ADMISSION TO SCHOOL by Niels Noorlander

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Introduction

The position of pupils and parents in the school system has played a marginal role in the law for a long time, they were mainly regarded as objects of education. This can be explained by the unequal relationship between the schools and pupils and parents, inherent in the exercise of power by school authorities and teaching staff. Until the 1960s, this inequality was not redressed by the law; since then pupils and parents have increasingly been viewed as legal subjects with rights as well as obligations in politics, science, and education. In the process, numerous judgments have been passed about the educational relationship, to such an extent that some speak of a juridification whereby this relationship is increasingly being pulled into the ambit of the law.

The debate over rights has acquired a new dimension with the entry into force of the international *Convention on the Rights of the Child*. This convention is arguably the most expansive and, therefore, most important international document to achieve international recognition of the rights inhering in children. This convention makes

provision for both protection and participation rights.[1]

The central theme of this chapter is the admission of pupils to school, for which educational rights can be of great importance. The right of all children to an education is clearly set out in Article 28 of the *Convention on the Rights of the Child*. Yet, since not all member states are immediately capable of carrying out this provision, the Convention includes a principle of progressively moving to achieve this goal, starting with primary education that is free and compulsory. In addition, member states are required to encourage the development of various forms of secondary and higher education accessible to all on the basis of capacity.

Article 2 of Protocol 1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) is in Europe the most relevant human rights statute with regard to the right to education. It states that nobody can be denied the right to education. Article 2 provides for the right not to be denied an education and the right for parents to have their children educated in accordance with their religious and other views. The right to education is also laid down in Article 13, section 13, part 1 of the *Convention on Civil and Political Rights*, Article 28, section 1, of the *Convention on the Rights of the Child* and in Article 14 of the *European Charter of the European Union*.

Based on freedom of school choice, parents are free to choose a public or a private school for their child. Admission to school constitutes an essential decision for the legal position of the learner and gives the pupil the status of 'student within the school'. After admission starts a legal relationship with the board of the school, which establishes a complexity of rights and obligations. The mirror image of admission is removal. The removal ends the legal relationship between the pupil and the school board. Within most educational systems admission to a public school creates a legal relationship under public law, while admission to a private school usually results in a legal relationship under private law. This chapter describes legal aspects of admission in five countries: Belgium, England, Germany, the Netherlands and South-Africa.

In the discussion of each country the same pattern is used. Because admission is often linked with the Constitutional basis of the educational system, the Constitutional principles that might be of interest for the admission right are explained first. It involves the neutrality of public education, freedom of education, the right to education and the principle of non-discrimination. Then admission to public schools is expounded. In this context after the outline of a general framework I discuss the selection of pupils when the school's absorption capacity is exceeded and selection based on suitability for teaching. Finally I will discuss admission to private (denominational) schools.

Belgium

Belgium is a Federal State made up of Communities and Regions (article 1 of the

Belgium Constitution). This paragraph discusses especially the legal side of admission in the Flemish community.

In Flanders traditionally education in schools is divided in three ´networks´ (schoolnetten): *Official Subsidized education*, *Community education* and *Free Subsidized education*.

Official Subsidized Education and Community education are both ´Official education´ which is *public* education.

The type of school board determines the network a school belongs to. Official S ubsidized education is education organized, sponsored and controlled by local authorities and subsidized by the Flemish Community.

Community education are established and arranged by the communities, but the Flemish community, using article 24.2 of the Constitution, has founded a national autonomous body, that organizes in the name of the Flemish Community, community education. Of course they are financed by the Flemish Community. This serves about 15 or 20 percent of the Flemish school population.

Free Subsidized education is education that is set up by private persons or institutions and subsidized by the Flemish Community. The school board is in most cases a not-profit association. There is confessional Free Subsidized education, which is based on a religion, such as Catholic, Protestant and Islamic. They have a certain freedom in offering curricula and teaching methods. As long as they conform to the conditions of the Flemish community, these schools receive a subsidy at the same level as community schools. In addition, there is Free Subsidized non-confessional education. The education of these school is not based on a religion. Often these are 'method schools', such as Steiner schools and Montessori education.

Belgium is a neutral state with a quasi-separation of state and church. The Belgian Constitution has no article that explicitly forces separation of Church and State, but in the educational article the neutrality of community education is specified in article 24 1.3 of the Constitution, stating:

> The Community organizes neutral education. Neutrality implies notably the respect of the philosophical, ideological, or religious conceptions of parents and pupils.

To official schools some neutrality requirement applies: official schools have the duty to offer optional instruction in the officially recognized faiths and philosophies of life and to respect the beliefs of every family with children in the school.

Article 24 subsection 1.1 of the Belgian Constitution provides that education is free, that

any preventative measure is forbidden and that repression of offenses is governed by law or decree. The freedom of education secured by article 24 does not merely guarantee the right to set up schools, and therefore to choose between them, based on different denominational or non-denominational ideologies. In addition, it guarantees the right to set up schools which define their identity by means of one or the other teaching concepts of education trends.[2] In Belgian literature the legal norm that provides that education is free is called the active freedom of education. As a supplement to this, the Belgian constitution formulates a right to education. This is called the *passive* freedom of education.

In article 24 subsection 3 of the Belgian Constitution the right to education is adopted:

> Everyone has the right to education with the respect of fundamental rights and freedoms. Access to education is free until the end of mandatory schooling.

This right to education includes a right to free school choice that extends to all educational branches, including denominational education. The principle of freedom of school choice, as expressed in this article, is in particular significant for the device of the system of education facilities. For example, when a decree sets too strict standards, with the result that the freedom to establish new educational institutions is limited, then this also threatens the freedom of choice of the parents. According to the Council of State such an obstacle to the freedom of choice of the parents has to be justified by the legislator, while the Court of Arbitration connects the freedom of choice to the pedagogical and organizing freedom of the school board on the one hand and to the right to subsidy, on the other hand.[3]

Article 10 section 2 of the Belgium Constitution enshrines the equality principle. It provides in the first sentence that Belgians are equal before the law. This principle has been specified with respect to education in article 24 section 4 of the Constitution. It states:

> All pupils or students, parents, teaching staff, or institutions are equal before the law or decree. The law and decree take into account objective differences, notably the characteristics of each organizing authority, that justify appropriate treatment.

Admission to state schools

Article 24 section 1.2 of the Constitution enshrines the freedom of school choice: “The Community offers free choice to parents”. With the advent of the *Equal Opportunities Decree*, freedom of school choice was provided a very strong basis in Flanders. In 2002, the Equal Opportunities Decree, better known under the name

(D)GOK, was enacted. Article I-3 DGOK-I defines the main objectives of the DGOK-I Decree:

> The provisions of this decree must be read in the light of realizing optimal learning and development opportunities for all pupils, avoiding exclusion, segregation and discrimination and promote social cohesion.

Hereby DGOK-I strives to strike a balance between, on the one hand, a strong right in freedom of school choice, and, on the other hand, countering segregated schools.[4]

In chapter III of the DGOK-I a fundamental right to register in the school of choice, for the parents and the pupil (from 12 years) is introduced. On the basis of article III. 1 § 1 DGOK-I every child has the right to enroll the school or location which is chosen by the parents.

The registration depends upon acceptance of the *pedagogical project* of the school. The Flemish Minister of education stipulates that parents who agree with the pedagogical project of the school and the school rules cannot be placed on a waiting list.[5] This is a system of first come, first served. For this reason no reserve places are held for brothers or sisters, children from the neighbourhood, or migrant children. The only thing that could be done within this system is to encourage timely enrollment.[6]

While the *Equal Opportunities Decree* contains for every child the right to enroll in the school which is chosen by the parents, admission conditions can only be set by law. For primary education admission conditions are adopted in the *Decree on primary education*. The most important article is article 13. Article 13 section 1 of the Decree Primary Education provides:

> To be admitted to primary education a pupil has to be six years for January 1 of the current school year. If he has not yet reached the age of seven years, or will reach for January 1 of the current school year, he must also meet one of the following conditions:
>
> (1) have been registered the preceding school year in a Dutch-speaking school for pre-primary education recognized by the Flemish Community and during that period have been present for at least 220 half days;
>
> (2) comply with a test of knowledge of Dutch. The Flemish Government ascertains the contents of that language test;
>
> (3) have proof that he has enjoyed the previous school year education in a Dutch-speaking educational institution from a Member State of the Dutch language Union.

