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# INDEPENDENT SCHOOLS BRIEFING



July 2009  
Public Benefit Assessment Reports



## Editor's Comment

This edition of Independent Schools Briefing comments on the Charity Commission's recently published public benefit assessments and their implications for independent schools.

The latest publications from the Commission, whilst running to many pages, still leave much that is unclear. The Commission has made a series of judgements about whether individual schools meet the public benefit requirement. How this will develop into a fair and transparent assessment process that can be consistently applied to all schools remains unclear.

**John Shuffrey**

### OFFICES

**Bournemouth** 01202 294281  
1 St Stephens Court, St Stephens Road, Bournemouth,  
Dorset BH2 6LA

**Bristol** 0117 915 1617  
Beaufort House, 2 Beaufort Road, Clifton,  
Bristol BS8 2AE

**Edinburgh** 0131 221 2777  
Edinburgh Quay, 133 Fountainbridge,  
Edinburgh EH3 9BA

**Geneva** +41 22 319 0970  
12 Cours des Bastions, 1205 Geneva, Switzerland

**Guernsey** 01481 721374  
PO Box 141, La Tonnelle House, Les Banques,  
St Sampson, Guernsey GY1 3HS  
Channel Islands

**Harrogate** 01423 568012  
Sovereign House, 6 Windsor Court, Clarence Drive,  
Harrogate, North Yorkshire HG1 2PE

**High Wycombe** 01494 464666  
Fox House, 26 Temple End, High Wycombe,  
Buckinghamshire HP13 5DR

**Inverness** 01463 246300  
Kintail House, Beechwood Park, Inverness IV2 3BW

**London** 020 7841 4000  
Lion House, Red Lion Street, London WC1R 4GB

**Manchester** 0161 200 8383  
City Tower, Piccadilly Plaza, Manchester M1 4BT

**Peterborough** 01733 353300  
Stuart House, City Road, Peterborough PE1 1QF

[charities@saffery.com](mailto:charities@saffery.com) [www.saffery.com](http://www.saffery.com)

# INDEPENDENT SCHOOLS BRIEFING

## *PUBLIC BENEFIT* NUMBERS AND WORDS

01

### INTRODUCTION

**The Charity Commission has published its first Public Benefit Assessment Reports. These included five schools, two of which failed. Both schools that failed were prep schools.**

**However, it is not yet clear how the process will evolve and it would almost certainly be wrong to extrapolate a “failure rate” of 40% from this initial group of five schools.**

The governors of the schools that failed have been given three months to confirm that they will address the matters raised by the Commission and they must “provide a plan [or a revised plan] agreement with the Commission in a further nine months.”

That is consistent with the timetable imposed by OSCR on the Scottish schools that failed their public benefit tests. However, the Commission, unlike OSCR, has not specified a further time limit by which the schools must be able to demonstrate sufficient public benefit. The emphasis on “plans” is significant.

This may suggest that the Commission will be supportive of a school whose plan to achieve sufficient public benefit covers a period of some years. OSCR imposed a further time limit of two years by which time “changes should be in place and effective.” It would seem unlikely that the Commission would in practice take action to remove a charity from the register any more quickly. However, the position is not clear.

It is also still not clear how public benefit is measured and how much is enough to satisfy the requirement. The Commission is understandably

reluctant to translate its many words on public benefit into numerical targets. However, as more schools are tested it will eventually become clearer what targets need to be met.

If bursaries are the “hard currency” of public benefit for schools, it will in time become clear how other public benefit actions (e.g. non means tested fee support and collaboration with state schools) can reduce the amount of bursaries that a school needs to provide to meet the requirement.

It will also become clearer how a school’s financial position affects the amount of public benefit that it has to provide. If these things do not become clearer, it will be a sign that the process is inconsistent, arbitrary and lacking in transparency, which it clearly must not be.

Whether or not the Commission’s approach is right in law is a matter for lawyers to express a view on. However, given the doubts about the approach that have been expressed by some leading charity lawyers, it would be helpful if the approach could be legally tested sooner rather than later.



02

The rest of this special edition tries to summarise the key points of interest for independent schools from the reports on the individual schools and from the Commission's report: "Emerging findings for charity trustees from the Charity Commission's public benefit assessment work:2008-09".

### THE TWO SUB-PRINCIPLES OF PUBLIC BENEFIT WHICH CAUSE THE PROBLEM

To meet the public benefit requirement, the organisation must meet the two public benefit principles. These are:

**Principle 1: There must be an identifiable benefit or benefits**

**Principle 2: Benefit must be to the public, or section of the public**

These are then divided into a number of sub-principles.

