

Leigh Day & Co

The Governing Body
..... School

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Your Ref.

Our Ref: **AMM/CHS/DA83790**

18 May 2012

LETTER BEFORE CLAIM

Dear Sirs

Re N D

This Letter Before Claim is sent in accordance with the pre-action protocol for Judicial Review. For the reasons set out in this letter, we consider that your refusal to allow our client to practise her daily prayers on the school premises represents unlawful indirect religious discrimination and is amenable to legal challenge.

If we have not received a satisfactory substantive reply to this Letter Before Claim within 14 days of the date of this letter we anticipate issuing legal proceedings against you without further notice.

Our client

We act on behalf of Miss N D. N's date of birth is 29 November 2002 and she is accordingly aged 9 years 5 months old. As N is a child, we are instructed in this matter through her mother, S D, acting as N's Litigation Friend.

The proposed Defendant

Should Judicial Review proceedings become necessary, we consider that the appropriate Defendants are:

- (1) The Governing Body of ...School;
- (2) Council.

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DLA EXHIBIT A

Service of documents by email will not be accepted

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The details of the matter being challenged

N was born in Tanzania and moved to the UK with her family some 2 and a half years ago when N's mother embarked on a Masters course in London.

In October 2009, Mrs D enrolled N and her brother, MD, at ...School. N was then aged 6 years old.

In general, N's experience at ...School has been a very positive one for her. In addition to educational progress, her parents feel that N has benefited from the social side of school, growing in confidence. Coming from a country where there are some religious tensions, N and her family are pleased that the school has placed a high priority on promoting diversity and respect for pupils with a wide variety of cultural and religious backgrounds.

N has been brought up a Muslim by her parents, who are practising Muslims.

According to the family's Muslim faith, once she turned 9 years old in December 2011, N was viewed as having attained puberty for religious purposes and consequently required to perform the obligatory religious duties of Islam. These, as you will be aware, include offering prayers at five set times of day.

Adherence to Islam requires these prayers to be offered at the proper times. N and her family believe that, as Muslims, they are obliged to offer prayers at the set hours unless there is some emergency situation that prevents this or the person is unable to pray by reason of sickness or travelling; prayers cannot be missed or combined on a regular basis.

N is able to do most of her prayers at home, and duly does so. However, depending on the time of year, the afternoon obligatory Islamic prayers will fall at a time when N is at school during the term-time week.

Consequently, Mrs D approached ...School asking for the School to provide prayer facilities for N to use. The request was made verbally to the school office in December 2011.

Arrangements were made by office staff at ... School to accommodate this request whereby N was offered a vacant room (whichever was available) during the lunch break to say her prayers for a period of some 4 weeks at which point it was decided no longer to provide prayer facilities. N was then no longer permitted to carry out her prayers on the school premises.

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Normally, N would go to the School office after her lunch and inform them that she wanted to pray. They would send her to Welfare, where either Ms R or Ms W would take N to a vacant room and stay with her as she offered her prayers for about seven to ten minutes. On this one day, when N went to Welfare after reporting to the office, she found that day another member of staff there, whom our client recalls is called Ms T or similar (please confirm her identity). Ms T told N she could not pray and asked her to go back to her class. N did so but, because she was very disturbed about not having said her prayers, she started crying. Her teacher, Ms M asked N why she was crying and N explained. Ms M asked N to go back to the office and tell them what had happened. The office staff then called Ms T to ask why she had not permitted N to pray. N states that, when she arrived, Ms T turned to her and said to her, "You have been very naughty. I asked you to go back to your class and instead you came to complain in the office." N says she replied that she needed to say her prayers, as it is obligatory, to which Ms T replied, "If all Muslims were to pray, the classes would be empty." She then told the office staff not to allow N henceforth to pray. N was very distressed by this encounter.

N's parents were most upset and surprised when they learned of the change of policy and that, consequently, N was being prevented from practising her religion properly.

N's mother went to the office the following day to inquire why N had not been permitted to pray. The lady at the office apologised and said she was aware that N had been distressed and cried the day before but she would try and sort out the matter. However, N was once again refused to pray that day. This was a Friday.

On Monday of the following week, after dropping N and MD to their classes in the morning, Mrs D went back to the office to inquire as to the situation. She was advised to speak to the Deputy Headteacher, Ms MM. However, Ms MM was not available that day. Mrs D was able to speak to Ms MM the following day, who told her that the school policy did not allow prayers to be said in school, since children need to be supervised all the time and the School did not have enough staff to accompany N while she said her prayers during lunch break.

Not satisfied with this answer, N's mum asked to speak to the headmaster, Mr S the next day.

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Mr S was very cordial but said he could not do much since the matter had been communicated to the Head Governor who had advised him not to allow prayers henceforth. He explained that the office staff had not asked him earlier, and had taken upon themselves to accommodate N to say her prayers but that the policy had always been not to allow any one religious group facilities that could not be offered to others. After a lengthy discussion where Mrs D explained why this was very important to N and her family, Mr S advised Mrs D to put the request in writing to the Head Governor.