In secondary education, admission conditions are laid down in the Decree on Secondary Education. The most important condition is the obligation of having a certificate of a successful completion of primary education. On this main line some exceptions apply.

Admittance to denominational schools

Despite the freedom of education, since the *Equal Opportunities Decree* (even) a 'free' (independent) school has the obligation to admit any pupil when its parents ask for and subscribe to the educational project of the school. According to article III. 1 § 1 DGOK-I third sentence the enrollment will be taken after consent of the parents with the educational project of the school and the school regulations.

The Legislation Section of the Belgian Council of State and the constitutional court of Belgium, the Court of Arbitration, paid attention to the question whether the basic right to register is compatible with freedom of education. Both are of the opinion that the registration duty as regulated in the Decree does not conflict with freedom of education.[7]

England

Education in England is overseen by the Department for Education in relation to schools, and the Department for Business, Innovation and Skills in relation to higher education. Local authorities (LAs) take responsibility for implementing policy for public education and state schools at a regional level. The education system is divided into nursery (ages 3–4), primary education (ages 4–11), secondary education (ages 11–18) and tertiary education (ages 18+).

The educational system includes state schools and non-state schools. All children in England between the ages of five and 16 are entitled to a free place at a state school. They are all regularly inspected. Local authority maintained schools are required to follow the *National Curriculum*. Academies and free schools do not have to follow the national curriculum, though many do in most respects: they are state schools though independent of the local authority in which they are located.

Approximately 7 percent of schoolchildren in England attend privately run independent schools, commonly called 'private schools', whilst private sixth forms are attended by around 18 percent of students. Independent schools do not have to follow the National Curriculum, and their teachers are not required or regulated by law to have official teaching qualifications. However non-state independent schools are regulated by statute and delegated legislation and subject to inspection by the

Secretary of State, in practice by Ofsted or a designated private agency. They are required to be formally registered, and in the event of failure to meet statutory standards may be de-registered. It is an offence to run an independent school which is not formally registered. Some of the earliest established independent schools are known for historical reasons as public schools.

In the United Kingdom, the term 'state school' refers to government-funded schools which provide education free of charge to pupils. In the UK, state schools exist in a bewildering variety of forms. Over the last hundred years, successive governments have struggled to improve education by reforming its structure. What all state schools have in common is that they are entirely free to parents, being funded through taxation.[8] State-run schools take pupils free of charge between the ages of 3 and 18. The schools may levy charges for activities such as swimming, theatre visits and field trips, provided the charges are voluntary, thus ensuring that those who cannot afford to pay are allowed to participate in such events. Approximately 93 percent of English schoolchildren attend such schools. Almost all state-funded schools in England are maintained schools, which receive their funding from local authorities, and are required to follow the National Curriculum.

Under the terms of the *Education Act 1944*, religious groups may apply to set up state-funded religious schools, also known as faith schools. Faith schools have an ambivalent character. On the one hand they are state schools and they are run in the same way as other state schools. On the other side they enjoy freedom of education where they are entitled to reflect their faith status in their religious curriculum, admissions criteria and staffing policies. While there is therefore some diversity of provision within the state maintained sector in terms of faith schools, it remains the case that the majority of maintained schools are not designated as being of any religious character: in 2010, of the 16,971 maintained primary schools in England, 10,755 were non-faith; and of the 3,332 maintained secondary schools, 2,716 were non-faith.[9]

Current statistics show that approximately one-third of state-funded schools are religious or faith schools and that nearly one-fourth of pupils attend such schools. The overwhelming majority of religious schools are Christian. Further, despite the falling numbers of those attending Church of England services, most of these Christian schools represent the Church of England or other Christian denominations. At primary level the religion or denomination with the highest number of schools was the Church of England, with Roman Catholicism having the highest number at secondary level.

Religious schools must comply with many of the same requirements as non-religious schools in order to qualify for state funding. This includes the requirement to follow the National Curriculum and to have fully qualified teachers. In addition, state-funded religious schools are under the same obligation as non-religious schools

to actively promote 'community cohesion'.

Although many of the fundamental principles for state-funded schools do apply there are some major differences. In particular the following special rules apply to religious schools:

- Admissions criteria.

- Staff – religious schools are allowed to take into account the faith of an individual when considering staff applications, as well as that individual's ability to support the religious ethos of the school. This means that an applicant's private life could be taken into account.

Anti-discrimination law also applies to the education provided at a school. Anti-discrimination legislation tries to ensure equality in relation to access to education on the basis of race/ethnicity (and nationality or national origins), sex, disability and (in the context of applications for admission to further or higher education) religion, religious belief, or similar philosophical belief.[10] The last decades have given new emphasis to the promotion of equality. Pupils with *Special Educational Needs* have legal rights to additional support,[11] schools must for example take reasonable steps to ensure that disabled student is not substantially disadvantaged as a result of his or her disability in relation to the services provided by the school[12] and school governing bodies and LEA's must promote racial and other forms of equality.[13] Education in both the public and the private spheres is subject to the Equality Act 2010. However there are provisions that permit exceptions to allow for the character of the school to be recognised.[14]

Admission to state schools

The legal framework for admission in England is formed by the *School Standards and Framework Act 1998*, as amended by a range of subsequent legislation, including the Education Act 2002.

According to section 85A(1) a local authority has to establish, in accordance with regulations establish for their area a body, to be known as an admission forum, for the purpose of (a) advising the authority on admission matters connected with the exercise of the authority's functions; (b) advising the admission authorities for maintained schools in the area for which the forum on matters connected with the determination of admission arrangements, and matters connected with the admission of pupils. The authority may establish sub-committees of the forum.

The *Admissions Code 2012*, as revised in February 2012, emphasises the importance of ensuring equity and fair access. At paragraph 3.9 the code states that each local

authority must have a *Fair Access Protocol*, agreed with the majority of schools in its area to ensure that - outside the normal admissions round - unplaced children, especially the most vulnerable, are offered a place at a suitable school as quickly as possible. In agreeing a protocol, the local authority must ensure that no school - including those with available places - is asked to take a disproportionate number of children who have been excluded from other schools, or who have challenging behaviour.

A local authority shall make arrangements for enabling the parent of a child to appeal against (a) any decision made by or on behalf of the authority as to the school at which education is be provided for the child in the exercise of the authority's functions, other than a decision leading to or embodied in a direction for admission (see about this category decisions the next paragraph); (b) in the case of a community or voluntary controlled school maintained by the authority, any decision made or on behalf of the governing body refusing the child admission to the school.[15]

The governing body of a foundation or voluntary aided schools shall make arrangements for enabling the parent of a child to appeal against any decision made by or on behalf of the governing body refusing child admission to the school.[16] A decision of an appeal panel under Schedule 24 to the Act has binding force.

The principle of freedom of school choice is enshrined in article 86 of the School Standards and framework Act. The core of the freedom of school choice has been laid down in section 86(1) and (2). According this section a local authority shall make arrangements for enabling the parent of a child in the area of the authority:

(a) to express a preference as to the school at which he wishes education to be provided for his child in the exercise of the authority's functions, and

(b) to give reasons for his preference.

