syllabus is taught, they also have the right to request their child to receive religious education in accordance with this syllabus unless this would be unreasonable.¹¹⁸

Collective worship must consist of a single act or several acts for pupils of different age groups or in different pre-existing school groups. In non-religious schools, arrangements must be made by the headteacher after consulting the school's governing body. In religious schools, they must be made by the governing body after consulting the headteacher.¹¹⁹ Collective worship must take place on school premises unless the governing body finds it desirable to go elsewhere on specific occasions.¹²⁰ In religious schools, collective worship must be in accordance with the tenets of the school's religion.¹²¹ In non-religious schools, collective worship must be of a broadly Christian character, without emphasising any particular denomination. It must also take into account pupils' family background. This requirement must be applied in the school term as a whole rather than to each act.¹²²

Upon request from the headteacher of a non-religious maintained school, the SACRE must determine whether the requirement for Christian collective worship should be disapplied to that school.¹²³ The determination must be reviewed upon request from the headteacher or a maximum of

¹¹³ EA 1996, Section 391.

¹¹⁴ EA 1996, Section 390.

¹¹⁵ EA 1996, Section 392.

¹¹⁶ SSFA 1998, Schedule 19, rule 2(5).

¹¹⁷ SSFA 1998, Schedule 19, rule 3.

¹¹⁸ SSFA 1998, Schedule 19, rule 4.

¹¹⁹ SSFA 1998, Schedule 20, rule 2(4).

¹²⁰ SSFA 1998, Schedule 20, rule 2(6)(7).

¹²¹ SSFA 1998, Schedule 20, rule 5.

¹²² SSFA 1998, Schedule 20, rule 4.

¹²³ EA 1996, Section 394.

five years after it took effect. The SACRE can either confirm or revoke the determination. A determination that has not been confirmed after five years automatically ceases to have effect.¹²⁴

While the EA 2010 circumscribes the duty to make reasonable adjustments to the grounds of disability, various provisions of the EA 1996 are designed to facilitate the accommodation of religious beliefs. Hence, attendance at a place of religious worship cannot be required of pupils in a maintained school.¹²⁵ Sex education must protect pupils from teaching and material that are inappropriate with regard to their religious and cultural background.¹²⁶ When exercising their functions in relation to transport, local authorities must have regard for parents' religious preferences (or those of pupils over compulsory school age).¹²⁷ They must provide free travel arrangements to pupils who cannot reasonably be expected to walk to school by virtue of, inter alia, their religious beliefs.¹²⁸ They must also take into account the wishes of the pupil's parents as to the religion or denomination of the person with whom the pupil resides in an out-of-school accommodation.¹²⁹

In relation to ethnicity, Section 20 of the CFA 2014 specifies that a child or young person does not have a learning difficulty simply because the language in which she is or will be taught is different from the one she speaks at home. This provision can partly be read as a safeguard against the clustering of minority children in special schools.

JUDICIAL REVIEW AND COMPLIANCE WITH HUMAN RIGHTS LAW

Various complaints have been brought against schools' failure to comply with their duty to make reasonable adjustments for pupils with disabilities. In *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal*,¹³⁰ a school authority appealed a tribunal decision that a pupil at the school had been the subject of disability discrimination contrary to the Disability Discrimination Act 1995, which preceded the Equality Act 2010. The pupil had attention deficit and hyperactivity disorder (ADHD) associated with non-compliant behaviour, temper tantrums, mood swings, learning problems and aggression. The school encountered difficulties with the pupil's behaviour and subjected him to internal and external exclusions, one of the latter after the physical assault of a member of staff. The parent of the pupil successfully claimed that the governing body had failed to make a reasonable adjustment by enlisting the advice and support of the Access to Learning Specialist Team prior to the last exclusion. The first instance tribunal ordered the governing body to apologise in respect of this discriminatory action and to ensure that all staff who had contact with the pupil undergo specific training on ADHD. In its appeal, the governing body of the school submitted that the ruling was wrong because the only aspect of the pupil's ADHD in relation to which a failure to adjust was found was his tendency to physical abuse of other persons. This was in spite of Regulation

¹²⁴ EA 1996, Section 395.

