



# STOP PRESS - PUBLIC BENEFIT

Since the implementation of the Charities Act 2006 ("the 2006 Act"), the Charity Commission has been undertaking public benefit assessments on a number of charities, including five independent schools.

Prior to the implementation of the 2006 Act there was a presumption that the provision of education was for the public benefit. That presumption has now been removed and it is necessary for schools seeking to achieve or retain charitable status to demonstrate that their activities are not only capable of being charitable but also for public benefit.

The results of these initial assessments have just been published ( 14 July 2009).

Of the five independent schools which have so far been assessed, two failed the public benefit test. They each failed for substantially the same reasons.

In assessing the public benefit requirements the Charity Commission will need to be satisfied that:

- The Charity's aims are capable of being charitable.
- The benefits are clear.
- The benefits are related to the aims.

- The benefits are balanced against any detriment or harm.
- The beneficiaries are appropriate to the aims.
- Where the benefit is to a section of the public, the benefit is not unreasonably restricted.
- The opportunity to benefit is not unreasonably restricted by the ability to pay any fees charged.
- People in poverty are not excluded from the opportunity to benefit.
- Any private benefits are incidental.

It will come as no surprise that the two schools which failed to satisfy the public benefit requirement failed because they could not demonstrate that there was sufficient opportunity to benefit, in a material way that was related to the relevant school's aims, for those who cannot afford the fees, including those in poverty.

In coming to their conclusions, the Charity Commission were unable to produce a simple formula that would allow schools to know the amount or percentage of the assistance that should be offered.

They say that it is necessary to take into account a number of factors and that what is right for one charity will not necessarily be right for another, even one with similar aims.

So, what can be learnt from the initial assessments?

Clearly it is not possible to identify definitive guidelines based on an assessment of only five independent schools. However, the fact that the two schools which failed the public benefit requirement did so on substantially the same grounds, must mean that all schools should pay particular attention to ensuring that the benefits afforded by the school are not unreasonably restricted by the ability to pay fees and that those in poverty are not excluded from the opportunity to benefit.

The Charity Commission say that what matters is that the opportunity to benefit the people who cannot afford fees is, overall, (when taken together with any other significant opportunities to benefit that do not involve providing free or subsidised access) more than minimal or tokenist or occurring by chance.

Schools may help to demonstrate this by providing opportunities to benefit to the wider public. However, in none of the cases assessed, were those benefits, on their own, significant enough to satisfy the test.

The real issue seems to be the extent to which means tested bursaries are available and whether the level of assistance is such as to ensure that people in poverty are not excluded from the opportunity to benefit. It is not sufficient to offer fee reductions which are still not affordable by those in poverty.

Of course, it is not the case that everybody must be able to attend any fee paying school. All fee paying schools will almost certainly be charging fees that are within the Charity Commission's definition of "high fees" in their guidance on "Public Benefit and Fee-Charging" because they are unaffordable to many people.

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What matters is that the Trustees need to demonstrate that there is sufficient opportunity for people who cannot afford those fees to benefit in a material way that is related to the Charity's aims. Material opportunities to benefit are those which are more than minimal or tokenist or which occurred by chance.

It is interesting to note that means tested assistance provided by the two schools which failed the public benefit requirement amounted to 1% of total annual income in one case and none in the other.

That compares with 14.3%, 9.7% and 5% for the other three schools.

That is an interesting comparison but clearly not the whole of the story. There are many other factors to be taken into account, including the availability of non means tested benefits.

Schools therefore need to review, as a matter of urgency, what steps they are taking to ensure that there is a sufficient level of assistance made available to enable pupils to attend notwithstanding that they, or their parents, are unable to pay the full level of fees or where they are in poverty (and probably requiring 100% assistance). Assistance also needs to be available for "additional costs", uniform, sports gear, extra lessons, school trips, etc. The cost of these alone is often a deterrent to many.

The availability of assistance should be well publicised (it is not acceptable to say that 100% bursaries are available if no-one knows about them).