A local authority and the governing body of a maintained school shall comply with any preference expressed in accordance with arrangements made under article 86(2).This duty imposed does not apply:

- if compliance with the preference would prejudice the provision of efficient education or the efficient use of resources; or

- if the arrangements for admission to the preferred school are wholly based on selection by reference to ability or aptitude, and are so based with a view to admitting only pupils with high ability or with aptitude, and compliance
- with the preference would be incompatible with selection under those arrangements.[17]

The admission authority for a maintained school shall, before the beginning of each school year, determine in accordance with this section the admission arrangements which are to apply for that year.[18] Before determining the admission arrangements which are to apply for a particular school year, the admission authority shall consult local education authority (where the governing body are the admission authority), the admission authorities for all other maintained schools and the admission authorities for maintained schools of any prescribed description in the relevant area or for such class of such schools as may be prescribed about the proposed arrangements.[19]

The admission authority for a maintained school shall not fix as the admission number for any relevant age group and any school year a number which is less than the relevant admissions number.[20] [21]

Catchment areas or zones are potentially discriminatory. If a school is oversubscribed, rational criteria laid down in the school's or local authority's admissions policy may be applied to determine priority for admission. In *The Queen on the Application of the Mayor and Burgesses of the London Borough of Hounslow v The School Admission Appeals Panels*[22] May LJ said that local education authorities have to make objectively fair decisions via a fair process. On the other hand they cannot avoid discrimination:

> There will necessarily be discrimination, because not every child whose patents apply for admission can be admitted. (...) Discrimination needs to have reasonable objective justification. Some children will have stronger cases than others for admission. A child with an elder brother or sister in a school may well have a strong case wherever they live; but so may a child who lives close to the school. Neither child's case is by definition stronger than the other child's case. Neither child's relevant Convention rights are by definition infringed, nor is it by definition objectively unfair, if either of them fails to gain admission.

In case of exceeding the capacity of the school schools are allowed to use waiting lists. According to the *Schools Admission Code* a waiting list is a list of children held and maintained by the admission authority when the school has allocated all of its places, on which children are ranked in priority order against the school's published oversubscription criteria. According to article 2.14 of the *Schools Admissions Code* each admission authority must maintain a clear, fair and objective waiting list for at least the first term of the academic year of admission, stating in their arrangements that each added child will require the list to be ranked again in line with the published oversubscription criteria. Priority must not be given to children based on the date their application was received or their name was added to the list. Looked after children, previously looked after children, and those allocated a place at the school in accordance with a *Fair Access Protocol*, must take precedence over those on a waiting list.

Denominational schools can be state schools ('faith schools') or independent schools. For denominational state schools article 91 of the *School Standards and Framework Act 1998* makes provision for the inclusion in the admission arrangements for a foundation or voluntary aided school which has a religious character of arrangements in respect of the admission of pupils to the school for preserving the religious character of the school ('special arrangements'). Where any special arrangements desired by the governing body of such a school are agreed to by the local authority the governing body may incorporate them in the proposed admission arrangements for a school year.[23] A denominational state school is not completely autonomous in the use of denominational criteria for the admission. Under the equality laws which apply to all schools, religious schools cannot favour children from a particular faith, unless the number of applications exceeds the number of places available. If a religious school is oversubscribed it is allowed to apply pre-determined admissions rules relating to the school's faith when selecting pupils. These rules may be set by the school or religious organisation but must be clear and objective.[24]

Further those criteria may not violate anti-racism legislation. In a dispute within the Jewish community about the propriety and legality of the criteria governing admission to a well-known Jewish school in London, JFS, formerly the Jews' Free school a student was refused a place at JFS because of his lack of a Jewish status. It should not be possible to consider the student for a place unless and until all applicants whose Jewish status has been confirmed have been offered places. This because the school was mainly oversubscribed. In the opinion of the student JFS's admissions policy is unlawful because:

- it does not reflect JFS's designated religious character;
- is discriminates directly and/or indirectly on racial grounds against children who are not of Jewish ethnic origin / descent through the maternal line;
- and it unlawfully fetters the Governing Body's discretion and/or sub-delegates to the OCR decisions on the admission of pupils to JFS.

The Court of Appeal, in June 2009 declared that JFS, under the *Race Relations Act 1976*, had illegally discriminated against the child on grounds of race. They ruled that the mother's religious status, and thus her child's religious status, had been determined using a racial criterion rather than a religious criterion.[25] The school subsequently issued revised admissions criteria based on religious practice including synagogue attendance, formal Jewish education and volunteering. JFS and the United Synagogue appealed to the House of Lords. On 16 December 2009, the UK Supreme Court upheld the Court of Appeal's ruling.[26]

Referring to the *Mandla* case establishing the test for an ethnic group under the Race Relations Act[27] (now the Equality Act 2010), Lord Phillips asserted that 'whatever their racial, national and ethnic background, conversion unquestionably brings the convert

within the Mandla definition of Jewish ethnicity.' However, whilst he acknowledged that it was possible to identify two different but largely overlapping cohorts of Jewish people, 'those who are descended by the maternal line from a Jew, and those who are currently members of the Jewish ethnic group', he concluded that under the *Race Relations Act*,

> [d]iscrimination against a person on the grounds that he or she is, or is not, a member of either group is racial discrimination. JFS discriminates in its admission requirements on the sole basis of genetic descent by the maternal line from a woman who is Jewish, in the *Mandla* as well as the religious sense. I can see no escape from the conclusion that this is direct racial discrimination.

Admittance to (denominational) non-state schools

Non state schools can be denominational and non-denominational. Non state schools are not funded by the state. Further the relationship between the school and the parents in the case of non-state schools is essentially based on contract rather than being based on a statutory relationship as with parents of pupils attending state schools. There is therefore far more freedom to negotiate terms.

For this reasons most of education law legislation is not applicable, including the School Standards and Framework Act admission provisions. General British non-discrimination law is nevertheless directly applicable. This legislation is important for the exceeding of the admission capacity of the school and the use of denominational criteria.

As in relation to state schools, catchment zones are allowed. If a school is oversubscribed, rational criteria laid down in the school's or local education authority's admissions policy may be applied to determine priority for admission.

Denominational non-state-schools are allowed to apply denominational criteria on the admittance of students. Non-discrimination law demands this is only allowed when the school is oversubscribed and when the admission rules are pre- determined, clear and objective. Race-discrimination is not allowed.

Germany

Germany is a federal parliamentary republic that consists of 16 federal states (the *Länder*).

Education in Germany is provided to a large extent by the government, with control coming from state level, and funding coming from two levels: federal and state. Curricula, funding, teaching, and other policies are set through the respective state's

Ministry of education. However, public schools are automatically recognized, since these schools are supervised directly by the ministry of education bureaucracy. The German is a binary one. It knows public and private education. The right to establish a private school is ensured in Article 7 subsection 4 of the German Constitution. The educational legislation at state level defines public and private schools (*Privatschule*) on the basis of a formal criterium: public schools are legal entities who are governed by territorial public law bodies. Private schools can be governed by for example natural persons, foundations, associations and churches.

Article 7 subsection 1 of the German Constitution (*Grundgesetz*) provides that the entire schooling system stands under the supervision of the state. The state has on the basis of this article the competence of planning and organizing the school system. The objective of this is to guarantee a school system that offers all young people, taking into account their skills and talents, equal educational opportunities. The supervision of the state comprises public and private education.[28] Decisions about the acknowledgment of private schools (the German equivalent to accreditation in the US) are also made by these ministries.

The legal foundation for the rights of students in Germany is the Constitution of the Federal Republic of Germany, which explicitly regulates only a small number of school-related legal issues because it has largely delegated competence for Germany's education system to the federal states.[29]

The German Constitution guarantees freedom of religion. Article 4 subsection 1 Grundgesetz states: '*Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.'* Two basic principles underlie the freedom religion: the neutrality of the German state and a separation of state and church. According to the principle of neutrality, there is no established church in Germany (Article 137 subsection 1 *Weimarer Reichsverfassung* in conjunction with Article 140 Constitution). The State must not have specific preference of a religious community or judge their belief. Religious institutions as well as ideological institutions have to be treated alike by the State.