¹²⁵ EA 1996, Section 398.

¹²⁶ EA 1996, Section 403.

¹²⁷ EA 1996, Section 509AD.

¹²⁸ EA 1996, Section 508B.

¹²⁹ EA 1996, Section 514.

¹³⁰ [2009] EWHC 1842 (Admin).

4 of the Disability Discrimination (Meaning of Disability) Regulations 1996 according to which a tendency to physical abuse of other persons was not to be treated as a disability. (As mentioned above, this provision has been incorporated in the EA [Disability] Regulations 2010.) The respondents, supported by the Equality and Human Rights Commission and the National Autistic Society, argued that the exception only applied to free standing conditions and not to consequential symptoms or manifestations of protected impairments. As the pupil's behaviour, namely the scratching and struggling to get free from his teacher, was related to his ADHD, it was not excluded under the Regulations.¹³¹ To support their reading of the regulations, the claimants referred to Articles 23, 28 and 29 of the UN Convention on the Rights of the Child and Articles 7 and 24 of the UN Convention on the Rights of Persons with Disabilities. Dismissing the relevance of these treaties for the case at hand, the High Court found in favour of the governing body that the protection of the anti-discrimination legislation was not intended to extend to the excluded conditions, whether or not they were manifestations of an underlying protected impairment. This position was reproduced in three subsequent decisions of the Upper Tribunal upholding the exclusion of pupils with an impairment-related tendency to physical abuse.¹³² In these later cases claimants relied on the EA 2010 and its associated regulations. One of them, *X v The Governing Body of a School (SEN)*, also cited the aforementioned UN Conventions as well as the EU Employment Equality Directive 2000/78 as interpretive aids.

In *C & C v The Governing Body of a School*,¹³³ where the Secretary of State for Education and the National Autistic Society intervened as interested parties and the Equality and Human Rights Commission intervened on behalf of the claimants, the Upper Tribunal radically departed from previous decisions by disapplying the provision of the Equality Act (Disability) Regulations 2010 excluding the tendency to physically abuse other persons from the definition of disability. The novelty of this case rested in claimants' recourse to Article 14 ECHR (prohibition of discrimination), taken in conjunction with Article of the First Protocol of the Convention (right to education). Simultaneously drawing on Strasbourg case law and recent government pronouncements relating to school exclusions, the Upper Tribunal concluded that the Secretary of State had failed to justify 'a provision which excludes from the ambit of the protection of the EA 2010 children whose behaviour in school is a manifestation of the very condition which calls for special educational provision to be made for them.' The Court specified that it had not resorted to relevant UN Conventions but was reassured that its conclusion was in harmony with their general principles.

In *F-T v The Governors of Hampton Dene Primary School*,¹³⁴ the mother of a child with a diagnosis of Down's syndrome brought a discrimination suit against her school for failing to provide her with full-time education during six months. The school had initially refused to admit the child but, having been named in her statement of educational needs, subsequently yielded to pressures from the local authority. In court, the school alleged that the child's challenging behaviour meant that she could only be educated part time. The Upper Tribunal found that the reduced educational provision

¹³¹ Para 1-8.

¹³² *P v Governing Body of a School*, [2013] UKUT 154 (AAC); *X v The Governing Body of a School (SEN)* [2015] UKUT 0007 (AAC); *C v Governing Body of I School (SEN)* [2015] UKUT 217 (AAC).

¹³³ [2018] UKUT 269 (AAC).

