

Shraga Stern and Asher Gratt

By email

4 June 2019

Dear Shraga and Asher,

I am writing to summarise the advice we and Hanif Mussa have provided in relation to the potential claim against the Department of Education, and to recommend what steps should now be taken.

I RSE Guidance

On 9 May 2019 the Government published the Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019. These require all schools in England to teach relationships education at primary level and relationships and sex education (“**RSE**”) at secondary level starting from September 2020.

The Regulations themselves do not define the content of RSE. The content is set out in statutory guidance which the Department for Education (“**DfE**”) publishes regarding RSE. The DfE has published RSE guidance which contains many content items which Charedi schools would not wish to teach, some coming under sex education, from which parents can opt-out, but many seemingly coming under relationships education, where there is no opt-out.

Hanif points out that the Regulations merely require schools to “*have regard*” to the RSE guidance, and the guidance itself states: “*Schools must have regard to the guidance, and where they depart from those parts of the guidance which state that they should (or should not) do something they will need to have good reasons for doing so.*”

Hanif’s advice, with which we agree, is that Charedi schools could legitimately argue that they have had regard to the guidance in forming their curriculum for RSE, and have chosen not to teach some elements of the suggested content because it is not appropriate for Charedi pupils due to their religious background. We set out below how we would suggest this be done in practice.

In isolation this would solve the problem you are facing. However, as set out below, Ofsted can require the teaching of LGBT through the Independent School Standards, even if we believe they could not enforce them through the RSE Guidance, as set out below.

II Independent School Standards

The Education (Independent School Standards) Regulations 2014 require private schools to teach pupils to respect other people “*paying particular regard to the protected characteristics*” in the Equality Act 2010. The DfE has recently issued new non-statutory advice stating that this provision cannot be fulfilled by teaching respect for all people in a

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general sense; schools must teach pupils about each of the protected characteristics in an age-appropriate way. You asked us to advise whether the court might accept that this provision could be read as not requiring schools to teach pupils anything about some of the protected characteristics.

Hanif's advice was that it would be extremely unlikely for a court to accept that not teaching pupils anything about some of the protected characteristics could comply with this requirement. The provision is worded too clearly to argue that teaching respect generally is sufficient. Also, the current atmosphere in society and the general liberal outlook of many judges, the courts are in our view very unlikely to accept a watered down interpretation of the wording.

We therefore do not recommend a court action to challenge the Independent School Standards or to challenge the DfE's new advice. However, we suggest below some steps outside of a court action which could be taken to reduce the challenge the Standards pose to Charedi schools.

III Human rights arguments

When we spoke with Hanif, he raised the possibility of a further argument. The relevant rules, if adhered to by schools, would produce a result that many Charedi parents will feel that their religious beliefs require them to withdraw their children from schools teaching the relevant material. Thus the rules put Charedi parents and children at a disadvantage as compared with other people in society. On that basis it could be argued that the rules: (a) are discriminatory against Charedim; and/or (b) breach Charedim's human right to practice their religion.

In particular we looked at the possibility of arguing that a strict application of the Independent School Standards would result in charedi children being taken out of school and having home schooling. We contemplated arguing that home schooling was disadvantageous to children and thus indirectly discriminatory.

In addition we contemplated arguing that the Independent School Standards could be struck down on the grounds that they require private schools to teach LGBT issues where no equivalent requirement is placed on maintained schools or home schooling.

Hanif has now sent us a note of advice in respect of these potential arguments (copy attached). In summary, whilst he accepts that the arguments raise arguable claims, he does not think that they would have a reasonable chance of succeeding. This is because the human rights in question are not absolute: if the Government can show that the rules are necessary for achieving a legitimate aim, the courts will allow the rules to stand even if the rules do interfere with people's human rights. There are several aims which the Government could argue are legitimate ones which it is trying to achieve with these rules. For example the aim that all children should know about the protected characteristics and respect people who have them. The Government would argue that that aim cannot be achieved without teaching all pupils about the protected characteristics.

Accordingly, we would not recommend a court challenge to the Independent Schools Standards on the basis of human rights law.

IV Advice – next steps

Our advice as to what should now be done is as follows:

- 1) A united approach across Charedi schools to Ofsted and the DfE is preferable if it can be achieved.
- 2) We do not recommend taking court action at this stage given what we have said above regarding the low chance of court action succeeding.
- 3) The RSE Regulations require all schools to publish a written Policy Statement setting out how they will teach RSE. Charedi schools could use such a Policy Statement to state that they have had regard to the statutory guidance on RSE, but have decided not to teach some of the content in the guidance. The approach should differ for different ages:
 - a. For Charedi primary schools – the Policy Statement should explain that having had regard to the RSE statutory guidance, the school is not going to teach pupils about LGBT issues because such issues are not age appropriate for pupils in the school and not appropriate in light of the religious background of the pupils in the school. The policy statement should mention that on 9 April 2019 the Secretary of State for Education wrote in a letter published by the DfE: “*Primary schools are enabled and encouraged to cover LGBT content **if they consider it age appropriate to do so.***” (emphasis added)
 - b. For Charedi secondary schools – the Policy Statement should explain that having had regard to the RSE statutory guidance, the school is not going to teach pupils about specified issues in the guidance, including LGBT issues, as such issues are not appropriate in light of the religious background of the pupils in the school.
- 4) Since the Independent School Standards must be met, a statement saying that the school will not be teaching all parts of it is potentially suggesting a level of ‘civil disobedience’. The Policy Statement should include arguments as to why in fact the school is compliant. We suggest a statement along the following lines:

“We consider that the curriculum set out in this Policy Statement conforms with the requirement in the Education (Independent School Standards) Regulations 2014 for this school to encourage pupils to respect other people, paying particular regard to the protected characteristics in the Equality Act 2010.

However, insofar as the curriculum does not meet that requirement, then this school relies on the Regulatory and Enforcement Action Policy Statement published by the Department for Education on 30 April 2019 which stated: *“Enforcement action will not normally occur if there are only one or two unmet requirements from the standards, although the judgement on this will take into account the severity of the breaches, including the extent to which the failings put children’s safety at risk.”*”

- 5) We would be happy to assist in the drafting of such a Policy Statement if that would be thought helpful.
- 6) If the Government is faced with a unified approach from Charedi schools as suggested above, and if those schools are otherwise compliant, then it may be politically unattractive for the Government to take an aggressive approach to this issue. The recent noisy demonstrations in Birmingham may well also weaken the Government’s desire to press this issue head-on. The more uniform and widespread the approach taken, the better chance there is of the Government taking a less aggressive approach and reaching a resolution amicably.

The above ideas are suggested tentatively as a possible way forward. We understand that, in light of the advice, there will need to be community wide debate as to next steps. It may well be that the suggestions we make can be of some assistance in such a debate, but we also recognise that alternative, and perhaps better, strategies might emerge.

Finally, I have been told by a number of sources outside Chinuch UK that the legal advice obtained by Chinuch UK was very negative. Our advice, whilst ultimately also advising against bringing legal action, does highlight some useful arguments which can be brought. It might well be that for both groups to exchange opinions would be of mutual benefit. This must be a decision for you.

Yours sincerely,

Trevor Asserson

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