Mr S said he was very optimistic that the Board of Governors was to meet soon and once the matter had been explained to them as Mrs D had explained to him - in particular why this was so important to N and her family in order to be able to practice their faith properly, the Governors would consider changing the policy.

Mrs D requested that N be allowed to pray during this period whilst the Board of Governors were considering her request. Mr S said he would ask the Head Governor and get back to Mrs D.

On the same day, Mr S called Mrs D to say N could pray while the matter was being considered, but not at lunch break. A compromise was reached that N would pray immediately after school ends at 3.00pm, before going to the After School Club. This was facilitated for the days N attended After School Club within the next one month.

On 6 February 2012, Mrs D accordingly wrote to the Chair of Governors at ...School raising the family's concerns. We attach a copy of that letter and Lynne Malzard's subsequent reply dated 6 March 2012 on behalf of the Governing Body.

As can be seen, Mrs D set out that prayer is one of the pillars of the Islamic religion which N is obliged to adhere to, now that she has attained the age of 9 years old. N had been happy at ...School to date but the decision not to provide her with facilities for praying at school had effectively created a situation where attending the School meant for N compromising on her religious obligation. The resulting conflict had unsettled N, who was aware of the importance of prayer in her Islamic faith, and was indeed a source of great stress to all her family.

Mrs D stated that it was within that context that she was writing to the Chair of Governors to request that ...School reconsider the decision not to offer facilities

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for Islamic prayer- and allow N space, time, and facilities to say her obligatory afternoon prayers in school with dignity. Mrs D attached a guidance document from the Muslim Council of Britain, which explains the religious obligations of Islam for State Schools.

The Chair of Governors replied to that letter on 6 March 2012. In her reply, she acknowledged Mrs D's request for praying facilities, within the school, for N to use during lunchtime but stated that this had been declined after consideration by the Governors:

"The decision of the Governors is as follows: -

- ...School is an inclusive secular school and as such does not permit activities on the school premises that are aimed at one religion. We pride ourselves in celebrating diversity together.
- The school staff have a duty of care towards all children during the school day. N would have to be supervised by a member of staff while she was praying and unfortunately, over the lunch break all staff are fully deployed and no-one is available to do this.
- We have no legal obligation to provide such facilities."

The Chair of Governors further stated that it was Mrs D's legal right to take N out of school during the lunch break (12.00 to 12.45pm) if she wished to do so, and prayer could then be observed by N at home. The Chair of Governors pointed out that it would be Mrs D's legal responsibility to ensure that N was back in school and on time for the afternoon session.

However, it is not practicable for Mrs D to take N home so she can pray during lunchtime. Mrs D and her husband both work full-time and, even if they were available to remove N, they do not believe that it would be feasible getting N back home and then back to school again, nor would N's parents wish for N to have to be withdrawn from school for the lunch time period when the other children have the opportunity to mix and socialise.

As a result of the decision of the Governing Body communicated to Mrs D on 6 March 2012, N has not been able to offer her afternoon prayers on days when she attends school.

N and her family remain very upset as a result of this. N herself questions values taught at school when it comes to equality or religious freedom, and asks both her parents and teachers why these values do not apply to her. She has mentioned this in her Home Learning. Recently, when she was given the School Charter she

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questioned why the religious freedom mentioned there did not apply to her. In one of her essays in school, when she was asked what she would change if she was made in charge one day, she said she would allow children to practise their religion properly and allow school prayers. This thought now tortures her constantly and her parents are very upset that at her young age, N has been exposed to the concept of discrimination based on her religious belief where she already sees herself as a target as a young Muslim woman. N's parents want to raise a confident young woman whose religion is part of her identity, without that becoming a burden upon her.

Furthermore, since they are bound by law to ensure N does go to school, N's parents are having to compromise their religious obligations by accepting N's failure to adhere to a very important aspect of their religion -daily prayers.

The issues

As you will be aware, under section 10 of The Equality Act 2010 ("the Act") religion or belief is a protected characteristic entitled to protection against discrimination.

Religion means any religion and a reference to religion includes a reference to a lack of religion: sub-section 10(1). This will clearly include Islam.

Chapter 1 of Part 6 of the Act deals with the duties on schools not to discriminate. Religion and belief, as defined *above*, is one of the protected characteristics for the purposes of the obligations imposed by the Act, apart from in the context of issues of harassment, which are not relevant in this case.

In particular, sub-section 85(2) of the Act states that:

"(2) The responsible body of such a school must not discriminate against a pupil-

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service;
- (e) by excluding the pupil from the school;
- (f) by subjecting the pupil to any other detriment."

In England and Wales, this obligation applies to schools maintained by a local authority, including primary schools such as ...School: ss85(7) and 89(5) of the Act; s4 Education Act 1996.

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The obligation is on the responsible body. We believe that the Governing Body will be the responsible body for the purposes of this case, but please clarify this. We are copying this letter to the local authority in any event.

Schedule 11 of the Act lays out a number of exceptions to the duties imposed on schools. The obligations in Sub-sections 85(2)(a) to (d), so far as these obligations relate to religion / belief, do not apply to anything done in connection with acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum). This does not exclude the protection in relation to exclusion from school and subjecting a pupil to a detriment.