¹³⁴ *(SEN)* [2016] UKUT 0468 (AAC).

had caused a significant educational deficit and that while the aim of preparing the child for full-time education was a legitimate one, the impugned measure was not proportionate. This was particularly true since there had been no attempt to provide the child with full-time education even after a psychologist reported in March 2014 that she did not appear tired in the afternoon.¹³⁵

In *C and C v The Governing Body of a School (SEN)*,¹³⁶ the parents of a child with SEN complained that the school's assessment system was inadequate since it did not cover all subjects and had not been adapted after the introduction of a new curriculum. They thereby alleged failure to make a reasonable adjustment in breach of the EA 2010. The court rejected the claim after finding no conclusive evidence that the school's assessment procedure was defective, let alone a contravention of the Act.

In its 2016 concluding observations on the United Kingdom,¹³⁷ the UN Committee on the Rights of the Child expressed concern that many children with disabilities are placed in special schools or special units in mainstream schools, many school buildings are not made fully accessible to children with disabilities¹³⁸ and many children with psychosocial disabilities and other SEN are subject to informal exclusion or taught off-site to control their behaviour.¹³⁹ It recommended ensuring that inclusive education is given priority over the placement of children in specialised institutions and classes,¹⁴⁰ using permanent or temporary exclusion as a means of last resort only and forbidding and abolishing informal exclusion and reducing the number of exclusions by working closely with social workers and educational psychologists in school, as well as by using mediation and restorative justice.¹⁴¹ The Committee also criticised the use of restraint and seclusion on children with psychosocial disabilities, including with autism, in schools.¹⁴²

In its 2017 concluding observations on the United Kingdom, the UN Committee on the Rights of Persons with Disabilities recommended that the United Kingdom withdraw its reservation to article 24(2)(a) and (b) the Convention on the Rights of Persons with Disabilities.¹⁴³ It also criticised the persistence of a dual education system that segregates children with disabilities in special schools, including based on parental choice; the increasing number of children with disabilities in segregated education environments; the refusal of school authorities to enroll a student deemed to be 'disruptive to other classmates'; and the fact that the education and training of teachers in inclusion competences

¹³⁵ Para 71.

¹³⁶ [2018] UKUT 61 (AAC).

¹³⁷ Committee on the Rights of the Child (2016), Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5.

¹³⁸ *Ibid.*, para 56(b).

¹³⁹ *Ibid.*, para 72(c).

¹⁴⁰ *Ibid.*, para 57(b).

¹⁴¹ *Ibid.*, para 73(b).

¹⁴² *Ibid.*, para 39(d).

¹⁴³ 24(2)(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability. (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.

does not reflect the requirements of inclusive education. The Committee recommended that the United Kingdom ensure that mainstream schools foster real inclusion of children with disabilities in the school environment and that teachers and all other professionals and persons in contact with children understand the concept of inclusion; strengthen monitoring of enrolment of children with disabilities and offer appropriate remedies in cases of disability-related discrimination and/or harassment; improve the extent and quality of inclusive education in classrooms, support provisions and teacher training, including pedagogical capabilities and within breaks between lessons or outside education time; and provide data on the number of students in inclusive and segregated education, disaggregated by impairment, age, sex and ethnic background.¹⁴⁴

Two recent cases have addressed discrimination on the grounds of religion or ethnicity in the educational setting. In *R v Governing Body of JFS*,¹⁴⁵ the father of a child born of a non-orthodox Jewish mother challenged the admissions policy of a school that only admitted orthodox students. Jewish orthodoxy was assessed through a matrilineal test with strict rules for conversion. The claim relied on Sections 1 and 3 of the Race Relations Act (RRA) 1976,¹⁴⁶ subsequently superseded by the EA 2010. The claimants were supported by the Equality and Human Rights Commissions and the British Humanist Association, whereas the respondent was supported by the United Synagogue and the Secretary of State for Children, Schools and Families. As the RRA 1976, like the EA 2010, did not prohibit religious discrimination per se, the case hinged on whether the school's definition of admissible students could be characterised as one of ethnic origin. In concurring but separately reasoned opinions, the majority of judges found that it was and therefore amounted to direct racial discrimination. *G v The Head Teacher & Governors of St Gregory's Catholic Science College*¹⁴⁷ involved a pupil of African-Caribbean ethnicity who kept his hair in cornrows in accordance with his family tradition. This was prohibited by the uniform policy of the secondary school at which he was due to commence his secondary education and was therefore prevented from attending school. The claimant contended that the prohibition of cornrows was discriminatory on sex and race grounds. The defendants opposed that the uniform policy was necessary to keep the 'gang culture' associated with cornrows and other styles out of the school gates. The Equality and Human Rights Commission intervened on behalf of the claimant. In its decision, the High Court simultaneously relied on the RRA 1976 and the EA 2010, arguing that they did not produce any significant difference as the former had been amended in 2003 to comply with EU directives. Accepting, based on expert testimonies, that cornrows are linked to a cultural tradition valued by the claimant, it found that their prohibition had not been adequately justified, particularly as cornrows as such could not be construed as symbols of a gang culture. The uniform policy therefore constituted indirect racial discrimination.