The principle of tolerance, which comes from the fundamental rights of the Constitution, tries to protect minorities against the opinions of the majority in public education. This principle demands a far-reaching neutrality and restraint in political, philosophical and religious questions and a non-identification with confessional goals and identities, while otherwise people with different opinions can be discriminated against.[30] The principle of tolerance forbids indoctrination of pupils. According to this principle the teacher has to expound the different views on an issue, especially political views, in an objective way, to enable independent formation of opinions.[31]

The education in state schools is not neutral in an absolute way. Religious instruction

is a normal school subject in German public schools. Further German education seeks explicitly (through religious instruction and in other ways) to teach values associated with the Christian tradition, without making acceptance of Christian beliefs a goal.[32] This is broadly accepted. According to Avenarius and Heckel, state neutrality based upon the Constitutional right of both positive and negative religious freedom does not constitute a claim to be spared, in school, from confrontation with the content of Christian beliefs.[33]

Freedom of education is guaranteed in Article 7 subsection 4 of the Constitution. This subsection provides that the right to establish private schools shall be guaranteed, though this right is not absolute. Schools that are intended to allow the pupils who attend them to satisfy the compulsory school attendance laws must receive state government approval, whether or not they seek public funding. The second sentence of Article 7 subsection 4 of the Constitution states: private schools that serve as alternatives to state schools shall require the approval of the State and shall be subject to the laws of the *Länder*. This approval is bound to certain quality conditions.[34] Each of the two predominant churches in Germany runs private schools. Being of equal quality, private schools can replace attendance in public schools. These private schools are consequently treated like public schools under public supervision, due to Article 7 subsection 1 of the Constitution.

The most important equality provision in German legislation is the Constitutional principle of equal treatment (Article 3 Constitution): No one must be treated in a disadvantaged or privileged manner due to his/her sex, descent, race, language, origin, faith or religious or political opinion or disability. This article represents the Constitutional guarantee of equal treatment in regard to the relationship between the state and its authorities on the one hand and its citizens on the other hand. This article has direct effect in public education and can have indirect effect in private education.

On the basis of the principle of equality everyone, based on his or her aptitude or motivation, has the equal right of access to public schools. This right may not be restricted for religious, ethnic, or gender specific reasons. Here is the principle of equality of opportunity respected. However this right can be restricted for reasons of capacity as well of aptitude or performance.[35]

Admission to state schools

Distinction must be made between the choice for a school type and the claim to admission to a specific school.[36] The freedom of choice of parents can come under pressure when applications exceed the absorption capacity of the school, in particular when pupils are allocated to schools by means of the establishment of catchment zones by state legislation. Such a measure can be annulled because of

declining student numbers.[37] Some federal states have legal provisions for the procedure that has to be taken when the absorption capacity of the school is exceeded. The admission can in this case only be limited when the situation on staff and space will make impossible the proper course of the education process.[38]

The school board has a discretionary power in relation to a pupil who wants to be placed outside the catchment; this is tested by the courts, which use such criteria as the proximity of the school to the parental home, the absorption capacity of the school, the capability of the school to accept a student who falls in the catchment area, and special personal circumstances.[39]

The question of the size of the absorption capacity of a school should be determined on the basis of the pedagogical freedom of the school, where the pedagogical objectives of the school play an important role. This should be the guiding principle for state legalisation wherein the possibility is created for the use of a maximum absorption capacity.[40] The selection of pupils after exceeding the absorption capacity shall take place on the basis of objective criteria, in particular the principle of equality.[41]

Confessional schools, (*Bekentnisschule*), are public or private schools, which teach - on the basis of the philosophical principles of the religion - the pupils who adhere the religion. Public confessional schools continue to serve about one third of the elementary pupils in North Rhine-Westphalia, the largest state. These are operated by local school authorities and subject to essentially the same controls as non-confessional public schools.[42]

With respect to admissions the interests of the confessional public schools which are focused on homogeneity and the free school choice of the parents can collide. In the case-law the precedence is given to the special character of a public confessional school in the sense that when pupils can find another school that is within a reasonable distance to the school they can be refused.[43] Non-adherence to the religion of the school does not constitute a legitimate ground for refusing a child admission to a public confessional school when the parents expressly desire that form of religious education. This is only considered credible if this includes participation in the religious education of the school.[44] The admission constitutes a public law act which results in a public law relationship.

Admittance to (denominational) non-state schools

Private (non-state) schools are, in theory, free to admit pupils who, in the school's judgment, are most likely to benefit from their programs and confession. They may not, however, exercise selection in such a way that only children from wealthy families

are admitted, since the Constitution makes a condition of the approval of private schools that this does not result in 'segregation of pupils according to the means of the parents' (Article 7, subsection 4 Constitution). States can, if they choose, require private schools that are recognized as equivalent to public schools to employ similar admission procedures.[45] When a pupil is admitted to a private school a private law contract is established between the pupil and the school board. This is not the case in regard to admission to private schools who are recognized by the government as providing education equivalent to that in state schools (*Ersatzschulen*). The admission constitutes then a public law act which results in a public law relationship.

The Netherlands[46]

The basic structure of the Dutch school system is, as laid down in Article 23 of the Constitution, is a binary one. The binary structure is linked to the dichotomy that Dutch law makes between public law, relating the vertical-hierarchical relation between state and citizen, and civil law that concerns the horizontal relation among individuals, including civil law corporations. It consist of two types of schools, public authority schools and private non-state schools, which complement and supplement each other.[47]

Non state schools (also called independent or private schools) are run by corporate bodies under civil law, they are also known as foundations or association. Although these schools are, in general, fully governmentally funded, they enjoy a level of autonomy safeguarded by the Constitution: the freedom of education.

The most essential characteristic of public education is that it is based on the principle of neutrality. Article 23, subsection 4 of the Dutch Constitution defines that within this context, public education must by law pay due respect to everyone's religion or belief. The principle is strongly connected with another characteristic of Dutch public education: the overall accessibility of public education. This primarily focuses on the pupil admittance policy. Pupils cannot be selected on the basis of a religious or ideological conviction, or on the basis of race, homosexuality or heterosexuality or political inclination. Both of these characteristics stem from the fundamental notion that the public school should be a school for all and, therefore, accessible to everyone, without regard to religion or belief that is adhered by (the parents of) the child.

Article 23 section 2 provides:

> All persons shall be free to provide education, without prejudice to the authorities' right of supervision and, with regard to forms of education designated by law, its right to examine the competence and moral integrity of

teachers, to be regulated by Act of Parliament.

The freedom to organize a school and provide education on the basis of a specific religious or philosophical view is explicitly safeguarded in Article 23 which declares that when the government issues quality standards (funding conditions for private schools), this freedom must be respected, not only in relation to the choice of teaching materials and the right to appoint teachers. For instance, this freedom also includes the right to select pupils on the basis of denominational criteria.

V*rijheid van inrichting*, the pedagogical-organizational autonomy, is less protected when school policies are based on non-denominational considerations. For example, a school board's discretion to decide which pupils to admit is much wider when it is based on religious adherence then when its decisions are based on 'secular' standards, such as purely pedagogical criteria. The right to establish a non-state school, *vrijheid van stichting*, is also strongly linked to the *vrijheid van inrichting*, the freedom to give such a education a distinctive religious or philosophical character. The majority of non-state primary and secondary schools, consisting of two thirds of all schools, at least formally have a Christian character. However it has to be stressed that most of the Catholic and Protestant schools do not in fact, nowadays retain a strongly distinctive religious character and present themselves as 'open' and pluralistic.