The two sub-principles which present an issue for fee-charging charities are:

- sub-principle 2b (the opportunity to benefit must not be unreasonably restricted by ability to pay any fees charged); and

- sub-principle 2c (people in poverty must not be excluded from the opportunity to benefit).

#### High fees

These sub-principles are an issue for schools (and other charities) which charge "high fees". These are defined as fees which are "unaffordable to many people." One of the schools that failed charges fees of £5,795 a year and the Commission states that this level of fees "fits within the definition of "high fees"". This confirms that the threshold for "high fees" will catch most independent school fees.

#### BURSARIES

Predictably, much of the report focuses on bursary provision and other means of fee support.

The reports highlight a number of key statistics. These include:

#### Proportion of pupils with bursaries or hardship awards

For the three schools that passed, the proportions ranged from 17% to 24%.

For the two schools that failed, the proportions were 0% and 0.8%.

#### Value of bursary and hardship awards in 2008/09 as a percentage of gross fee income

For the three schools that passed, the percentages ranged from 5% to 14.3%. The 14.3% excludes the value of hardship awards for that school. Temporary hardship awards had been made to 3% of pupils so the combined percentage would be higher than 14.3%.

For the two schools that failed, the percentages were 0% and less than 1%.

The other statistics quoted included the numbers of bursaries and hardship awards currently awarded and the advertised value of bursary awards which ranged from 80% to 100% of fees.

#### Non means-tested fee support

The reports also examined non means-tested assistance, principally Continuity of Education Allowance ("CEA") (for children of qualifying armed forces families) and scholarships. For those schools that offered scholarships (not all of the five did) the maximum discount on fees ranged from 10% to 50% and the percentage of gross fees spent on scholarships, where shown, ranged from 0.3% to 4.7%.

Because the CEA "provides opportunities to benefit for those unable to afford the fees" it does provide some public benefit. Because it is not means-tested and is limited to children whose fees are funded by the MOD it has "less impact than measures designed specifically to assist people in poverty."

"However, where a school provides further means-tested support to bridge the difference between these schemes and the fees, we would take that into consideration as means-tested fee assistance to people who cannot afford the fees."

### What level of bursary provision is needed to satisfy the public benefit requirement?

Although non means-tested support by itself will not enable a school to satisfy the public benefit requirement, the Commission looked at the total proportion of pupils who “benefit in some way from fee reductions.”

The school which spent 5% of its gross income on bursaries and hardship awards had 66% of its pupils benefiting “in some way from fee reductions, including 19% who are helped on a means-tested basis.”

The Commission also “took account of the relatively small size of the school” and “its circumstances.” The school also provided some other educational benefits, principally through sports training and tournaments for local community schools and non-pupils.

For the school which spent 9.7% of its gross income on bursaries, “we also took account of the fact that total assistance (means-tested and untested) [including CEA] amounts to some £1.3m.” The school also has “links with local state schools resulting in educational benefits.”

Because there is such a significant gap between the bursary provision (and other fee support) of those schools that passed and those that failed, it is not possible to determine what the minimum requirement might be for a school to satisfy the public benefit requirement.

If a school simply spent 5% of its gross income on bursaries and did (and could do) little else, would that satisfy the requirement? We do not know, but suspect that for many schools the threshold may turn out to be higher.

It is in some ways unfortunate that two of the schools that passed had such a significant proportion of pupils benefiting from the CEA, as it makes it more difficult to interpret the results for those schools that do not have

many pupils benefiting from the CEA.

Two of the schools which passed the assessment received some “good practice recommendations”. These were the same for each of the two schools and were as follows:

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

Of these two schools, the one whose bursaries and hardship awards represented 5% of its fee income will have its progress against these recommendations reviewed by the Commission within eighteen months.

Whether that suggests that this school only just passed the assessment is not clear.

### 100% bursaries

“An important factor here was whether the charity provides subsidised access of up to 100% of fee remission.

“Where the level of fees charged is very high this may be especially important in demonstrating that the poor are not excluded from the opportunity to benefit.

“However, this does not mean that all the fee remission offered by a charity would need to be 100% fee remission; simply that 100% fee remission is available where needed.”

### Percentage of gross fees versus percentage of pupils with bursaries

The Commission clearly places importance on both these figures. Reports on individual schools stress the desirability of 100% bursaries being available and the Commission notes the number of pupils enjoying a 100% bursary.

If a school was to respond to this by offering more high value bursaries it follows that, unless the bursary budget was increased, the total number of bursaries would fall as would of course the percentage of pupils receiving bursaries.