¹⁴⁴ Para 51-53.

¹⁴⁵ [2009] UKSC 15.

¹⁴⁶ 1(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if (a) On racial grounds he treats the other less favourably than he treats or would treat other persons [...] 3(1) In this Act, unless the context otherwise requires - 'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins; 'racial group' means a group of persons defined by reference to colour, race, nationality, or ethnic or national origins; (2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.

¹⁴⁷ [2011] EWHC 1452 (Admin).

The 2016 concluding observations of the UN Committee on Economic, Social and Cultural Rights noted significant inequalities in educational attainment for children belonging to ethnic, religious or other minorities and recommended measures to reduce de facto discrimination and segregation of students based on their religion or their national or social origin.¹⁴⁸ The UN Committee on the Rights of the Child has evinced concern about the requirement for schools to organise a daily religious worship that is wholly or mainly of a broadly Christian character, including the fact that children do not have the right to withdraw without parental permission. It recommended repealing this provision and ensuring that children can independently withdraw from religious worship at school.¹⁴⁹ In addition to disabled children, the Committee identified Roma, gypsy, traveller and Caribbean children as victims of persisting inequalities and permanent or temporary school exclusions. It highlighted that, unlike disabled children, these do not have the right to appeal against their exclusion.¹⁵⁰

EDUCATION LAW AND JUSTICE

The contemporary regulation of compulsory education in England sheds light on multiple links between education and justice. First of all, the law clearly and increasingly conceives education as a subjective right. This is visible in the general obligation of the Secretary of State to promote education and in the steady expansion of statutory duties placed on public authorities, school governing bodies and parents toward the children in their care. These duties include the admission of all students who apply to undersubscribed schools and strict restrictions on the recourse to exclusion. Insofar as they reduce power inequalities between institutions and individuals, they can be seen as embodying ideals of justice. At the same time, the compulsory nature of school attendance shows that education is simultaneously understood as a duty of the child. In this sense it evinces interesting parallels with legal conceptions of work, which is a self-standing right but also a requirement to access various social and economic benefits. Children's duty to learn is enforced by investing public authorities, school governing bodies and parents with a range of powers to promote attendance. Due to children's age these powers do not usually reach the level of coercion that is routinely applied to adults (note how fines for students over compulsory school age remain to be brought into force), but in practice children's subordination to school and parental authority opens the door to a wide range of disciplinary measures. This suggests that educational regulations are not only driven by the interests of children receiving education but also those of other parties who may benefit from the transmission of specific knowledge or attitudes.

If educational provisions partly express ideals of justice, what do these ideals look like? Let us first start with the grounds on which rights can be claimed by the groups covered in this report. Disability, ethnicity and religion are all recognised as protected characteristics in anti-discrimination law, but regulations show that their protection is uneven and their definition is far from

¹⁴⁸ Committee on Economic, Social and Cultural Rights (2016), Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, para 63-64.

¹⁴⁹ Committee on the Rights of the Child (2016), Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, para 35-36.