The Dutch courts have denied Article 2 Protocol 1 ECHR so-called '*horizontal* effect', to the effect that is not equally applicable to the relation between pupils and non-state schools. The Supreme Court, for instance, ruled in a case in which a Catholic school expelled pupils because their parents for religious reasons did not allow them take certain classes, 'that one cannot derive from this provision [Article 2 Protocol 1 ECHR] the obligation for non-state schools to admit pupils who in conformity with their parents' wishes refuse to attend specific lessons.'[48] Access to a public school does not entail an unrestricted right to be admitted to a *specific* school of one' choice: although a public school is not allowed to refuse pupils on denominational schools, which would violate the principle of neutrality of public schools, Article 23 subsection 3 of the Constitution, it may restrict admittance on practical grounds (for instance lack of space).

The right to equal access to schools is also inherent in the Constitutional principle of equality.[49] According to the first sentence of Article 1 of the Dutch Constitution, all persons have to be treated equally in equal cases. The second sentence of this provision prohibits discrimination. In 1994, the *General Equal Treatment Act* (*Algemene Wet Gelijke Behandeling*, AWGB) came into force.[50] This Act endeavors to give 'more substance', more precision, and more effectiveness to the general, broad principle of equality of the Dutch Constitution. The AWGB is not only applicable to 'vertical' relations between public authorities and individuals in public schools, but is to a certain extent also applicable to 'horizontal' relations, those between individuals and

private organizations such as private denominational schools.

The AWGB distinguishes between treatment explicitly based on a suspect criterion like race, which are always prohibited, and differential treatment in which criteria are applied that seem to be neutral, but in practice disproportionately targets persons sharing a common characteristic such as race. As to education, indirect differential treatment is prohibited, unless a school board is able to give strong arguments due to such concerns as safety, order, and/or educational purposes in favor of it. Within certain legal limits, non-state denominational schools are not as fully bound by the equality principle and the AWGB as public schools and have the right to refuse to admit pupils on the basis of religious standards.

Based on the freedom of school choice, parents are free to choose a public or a private school for their child. Public education is philosophically neutral and generally accessible. However, these principles do not imply the right of admission to a specific school within a municipality. Because of the guaranteed acceptance of all future pupils, the public school board can only refuse a pupil on specific grounds. Most case law regards situations where the admission of the pupil exceeds the admission capacity of the school involved, situations where pupils form a threat to others and the order of the school, and situations where the school cannot provide the required care for a pupil.

In case law, the legal relationship between the educational authority and the pupil/parents within public education is generally qualified as a relationship governed by public law. The decision of admittance to a public school must be labelled as a decision in the sense of Article 1:3, section 1, of the *General Administrative Act* (*Algemene Wet Bestuursrecht*). From this decision results a public law relationship.

On the basis of Article 65 *Primary Education Act* (*Wet op het Primair Onderwijs*) it is possible that the Commune Council, in the interest of an effective distribution of pupils about public schools, may divide the territory of the commune in school districts. According to the explanatory memorandum of the Primary Education Act, setting school districts contribute to a balanced distribution of pupils about the public schools in the municipality and to an effective distribution of new-built schools as for an efficient use of the existing school buildings.[51] The admission to a public school shall be effected in accordance with the established school districts, unless the parents of a pupil notify in a letter the school board that they want their child to attend another school district.

Selection on the basis of ability or aptitude for the school is not allowed in primary education. It is permitted, even prescribed in secondary education.

Admittance to denominational schools[52]

Within certain limits, non-state denominational schools are not as fully bound by the equality principle and the AWGB as private schools and have the right to refuse to admit pupils on the basis of religious standards. In the famous 1988 *Maimonides* judgement, the Supreme Court ruled that an orthodox Jewish school could exclude a boy from a liberal Jewish family; the school therefore could rely on its freedom of education.[53] Due to legal technicalities, the Court did not decide the other core issue, whether the application of religion-based criteria that were linked to ethnicity, in this case, the Jewish mother criterion, should have been regarded as racial discrimination.

In line with Mainmonides, the AWGB leaves denominational, non-state, schools the freedom to use criteria derived from their religious mission to decide which pupils they admit on the basis of such criteria as long as they do in a constituent manner. This means that Mainmonides would probably be decided in the same way under the regime of the AWGB as it was in 1988. It also indicates that if a denominational school selects among pupils on denominational grounds on a case-by case basis rather than in a consistent manner, it cannot appeal to the exemption of the AWGB (Article 7, subsection 2 of the AWGB) since this would be a breach of Article 7, subsection 1 AWGB. In practice this means that the majority of non-orthodox schools cannot invoke the exemption.

Private denominational schools also have the authority, guaranteed by the *vrijheid van inrichting*, to apply admission criteria that are not linked to their religious identities. For instance, these schools can refuse pupils on practical grounds such as the school is at capacity; due to such pedagogical motives as 'we do not have the specialized teachers that meet the needs of this handicapped pupil'; or for 'public order' reasons such as 'students who wear clothing that suggest Nazi sympathies will be refused of possible conflicts with students from ethnic minorities.'[54] While this freedom, which also can be claimed to a certain extent by public schools, is less well protected then the freedom to select on denominational grounds. If the selection process leads to a refusal on the basis of a criterion that mostly affects religious or ethnic-minority pupils, a school board has to show a compelling legitimate interest to apply this criterion; otherwise its application amounts to indirect differential treatment prohibited by the AWGB.

In my opinion, this last notion has been wrongly applied in a judgment concerning the expulsion from a Catholic school of two Muslim girls who refused to attend swimming lessons because of their religious beliefs. The Court of Appeal rule this expulsion lawful based on freedom of education:

> The school has referred to their Constitutional guaranteed freedom of education. This freedom comprises in any case the freedom to regard

> swimming-lessons as a necessary part of the curriculum; in this regard the board is also free to teach this in 'mixed' classes, and to appoint male teachers.[55]

The Court allowed the school board a margin of discretion that is too wide; the board's decision was not based on a religious view, *vrijheid van richting*, and was not grounded on the Catholic identity of the school, but merely on its general pedagogical freedom, *vrijheid van inrichting*, which is less well protected than its religious autonomy.

The relationship between an institution for private education and the parents/pupils can be qualified as a private law educational agreement.

South Africa

South Africa has like the most of the countries in the world the concept of public and private schools. They vary according to character, size, quality of education, and financial advantages.

The Member of the Executive Council of province who is responsible for education in that province must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.[56] A public school may be an ordinary public school or a public school for learners with special education needs.[57] The provision of gender-specific public schools is not prohibited. Every public school is a juristic person, with legal capacity to perform its functions in terms of the *South African Schools Act 1996*.[58] The governance of every public schools is vested in its governing body.[59] A governing body stands in a position of trust towards the school.[60]

The governing body consists of a majority of parents (the representatives of the parent community), a number of educators, administrative staff and, in the case of secondary schools, also learners. It is responsible for the governance of the school.[61] In terms of section 23 subsection 9 of the *South Africa Schools Act*, the number of parent members must comprise one more than the combined total of the other members of the governing body who have voting rights. The fact that parents make up the majority on the governing body demonstrates the importance of their involvement and constitutes the principle of partnership and mutual responsibility in a public school.[62]

The state must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.[63] The Minister of Education must determine norms and minimum standards for the funding of public schools after consultation

with the Council of Education Ministers, the Financial and Fiscal Commission and the Minister of Finance.[64]

Non-public schools are subject to direct and indirect means of state control, - chiefly through registration and funding. The question inevitably arises, 'how private (independent) are private (independent) schools'? Although they have a free choice of the type of education they provide (for example special, religious
– or culture – based) they have to meet certain conditions for registration and without registration they cannot (legally) survive.'[65]

Everyone has the right to establish and maintain, at his own expense, independent educational institutions which meet some conditions.[66] Private educational institutions cannot be used in ways that are inconsistent with the *Bill of Rights* as enclaves of apartheid and the perpetuation of past privilege.[67]