Schools should approach these issues from the perspective that they are required to provide "public benefit". It is not optional if charitable status is to be retained. It is not sufficient to show that fees are kept as low as possible. That only benefits those who can afford them, not the many that cannot. There must be an appropriate level of assistance available and, although some of this may be available from third parties, it would appear that the Charity Commission

expects the school itself to take steps to provide at least some fee assistance itself.

The two schools which failed the public benefit requirement have been given three months within which to confirm that they will address the Charity Commission's concerns and a further nine months within which to produce plans to show how they will ensure that the benefits available will ensure that there is sufficient opportunity to benefit in a material way for those who cannot afford the fees, including people in poverty.

Of the other three schools which were assessed, only in one case did the Charity Commission conclude that there were no required or recommended actions for the Governors to take.

In respect of the other two, whilst concluding that these schools were operated for the public benefit, the report stated that there were steps the Governors should take in order to demonstrate that they are meeting key good practice requirements in the Charity Commission's public benefit guidance.

These good practice recommendations are:

- The Governors should publicise more clearly details of means tested awards, the extent of the discount available and what types of assistance are available;
- The Governors should review the scope for extending the impact of the bursary programme by increasing the relative number of higher percentage awards;
- The Trustees should keep under review the extent to which the opportunities to benefit are taken up by people who are unable to afford the fees, including people in poverty.

Again, these relate to what has emerged as the key issue facing independent schools if they are to retain their charitable status.

One other issue which arose from the assessments related to the management of conflicts of interest. One of the (failed) schools has a predominance of parent governors on its board, at least six of the ten.

Governors (trustees) have a duty to act in the best interests of the Charity and not to place themselves in a position where

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personal interests may conflict with their duties as trustees. Parents have a personal interest in the level of fees which they pay and, as such, that interest may conflict with their duties to act in the best interests of the Charity and in the public interest.

Usually, such a conflict can be dealt with by the declaration of the personal interest and a withdrawal of the conflicting Governor(s) from the decision making process. However, in this case, the school’s constitution requires that a majority of the Governors be parents making the management of conflicts extremely difficult. The Charity Commission will be working with the school to address the future management of conflicts of interest.

Another issue which all schools need to bear in mind is that the Charity Commission will not only assess whether the school’s stated objects or aims are capable of being charitable but whether the benefits provided are actually related to the objects or aims.

The objects or aims are set out in the school’s constitution and may not accurately reflect the activities which are currently being carried on. Schools should therefore keep their aims and objects under review and, if necessary, they should be amended with the consent of the Charity Commission to reflect the activities currently being undertaken, assuming, of course, that they are charitable.

There are many other issues emerging as a result of the 2006 Act and the Charity Commission’s recent assessments which need to be addressed and kept under review by schools if they wish to retain their charitable status.

We have not reviewed here how the Commission approached the other public benefit requirements referred to above. The fact that none of the schools assessed failed any of these tests does not mean that there

were not issues or that they can be ignored by other schools. They will need to be carefully addressed when reporting on how the public benefit requirement is being met.

The Charity Commission will no doubt be undertaking further assessments and all schools should be prepared for these. These assessments may well not include visits but will include more sophisticated questionnaires and requests for information based on the lessons which the Commission will have learned from the initial assessments.

**This bulletin summarises complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.**

**For further information please contact  
David Allison, Partner  
Head of Charities on  
T: 0870 763 1588  
E: [david.allison@martineau-uk.com](mailto:david.allison@martineau-uk.com)**





# martineau

## CONTACT US...

**Birmingham Office:**

No 1 Colmore Square  
Birmingham  
B4 6AA

**London Office:**

35 New Bridge Street  
London  
EC4V 6BW

**Tel:** 44(0)870 763 2000

**Fax:** 44(0)870 763 2001

**DX:** 721090 Birmingham 43

**Email:** [lawyers@martineau-uk.com](mailto:lawyers@martineau-uk.com)

**Web:** [www.martineau-uk.com](http://www.martineau-uk.com)

**International:** [www.multilaw.com](http://www.multilaw.com)

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