¹⁵⁰ *Ibid.*, para 72.

straightforward. Of these grounds, disability is the only one that gives rise to a general duty to make reasonable adjustments. This suggests that the law conceives disability as a stronger ground on which to make justice claims than the others. In practice, however, the difference between them is not so clear cut, as legislation and case law both establish more specific duties for educational providers to make reasonable adjustments for ethnic and religious differences. Another hierarchy emerges between ethnicity, which is protected against all forms of discrimination, and religion, which is excluded from most anti-discrimination protection in religious schools as well as several equality standards (including the prohibition of harassment) in secular ones.

Possible reasons for these distinctions may be inferred from the definitions of the grounds and the justification of specific inclusions and exclusions. Disability is defined in a clearly negative way as an impairment with 'substantial and long-term adverse effect' on normal day-to-day activities. Hence it is a condition that few people would want to find themselves in and normally arises from circumstances beyond their control – generally severe health-related problems. This general principle is reinforced by the exclusion from the definition of addictions or tendencies, which can be expected to provide personal pleasure or benefits (unless the addictions stem from medical treatment). The association of disability with involuntary hardship also seems to underlie the requirement to consider the number of activities hampered by the impairment and the possibility of behavioral adaptation to it. Judicial definitions of ethnicity also imply a degree of involuntariness, insofar as they locate its source in family-transmitted cultural identities and traditions:

The criteria whose application debarred M from entry to JFS are readily identified. They are the criteria recognised by the OCR as conferring the status of a Jew. The child will be a Jew if at the time of his birth his mother was a Jew. His mother will be a Jew if her mother was a Jew or if she has converted to Judaism in a manner that satisfies the requirements of the Orthodox religion. M does not satisfy those criteria because of his matrilineal descent. His mother was not born of a Jewish mother and had not at the time of his birth complied with the requirements for conversion, as laid down by the OCR. Accordingly M does not satisfy the Orthodox test of Jewish status.¹⁵¹

Unlike disability, however, ethnicity is conceived as a characteristic that may be positively valued by its bearers and thus willingly adopted.¹⁵² This voluntary element is assumed even more explicitly in the case of religion, as suggested by the default expectation that religious parents will accept to enroll their child in a school that subscribes to a faith different from their own. Notions of vulnerability do not seem to play any significant role in the definition of the grounds of discrimination in the educational sphere.

Recent legislative reforms hint at important shifts in the scope of justice embodied in education law. The rapid conversion of maintained schools into academies, particularly at the

¹⁵¹ R v Governing Body of JFS [2009] UKSC 15, para 26.

¹⁵² This argument was mobilised by the defendants in G v The Head Teacher & Governors of St Gregory's Catholic Science College, para 28: 'Mr Oldham further submits that in any event English law does not recognise that voluntarily adopted socio-cultural practices associated with a particular race can amount to race discrimination.'

secondary level,¹⁵³ can simultaneously be interpreted as a state centralisation of educational provision and a reconfiguration of decentralised governance. From a centralisation perspective, it has transferred from local to state authorities key powers in matters of admissions, funding, governance and religious education, enforced through an expanding inspection apparatus. From a reconfigured decentralisation perspective, it has transferred powers of day-to-day administration – including finance, human resources and religious education – from local authorities to charities, individual parents, limited companies, universities and other organisations participating in the creation of new academies. It has also devolved from the state administration to school boards the responsibility to develop specific curriculum standards, within the confines set by central guidelines and standardised tests. In very broad strokes, these shifts mean that 1) educational decision-making has become increasingly concentrated at the state level; 2) it has become increasingly deterritorialised; and 3) it has become less democratic.