The *South African Schools Act* (1996) promotes access, quality and democratic governance in the schooling system. It ensures that all learners have right of access to quality education without discrimination, and makes schooling compulsory for children aged 7 to 14.[68]

The state is religiously neutral but public schools through their governing bodies are allowed to determine the ethos of the school.[69] Public schools are allowed to conduct 'religious observances'[70] and governing bodies are empowered to draw up an admission policy for public schools.[71] According to Article 29 section 3 of the Constitution everyone has the right to establish and maintain, at their own expense, independent educational institutions that:

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

According to Article 29 of the Constitution everyone has the right

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

This right requires the state to provide sufficient schools, educators and support and other incidental services in order to ensure reasonable access to basic education for everybody. The right to education has a qualitative component too. The education has

to be 'adequate'. In the South Africa context, 'adequate' education could refer to a standard of education that empowers people to rise above the poverty cycle and complete effectively in the labour market, enables people to understand and enjoy their acquired democratic values, rights, and freedoms, encourages people to participate in and protect the fledgling democratic system, and enhances their feeling of self-worth as human beings.[72]

According to Article 9 subsection 1 everyone is equal before the law and has the right to equal protection and benefit of the law. Subsection 2 of Article 9 provides that equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. Article 9 subsection 3 prescribes that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The *South African Schools Act* stipulates that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.[73]

Admission to state schools

Section 29 does not contain an express right to equal access to educational institutions since it is covered by the equality rights guaranteed in section 9.

Equal access does not imply total equality, but equal opportunities to education according to very person's abilities, but equal opportunities to education according to every person's abilities and potential. Reasonable and justifiable admission requirements based on performance, language proficiency, and age may in other words be imposed.[74] The *Promotion of Equality and Prevention of Unfair Discrimination Act* gives effect to section 9. In respect of education this act prohibits among others the unfair practices of unfair exclusion of learners form educational institutions, including learners with special needs.

While public schools may have a distinctive character, and even a religious one, the law stipulates that applicants may not be denied admission on the grounds that his or her parent does not subscribe to the mission statement of the school.[75] This prohibition reflects seriously on the ability of the governing body to manage the school according to the needs of the democratically/traditionally accepted ethos of the school.[76]

A Head of Department, after consultation with representatives of governing bodies, may determine feeder zones for ordinary public schools, in order to control the

learner numbers of schools and coordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other.[77] A learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed.[78] The Regulations concerning Admission Policy for ordinary Pubic Schools are largely silent with respect to the party who possesses the ultimate power who determine the extent to which a school admission policy must take the interests of non-domicile learners seriously.[79]

A learner who lives within the feeder zone of a school A must be referred to the neighbouring school B, if school A is oversubscribed. If school B is oversubscribed an alternative school within a reasonable distance must be found by the Head of Department. If that is not possible, School A must admit the learner.[80] The preference order of admission is: (a) learners whose parents live in the feeder zone, in their own domicile or their employer's domicile (b) learners whose parent's work address is in the feeder area or; (c) other learners: first come first served.

In public education the governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test.[81] By test is especially meant language test (South Africa is a multi-lingual nation). Nevertheless schools with a specific field of study are competent to select pupils on the basis of aptitude without administering a test. A school with specific field of study must have lager feeder zones to accommodate learners with specific aptitudes, interests or needs.[82] The prohibition of administering a test doesn't apply in private education.

Admittance to (denominational) non-state schools

Private schools operate in terms of contracts between the school and the parents. As long as they do not violate Article 9 of the South African Constitution they can select learners as they wish.[83] They can require pupils to subscribe the mission statement of the school. In this context discrimination can take place. Nevertheless a non-state school cannot be registered by a Head of Department if the admission policy discriminates on the grounds of race.[84] A non-state school ca be declared as a public school on the basis of an agreement. If such a shift is implemented the non-state school can no longer refuse admission on the ground that the parents do not subscribe to the mission statement of the school.[85]

Comparative conclusions

England is the only country that has no written Constitution. The Constitution is an uncodified one. The Constitution of the United Kingdom is the set of laws and

principles under which the United Kingdom is governed. The extent of regulation of the system of admission by the Constitution depends. In the Netherlands and Flanders this is strongly the case. In the remaining countries this to a lesser extent the case.

In all of the examined educational systems, freedom of school choice is a fundamental principle for admission.

More applicants than the maximum capacity of the school

In *Flanders* registration depends upon acceptance of the pedagogical project of the school. The Flemish Minister of education insists that parents who agree with the pedagogical project of the school cannot be placed on a waiting list. Maybe there is another solution. A school could define its pedagogical project for example in that way that it belongs to his essential objectives of the education, to provide on the one hand a sufficient number of pupils from the neighborhood to ensure the local embedding, on the other hand, a contingent of pupils for whom a risk factor applies on the basis of the *Equal Opportunities Decree*. The school board shares this with the parents and then opens an application list which overflows the notifications of the already announced start day for effective registration. In Flanders it is accepted that several schools organize a centralized application system. Parents apply for several schools and pass on the school they first prefer, secondly prefer and so on. If the school of first preference is full, then the next school has to admit the pupil and so on. This allocation policy may not be discriminatory.

On the basis of the *Dutch Primary Education Act* it is possible that the Commune Council, in the interest of an effective distribution of pupils about public schools, may divide the territory of the commune in school districts. The admission to a public school is effected in accordance with the established school districts, unless the parents of a pupil notify in a letter to the school board that they want their child to attend another school district. This 'unless-clause' according to the Minister of OCW Pais constitutes a recognition of the right of parents to the school of their choice.

Beside the division of a commune in school districts, the Dutch school board can ascertain a maximum capacity. If the school board has established such a limit, only in the case of a complete exhaustion of the capacity can a pupil be denied. A school can create a waiting list for pupils eligible to be admitted to the school. When on the registration date the absorption capacity is not exceeded all pupils can be admitted and make a selection on the basis of the principles of equality and non-discrimination.

In *England* if a school is oversubscribed, rational criteria laid down in the school's or local authority's admissions policy may be applied to determine priority for

admission. The local authorities have to make objectively fair decisions via a fair process. In case of exceeding the capacity of the school schools are allowed to use waiting lists. According to article 2.14 of the *Schools Admissions Code* each admission authority must maintain a clear, fair and objective waiting list for at least the first term of the academic year of admission, stating in their arrangements that each added child will require the list to be ranked again in line with the published oversubscription criteria. Priority must not be given to children based on the date their application was received or their name was added to the list. Looked after children, previously looked after children, and those allocated a place at the school in accordance with a Fair Access Protocol, must take precedence over those on a waiting list.

In *Germany* it is allowed to establish catchment zones by state legislation on the basis of which pupils are allocated on different schools. Such a measure can be annulled because of declining student numbers. Some federal states have legal provisions for the procedure that have to be taken account when the absorption capacity of the school is exceeded. The school board has discretion whether to admit a pupil who wants to be placed outside the catchment; the courts judge these decisions by such criteria as the proximity of the school to the parental home, the absorption capacity of the school, the capability of the school to accept a student who falls in the catchment area, and special personal circumstances.

In *South Africa* a Head of Department, after consultation with representatives of governing bodies, may determine feeder zones for ordinary public schools, in order to control the learner numbers of schools and coordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other. If a feeder zone is created must be given precedence to a learner who lives in the feeder zone of a school or who resides with or her parents at an employer's home in the feeder zone. A learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed.

In all the countries which are discusses in this Article the establishment of catchment zones is allowed. Only in the Netherlands the catchment zones are not legally binding. Waiting lists are sometimes officially allowed (England and the Netherlands), sometimes they are not (Flanders). In the context of selection on the basis of a maximum absorption capacity rational criteria should be taken into account, especially the principle of non-discrimination.