Given the Commission’s emphasis in some cases on the total number of pupils receiving some form of fee support, it is not clear whether concentrating the bursary budget on a smaller number of pupils would help or harm a school’s public benefit position. This leaves aside the question of whether a full bursary pupil might be harder to integrate into a school than someone who needs a smaller bursary.

### Hardship awards

Some schools may have been concerned that hardship bursaries would not count towards public benefit. The following comments from one of the reports should provide some limited reassurance, particularly as this type of award is likely to increase in the current economic conditions:

“Hardship awards provide opportunities to benefit to those who cannot afford the fees (including those in poverty), although to a lesser extent than bursaries because they are only available to a very limited number of people – that is, families of existing pupils who have been able to afford the fees but who encounter financial difficulties. In awarding 100% hardship awards, however, the charity has provided opportunity to benefit to people who cannot afford the fees including people in poverty.”

### Publicity for bursaries

The “Emerging findings” include:

- “How fee assistance is advertised

“We considered it important that the availability of fee assistance is widely advertised, such as on the charity’s website, or ideally through a range of media which reaches a socially diverse audience.

“Even though a charity may operate a fee assistance scheme, if it does not advertise the details of that scheme sufficiently widely, then people who cannot afford the fees are likely to be deterred from applying to benefit from the charity’s services. It may therefore be difficult for the charity to demonstrate that it has provided those people with a material opportunity to benefit.”

The Commission does not directly address the position of schools that have a bursary scheme, but have difficulty in finding suitable candidates, having advertised the scheme thoroughly.

### What is the position of a school that has set up a bursary scheme, but is in the early years of implementing it?

This is the position of one of the two schools which failed. The appendix to the report sets out details of the school’s bursary scheme which was set up in 2007.

The school plans to award one bursary of up to 90% of fees “each year to a child entering year1”. Each bursary lasts until the child leaves school.

“From 2011, it is planned that the number of such bursaries will rise to two each year.” The scheme also includes allowances for learning support and extras.

The school has arranged for pupils funded by bursaries to continue their education at a choice of six independent schools on the same

bursary terms as provided by the prep school. “Bursaries are funded on a 50:50 basis from an appeal fund set up by the charity and from the charity’s existing income.”

Although the current value of assistance is less than 1% of the school’s income, this would rise over the next few if the plans for the scheme are fully realised.

The overall conclusion to the public benefit assessment for this school says: “The governors must produce a revised plan showing that the totality of benefits can be described as providing a sufficient opportunity to benefit in a material way for those who cannot afford the fees, including people in poverty.

“The governors must confirm their intention to do this within three months of the date of publication of this report and provide a plan for agreement with the Charity Commission within a further nine months.”

The Commission is clearly commenting on the level of public benefit currently provided, but the requirement to produce a “revised plan” suggests that it may not be sufficient simply to implement the existing bursary scheme as currently planned.

### The financial position of the school

There is clearly a limit to how much bursary support a school, particularly one without an endowment and with limited fund raising potential, can provide.

One of the two schools which failed the test currently provides no bursaries. Its fees are low by comparison to most independent schools; its surplus is modest and its reserves are mainly represented by the school buildings. It is partly financed by overdraft.

Many schools, both larger and smaller are in a not dissimilar position.

Their capacity to finance bursaries is extremely limited and they may have few other means of demonstrating public benefit in the way that the Commission wants.

The “Emerging findings” state that “a charity’s financial and other circumstances are an important part of assessing the extent to which it can satisfy principles 2b and 2c [of the public benefit requirement]”. It goes on to say:

- “The financial health and circumstances of the charity

“In our assessments, where fee-charging was an issue, we considered what was reasonable and appropriate for a charity to do in its particular financial circumstances to provide opportunities to benefit for people who cannot afford the fees. We took into account:

- the level of income from fees;
- the extent of the charity’s reserves and endowments;
- whether the charity’s reserves and endowments were in the form of savings and investments or property (and so the extent to which they could be used to subsidise fee assistance); and
- the ability of the charity to make any necessary changes within a reasonable timeframe to provide sufficient opportunities to benefit.”

The recession will of course make it cheaper, in a sense, for some schools to fund bursaries as schools are more likely to have unfilled places. The cost of the bursary is then simply the marginal cost of the pupil rather than the fee foregone. However, schools suffering losses because of unfilled places will want additional full fee paying pupils rather than pupils on bursaries.

We still do not know how the Commission will respond to a school that is doing all it can to meet the

public benefit requirement, but because of its financial and other circumstances, can do very little. This uncertainty will be a cause of concern to a number of schools.

It is also not clear how the Commission will respond to a school that sets up a bursary scheme, markets it comprehensively, but fails to attract suitable pupils or a school where pupils on bursaries drop out because they do not “fit in” to the school. This is perhaps more likely to be an issue where the number of pupils with bursaries is small.