While the first two observations seem relatively straightforward, the last one deserves some additional explanation and qualification. On the one hand, the increasing diversity of educational providers (including in terms of religious denomination) and the freedom of school choice that underpins admission rules have transformed parents in consumers of educational services, investing them with significant purchasing power in a competitive market. In this sense, it could be argued that local and national representative bodies have partly delegated educational decision-making to households. On the other hand, market dynamics mean that family preferences must be aggregated at school level, which offers plenty of opportunity for school governing bodies to interpret and shape these preferences. As theorists have pointed out, the participation in these governing bodies of non-elected organisations with complex and often opaque interests may result in a democratic deficit.¹⁵⁴ In addition, families' effective market power depends on the degree of competition between schools, which may vary considerably from one municipality or region to the next. Freedom of choice can also be curtailed by the uneven popularity of different schools in the same area. Oversubscription opens the door to the consideration of factors such as residence in a 'clearly demarcated' catchment area, which may limit the options available to residentially segregated ethnic or religious minorities. Finally, the implementation of admission rules may be hampered by the fact that most academies are in charge of their own admissions. While the law sets out substantive admissions requirements and detailed rights of appeal against related decisions, most relevant information is in the hands of admissions authorities, which puts claimants at a procedural disadvantage. This may be especially problematic for the families of students with learning difficulties who must prove that admitting them would be compatible with the provision of 'efficient' education for others, an indeterminate standard that readily lends itself to opportunistic interpretations.

From a justice perspective, most of the benefits of an increasingly centralised and marketised educational provision seem to have accrued to the families who wish their children to receive either state education or one that is tailored to their specific preferences, including in matters of SEN and

¹⁵³ In January 2017, 68.8% of secondary pupils and 24.3% of primary pupils in England were enrolled in academies. See *Academies and free schools*, op. cit., p. 9.

¹⁵⁴ Stephen Ball (2011), 'Academies, policy networks and governance', in Helen Gunter (ed), *The state and education policy: The academies programme*, London: Continuum, pp. 146-158.

religious identities. Hence, the CFA 2014 has enshrined families' right to request education in special schools that take into account children's learning difficulties, not necessarily stemming from a disability as defined under anti-discrimination law. At the same time, the academies programme has catalysed state funding for minority religious schools, making religiously tailored education available to low-income families. The price of enhanced opportunities for family-level cultural reproduction may be segregation along lines of ability, ethnicity and religion, with predictable consequences for intergroup recognition.¹⁵⁵

The legal framework reveals other tensions between conceptions of justice, as well as disagreements around their meaning. For instance, the ideal of efficient education is cited as a reason to exclude disabled pupils from mainstream schools, seemingly pitting a utilitarian argument (based on aggregate benefits to the student body) against a strictly egalitarian one (based on the rights of individual disabled students). The cases concerning the exclusion of aggressive disabled students similarly crystallised underlying discrepancies on the weight given to the interests of the excluded student, even if in this case the countervailing interest could more easily be read as a deontological matter of personal security or protection:¹⁵⁶

This instrument [a memorandum on the types of disabilities protected by the EA 2010] prescribes that addictions to non-prescribed substances, and certain other conditions, like a tendency to steal, are excluded from being impairments and, consequently, from providing protection under the Act. These are excluded for public policy reasons, for example to avoid providing protection for people where the effect of their condition may involve anti-social or criminal activity.¹⁵⁷

Likewise, the admissions controversies revolving around the ethnic or religious status of Jewishness carried into the legal arena long-standing philosophical controversies on the treatment of cultural and religious difference, which could be advanced by paying closer attention to the centrality of cultural reproduction in the legal regulation of the right to education.

¹⁵⁵ Ayse Bugra and Basak Akkan (2019), *Discourse on minorities' (and vulnerable groups') access to education: Inclusionary and exclusionary aspects*, ETHOS Deliverable 4.3 [accessed via https://www.ethos-europe.eu/sites/default/files//docs/d4.3_website_report_complete.pdf].

¹⁵⁶ Cf Susan Divald (2019), *The Trojan Horse Controversy: Mapping the construction of justice in UK media*, ETHOS WP 4.4.

¹⁵⁷ X v The Governing Body of a School (SEN) [2015] UKUT 0007 (AAC), para 20.

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