Selection on the basis of ability or aptitude for the school

While the Flemish Equal Opportunities Decree contains for every child the right to enroll in the school chosen by the parents, admission conditions can only be set by

law. For primary education admission conditions are adopted in the Decree primary education Union.

In secondary education admission conditions are laid down in the Decree Secondary Education. The most important condition is the obligation of having a certificate of a successful completion of primary education. On this main line some exceptions apply.

In England specialist schools are permitted to select of up to 10 per cent of their pupils on the basis of aptitude for the relevant specialisation. No admission arrangements for a maintained school may make provision for selection by ability unless— they make provision for a permitted form of such selection; or the school is a grammar school. Tests for all forms of selection must be clear, objective, and give an accurate reflection of the child's ability or aptitude, irrespective of sex, race, or disability. It is for the admission authority to decide the content of the test, providing that the test is a true test of aptitude or ability.

In Germany it is legally permitted to refuse a request for admission on the basis of the suitability of the student for the education of the school. This is in particularly important in the case of transition from schools for primary education (*Grundschule*) to further schools. At the level of the states is controlled how the suitability of a pupil to a school is established. Although German state law places the freedom of school choice by the parents strongly in the foreground, this does not guarantee admission to the school if the student is not suitable to follow education at a school

Selection on the basis for ability or aptitude for the school is not allowed in Dutch primary education. It is permitted, even prescribed in secondary education.

In South-Africa public education the governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test. With test is especially meant language test. Nevertheless schools with a specific field of study are competent to select pupils on the basis of aptitude without administering a test. A school with specific field of study must have lager feeder zones to accommodate learners with specific aptitudes, interests or needs. The prohibition of administering a test doesn't apply in private education.

General conclusions selection on the basis of ability or aptitude for the school

In most countries selection on the basis of ability or aptitude for the school is allowed. Only in Flanders is this not possible. In South Africa selection on the basis of test, f.eg. language test, is not allowed. In England tests for all forms of selection must be clear, objective, and give an accurate reflection of the child's ability or

aptitude, irrespective of sex, race, or disability. It is up to the admission authority to decide the content of the test, providing that the test is a true test of aptitude or ability.

Admittance to denominational schools

Despite the freedom of education, since the *Equal Opportunities Decree* in Belgium a 'free' (independent) school has the obligation to admit any pupil when its parents ask for and subscribe to the educational project of the school. According to Article III. 1 § 1 DGOK-I third sentence the enrollment will be taken after consent of the parents with the educational project of the school and the school regulations.

In England for denominational state schools article 91 of the *School Standards and Framework Act 1998* makes provision for the inclusion in the admission arrangements for a foundation or voluntary aided school which has a religious character of arrangements in respect of the admission of pupils to the school for preserving the religious character of the school ('special arrangements'). Where any special arrangements desired by the governing body of such a school are agreed to by the local authority the governing body may incorporate them in the proposed admission arrangements for a school year. A denominational state school is not completely autonomous in the use of denominational criteria for the admission. Under the equality laws which apply to all schools, religious schools cannot favour children from a particular faith, unless the number of applications exceeds the number of places available. If a religious school is oversubscribed it is allowed to apply pre-determined admissions rules relating to the school's faith when selecting pupils. These rules may be set by the school or religious organisation but must be clear and objective.

Non state schools can be denominational and non-denominational. The relationship between the school and the parents in the case of non-state schools is essentially based on contract rather than being based on a statutory relationship as with parents of pupils attending state schools. There is therefore far more freedom to negotiate terms. For this reasons most of education law legislation is not applicable. So the provisions of the *School Standards and Framework Act* concerning admission are not applicable. General British non-discrimination law is nevertheless directly applicable. This legislation is important for the exceeding of the admission capacity of the school and the use of denominational criteria.

Denominational non state schools are allowed to apply denominational criteria on the admittance of students. Non-discrimination law demands this is only allowed when the school is oversubscribed and when the admission rules are pre- determined, clear and objective. Race-discrimination is not allowed.

In Germany within the context of admission the interests of the confessional public schools which are focused on homogeneity and the free school choice of the parents can

collide. In the case-law the precedence is given to the special character of a public confessional school in that sense that when pupils can find a school that is within a reasonable distance to the school they can be refused. The non-adherence to the religion of the school constitutes only then no legitimate ground for refusing the child the access to the public confessional school, when the parents expressly desire the religious education of their children from that public confessional school. This is only considered as being credible if this simultaneously comprises the participation in the religious education of the school.

Private schools are, in theory, in Germany free to admit pupils who, in the school's judgement, are most likely to benefit from their programs and confession. They may not, however, exercise selection in such a way that only children from wealthy families are admitted, since the Constitution makes a condition of the approval of private schools that this does not result in 'segregation of pupils according to the means of the parents' (Article 7, subsection 4 Constitution). States can, if they choose, require private schools that are recognized as equivalent to public schools to employ similar admission procedures.

In the Netherlands within certain limits, non-state denominational schools are not as fully bound by the equality principle and the Dutch *General Equal treatment Act* as state schools and have the right to refuse to admit pupils on the basis of religious standards. When a refusal is grounded on denominational criteria, this right is protected by the *vrijheid van richting*, the freedom of education guaranteed by Article 23 of the Constitution. In the famous 1988 Maimonides judgement, the Supreme Court rules that an orthodox Jewish school could exclude a boy from a liberal Jewish family, the school therefore could rely on its freedom education.

In line with the Mainmonides judgment, the AWGB leaves denominational, non- state, schools the freedom to use criteria derived from their religious 'mission' to decide which pupils they admit on the basis of such criteria as long as they do in a constituent manner. This means that Mainmonides would probably be decided in the same way under the regime of the AWGB as it was in 1988. It also indicates that if a denominational school selects among pupils on denominational grounds on a case-by case basis rather than in a consistent manner, it cannot appeal to the exemption of the AWGB (Article 7, subsection 2 of the AWGB) since this would be a breach of Article 7, Section 1 AWGB. In practice this means that the majority of non-orthodox schools cannot invoke the exemption.

In South Africa private schools operate in terms of contracts between the school and the parents. As long as they do not violate Article 9 of the South African Constitution they can select learners as they wish. They can require pupils to subscribe the mission statement of the school. In this context discrimination can take place. Nevertheless a non-state school cannot be registered by a Head of Department if the admission policy discriminates on the grounds of race. A non-state school can be declared as a public school on the basis of an agreement. If such a shift is implemented the non-state school can no

longer refuse admission on the ground that the learner does not subscribe to the mission statement of the school.

General conclusions admittance to denominational schools

In Belgium a 'free' (independent) school has the obligation to admit any pupil when its parents ask for and subscribe to the educational project of the school. In the remaining countries denominational schools are allowed to refuse to admit pupils on the basis of religious standards. In this regard denominational schools are not bound by the equality principle. Discrimination on the grounds of race is nevertheless not permitted. In England the use of denominational criteria for admission by denominational state schools is further restricted by the rule that denominational state schools cannot favour children from a particular faith, unless the number of applications exceeds the number of places available. If a denominational school is oversubscribed it is allowed to apply pre-determined admissions rules relating to the school's faith when selecting pupils.

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Endnotes

[1] Charles C. Russo, Douglas J. Stewart & Jan de Groof, 'Introduction' in: Charles C. Russo, Douglas J. Stewart & Jan de Groof, *The educational rights of students. International perspectives on demystification the Legal issues*, Lanham, New York, Toronto, Plymouth UK: Rowman & Littlefield Education: 2007, pp. 3-4.

[2] Court of Arbitration, no. 28-92, April 2, 1992, *B.S.*, May 14, 1992, 10.991.

[3] V 97/98, 1058-1 G.

[4] Dutch Education Council, *Vaste grond onder de voeten*, Den Haag: 2002, p. 64.