#### OTHER FORMS OF PUBLIC BENEFIT

Whilst bursaries appear to be the “hard currency” of public benefit for independent schools, other forms of public benefit are taken into account. To what extent these other forms of public benefit reduce the need for a school to provide bursaries is unclear. A broad range of activities including joint initiatives with state schools and “interview coaching for Oxbridge candidates” are quoted as “relevant benefits”.

The following are examples of “activities and opportunities” which are not related to the charity’s aims and thus do not count towards public benefit:

“Placements for gap year students are offered every year where the school provides accommodation, training, and mentoring for the period of their placement.”

“Public use of the bluebell woods which are maintained by the college.”

“Financial benefit to the state by educating the pupils at the college.”

#### OTHER MATTERS

##### Multiple aims

“It is important that trustees of charities that have multiple aims are able to demonstrate how they are carrying out each of those aims for the public benefit.”

This re emphasises the need for schools to be aware of what their charitable objects are and to think carefully before changing them.

#### The onus is on the charity to demonstrate its public benefit

“We did not consider it cost effective for us to search out evidence of benefit where insufficient evidence was provided by the charity. The responsibility lies with the charity trustees to demonstrate evidence of benefit where that is not obvious or clear.”

#### The Joint Educational Trust

##### “Case study: The Joint Educational Trust (‘JET’)

“The Joint Educational Trust (usually known as JET) is a charity which enables children between 7 and 13 who have suffered seriously at home, or are at risk in some way, to attend independent boarding or day schools, or state boarding schools, by arranging part or full funding for their education.

“The JET scheme is specifically directed at providing assistance to people who cannot afford a school’s fees and so where schools accept children whose education is funded, in full or in part, by the JET scheme this can help satisfy principles 2b and 2c.

“Schools have no control over how



many referrals the JET scheme makes to them and so the fact that the school will take referrals may not be sufficient by itself to satisfy those principles – however, we will look at levels of such referrals.”

### Sibling discounts

This “only extends the opportunity to benefit very slightly to people who cannot afford the fees.”

### Staff discounts

As the benefit arises out of a contractual entitlement it does not count towards public benefit.

### “NEXT STEPS”

In its Emerging Findings, the Commission concludes:

“We expect to start the next phase of the assessment programme later this year, following a review of the costs of the programme, the benefits achieved and how these might affect future programmes. In the next programme we intend to include other types of fee-charging charities, some small charities and charities for which sub-principle 2d (any private benefits must be incidental) may be an issue.

“As we note in section H of Charities and Public Benefit, we will, on a wider front, develop public benefit assessments through our general casework, through working with professional and umbrella bodies and by carrying out public benefit research studies.”

### CONCLUSION

The fact that two out of the five schools selected have failed their public benefit assessment has come as a shock to the independent schools sector. There will be a significant number of schools that are similar to those that failed.

It is possible that the Commission’s interpretation of public benefit could be legally challenged. However schools should not assume that a legal challenge would change things nor that a change of government would change things, although either of these could change the way that public benefit is applied to independent schools and, indeed, more generally.

The key question is how long the Commission will allow a school to demonstrate that it meets the public benefit requirement. By not giving schools a time limit, other than the twelve months in which to produce a plan, the Commission is clearly distinguishing its approach from that of OSCR.

It is possible that some schools will need to change their business models quite radically, whilst others may need only to make fairly modest changes to meet the Commission’s requirements.

Many schools will be found to be meeting the requirements already. It would seem likely that those schools that can make the necessary changes will be given the time to make them, provided the governors are tackling the issue positively and with sufficient energy.

It is to be hoped that the Commission will work constructively with those schools whose circumstances make it very difficult for them to comply with the requirements.

Whether the Commission has the resources to monitor the entire independent schools sector’s progress towards meeting the public benefit requirement (as defined by the Commission) is another question!

### OFFICE CONTACTS

**Bournemouth** David Macey 01202 294281, **Bristol** Jerry Barnes 0117 915 1617, **Edinburgh** Max Floydd 0131 221 2777, **Geneva** Andrew Cleeton +41 22 319 0970, **Guernsey** Kelvin Hudson 01481 721374, **Harrogate** Chris Adams 01423 568012, **High Wycombe** Leah Sowden 01494 464666, **Inverness** Susie Swift 01463 246300, **London** John Shuffrey 020 7841 4000, **Manchester** Mike Harrison 0161 200 8383, **Peterborough** Stephen Collins 01733 353300  
[info@saffery.com](mailto:info@saffery.com) [www.saffery.com](http://www.saffery.com)