[5] Ministerial letter BaO 2003-001 of 21 January 2003 and SO 2003-001 of 21 January 2003.

[6] R. Verstegen, 'Gelijke onderwijskansen in de Vlaamwe gemeenschap, in: F.H.J.G. Bekelmans, C.W. Noorlander & R. Verstegen, *Gelijke onderwijskansen*, Preadviezen Vereniging voor Onderwijsrecht, Sdu Uitgevers, Den Haag, 2003, p. 94.

[7] Advice Raad van State, Parl. St. VI. Parl. 2001/02, nr. 1153-1. Court of Arbitration, nr. 131-2003, 8 October 2003. See: J. de Groof, 'Het onderwijs is vrij (art. 24 § 4, al. G.W.). Zienswijzen van het Arbitragehof en de Raad van State omtrent de onderwijsvrijheid, *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid,* 2006-2007, nr.2-3-4, p. 124-167.

[8] <http://www.goodschoolsguide.co.uk/schools/uk-schools/state-schools.html>.

[9] Department for Education Statistical First Release SFR 09/2010. From the chapter about England.

[10] See the Equality Act 2010.

[11] Education Act 1996.

[12] Disability Discrimination Act 1995, s 28C.

[13] Race Relations Act (Amendment) AC 2000.

[14] See Blair and Meredith in their country report about England in this book.

[15] Article 94(1), School Standards and Framework Act.

[16] Article 94(2) School Standards and Framework Act.

[17] Article 86(3) School Standards and Framework Act.

[18] Article 89(1) School Standards and Framework Act.

[19] Article 89 (2) School Standards and Framework Act.

[20] Article 93 (1) School Standards and Framework Act..

[21] The admissions authority for the school is required to set an admissions number, and regulations make provision for the calculation of this number, taking into account the 'net capacity formula'.

[22] *The Queen on the Applications of the Mayor and Burgesses of the London Borough of Hounslow vs. The School Admission Appeals Panels* [2001] EWHC Admin 732, [2002] ELR 309.

[23] Article 91 (2) School Standards and Framework Act.

[24] *The Queen on the Applications of the Mayor and Burgesses of the London Borough of Hounslow vs. The School Admission Appeals Panels* [2001] EWHC Admin 732, [2002] ELR 309.

[25] R*(E) v Governing Body of JFS* [2009] EWCA Civ 626 (25 June 2009).

[26] *R(E) v Governing Body of JFS* [2009] ELR 15.

[27] *Mandla v Dowell Lee* [1983] 2 AC 548.

[28] N. Niehues, *Schul- und Prüfungsrecht,* Band 1 Schulrecht, München: Verlag C.H. Beck 1994, p. 4.

[29] I. Richter, 'Germany', in: Charles C. Russo, Douglas J. Stewart & Jan de Groof, *The educational rights of students. International perspectives on demystification the Legal issues*, Lanham, New York, Toronto, Plymouth UK: Rowman & Littlefield Education: 2007, p. 73.

[30] J. Staupe, *Schulrecht von A-Z*, 5 2001, München: Deutscher Taschenbuch Verlag 2001, p. 157; Niehues 1994, p. 277.

[31] Staupe 2001, p. 158.

[32] See Füssel in his countryreport about Germany in this book..

[33] H. Avenarius & H. Heckel, *Schulrechtskunde*, Nieuwied/Kriftel: Luchterhand 2012, p. X.

[34] So the approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Further the approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.

[35] BVerfGE 34, 165; 33, 303.

[36] Avenarius & Heckel 2000, p. X.

[37] BayVGH, BayVBL. 1998, 691.

[38] VG Potsdam, LKV 1997, 138 (140).

[39] Staupe 2001, p. 220.

[40] Niehues 1994, p. 172-173.

[41] Niehues 1994, p. 173.

[42] See Füssel in his countryreport about Germany in this book..

[43] Niehues 1994. p. 176.

[44] Niehues 1994. p. p.176-177.

[45] See Füssel in his country report about Germany in this book.

[46] C.W. Noorlander & B.P. Vermeulen, 'Netherlands' in: Charles C. Russo, Douglas J. Stewart & Jan de Groof, *The educational rights of students. International perspectives on demystification the Legal issues*, Lanham, New York, Toronto, Plymouth UK: Rowman & Littlefield Education: 2007, p. 130-131.

[47] Henk J.M. Hoefnagel & Ben Vermeulen, 'Recent Developments in Dutch legisaltion on Education', *European Journal for Education Law and Policy* 1997, nr. 1, pp. 155 ff.

[48] Hoge Raad (Supreme Court) April 9, 1976, Nederlandse Jurisprudentie 1976, 409 (Terheijden).

[49] Vermeulen en Noorlander 2006, p. 132.

[50] *Staatsblad* 1994, 230.

[51] *Kamerstukken II* 1979/80, 14 428, nr. 12, p. 52.

[52] Vermeulen & Noorlander 2006, p. 132-134.

[53] Hoge Raad January 22, 1988, Administratiefrechtelijke Beslissingen 1988, 96.

[54]Voorzieningenrechter Rb. Haarlem March 21, 2003, Adminstratiefrechtelijke Beslissingen 2003, 234 (with note by by Vermeulen).

[55] Hof Den Bosch September 5, 1989, Rechtspraak Vreemdelingenrecht 1989, 96.
[56] Article 12 subsection 1South Africa Schools Act 1996.

[57] Article 12 subsection 3South Africa Schools Act 1996.

[58] Article 15 South Africa Schools Act 1996.

[59] Article 16 subsection 1 South Africa Schools Act 1996.

[60] Article 16 subsection 2 South Africa Schools Act 1996.

[61] Article 16 South African Schools Act 1996.

[62] Prinsloo, 'State Interference in the Governance of Public Schools', *South Africa Journal of Education* 2006, Vol. 26(3), p. 357.

[63] Article 34 subsection 1 South Africa Schools Act 1996.

[64] Article 34 subsection 3 South Africa Schools Act 1996.

[65] See R. Joubert en W. van Vollenhoven, in their countryreport about South Africa.

[66] See paragraph:

[67] See R. Joubert en W. van Vollenhoven, in their countryreport about South Africa.

[68] See R. Joubert en W. van Vollenhoven, in their countryreport about South Africa.

[69] Article 20 South Africa Schools Act 1996.

[70] Article 7 South Africa Schools Act 1996.

[71] Article 5 subsection 3(b) South Africa Schools Act 1996.

[72] R. Malherbe, 'South Africa', in: Charles C. Russo, Douglas J. Stewart & Jan de Groof, *The educational rights of students. International perspectives on demystification the Legal issues*, Lanham, New York, Toronto, Plymouth UK: Rowman & Littlefield Education: 2007, p. 199.

[73] Article 5 section 1 South Africa Schools Act 1996.

[74] Malherbe 2007, p. 197.

[75] Article 5 section 3 sub b South Africa Schools Act 1996.

[76] See R. Joubert en W. van Vollenhoven, in their country report about South Africa.

[77] Article 33 Admission Policy for ordinary Pubic Schools.

[78] Article 34 sub b Admission Policy for ordinary Pubic Schools.

[79] S. Woolman & B. Fleisch, *The Constitution in the classroom. Law and Education in South- Africa 1994-2008*, Cape Town: ABC Press 2009, p. 27.

[80] Article 34 sub c Admission Policy for ordinary Pubic Schools.

[81] Article 16 subsection 2 South Africa Schools Act 1996.

[82] Article 35 Admission Policy for ordinary Pubic Schools.

[83] Compare: *Wittman v. Deutscher Schulverein, Preatoria and others* (4) SA 423 (T) *Witmann v. Deutscher Sxhulverein, Pretoria and others* 1998 (4) SA 423 (T).

[84] Article 46 subsection 3(b) South Africa Schools Act 1996.

[85] Article 5 subsection 3(b) South Africa Schools Act 1996.