There are various types of discrimination prohibited by the Equality Act, as you will be aware.

Section 19 of the Act deals with indirect discrimination, relating it to the various protected characteristics identified in section 19(3). These include religion and belief, as defined above. Sections 19(1) and (2) of the Act read:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's **if-**

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

It is our view that the refusal of the Governors of ...School to agree to Mrs D's request on behalf of N for facilities for N to offer her obligatory Islamic prayers amounts to indirect religious discrimination.

The Chair of Governors' response dated 6 March 2012 indicates that the refusal of facilities for religious worship and of permission to carry out religious activities on the school premises applies to persons of all religions.

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However, the effect of that policy or practice is to put N and other practising Muslims at a disadvantage by comparison with persons who are non-Muslim. That is because under the Islamic religion adherents are required to offer prayers at fixed hours and it is not permissible to delay prayers or pray before the proper time, which does not apply to other religions or beliefs such as Christianity.

We submit that the reasons given by the Chair of Governors on behalf of the Governing Body do not justify the discrimination. Whilst the provision against manifesting religious belief in school applies to persons of all religions, the Governing Body does not appear to have considered that it puts practising Muslims at a particular disadvantage. It is not clear at all how providing facilities for Islamic prayers would compromise the School's inclusive nature but rather it will promote equal opportunity and respect for different religions by accommodating the requirement for Muslims to practise their religion properly and diligently, as Mrs D pointed out in her letter of 6 February 2012.

The School was able to accommodate the request and provide prayer facilities for N initially, so it is not clear why this would now be impracticable. The obligatory afternoon prayer can be offered in ten minutes.

We submit that the School does have a legal obligation to provide facilities for prayer in the circumstances of this case as set out above and below.

The alternative of removing N from school at lunchtime suggested in the Chair of Governors' response does not remove the disadvantage for the reasons previously described.

We should add that we do not believe that paragraph 6 of Schedule 11 to the Act exempts the School from its duties in this area. The Schedule 11 exception is directed to acts of worship or other religious observance organised by or on behalf of a school, not to accommodating the needs of pupils who themselves as individuals wish to manifest their religion in school. In any event, N has been subjected to a detriment as a result of the Governing Body's decision.

The Equality Act 2010 also introduced a single Public Sector Equality Duty on public bodies including maintained schools and Academies.

This combined Equality Duty came into effect in April 2011 and is set out in section 149 of the Act:

"149 Public sector equality duty

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(1) A public authority must, in the exercise of its functions, have due regard to the need to-

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

Having due regard means consciously thinking about the three aims of the Equality Duty as outlined above when making a decision or taking an action which may have implications for people with particular protected characteristics. Relevant case law, which we will refer to at any hearing, has established that equality considerations should be considered before and at the time that policy is developed and decisions taken, not as an afterthought. The equality duty has to be carried out seriously, rigorously and with an open mind – it is not just a question of ticking boxes.

The Act explains in sub-section 149(3) that having due regard for the second aim of advancing equality includes:

- Removing or minimising disadvantages suffered by persons due to their protected characteristics.
- Taking steps to meet the needs of people from protected groups where these are different from the needs of other people.
- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

Fostering good relations involves tackling prejudice and promoting understanding between people who share a protected characteristic and others: sub-section 149(5).

The School is also required to publish sufficient information to demonstrate its compliance with the general equality duty across its functions and updated this annually, and prepare and publish its objectives towards meeting the aims of the Equality Duty.

We seek further disclosure of information as to the facts and matters taken into account by the Governing Body when deciding to refuse Mrs D's request on behalf of N for facilities for N to offer her obligatory Islamic prayers.

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However, we are concerned that the Equality Duty has not been complied with in this case.

We also believe that N's rights under Articles 9 (Freedom of thought, conscience and religion) and 14 (prohibition of discrimination) of the European Convention on Human Rights are engaged in this case and the School's decision is contrary to section 6(1) of the Human Rights Act 1998.

For the above reasons, we believe that the denial of the Governing Body of ...School of the opportunity and facilities for our client to offer Islamic prayers in school amounts to indirect discrimination; contravenes the School's equality duty; and is a breach of our client's Convention rights. We believe that the Governing Body's decision will be susceptible to judicial review.

The details of the action that the Defendant is expected to take

Forthwith, reconsider Mrs D's request for facilities for N to say her obligatory afternoon prayers in school with dignity.

In the circumstances, we believe that the only reasonable decision for the School to take is to forthwith provide N with suitable facilities to enable her to perform her obligatory Islamic prayers.

We also ask you to apologise to N and her family for the distress that the withdrawal of prayer facilities has caused them.

Information sought

Please provide copies of ...School's Equality Policy and equality objectives / Action Plan, together with any updates, covering the period December 2011 to date.

Please also provide the relevant sections of the minutes of the Governing Body meeting at which Mrs D's request for prayer facilities for N in school was discussed, together with any documents submitted to or considered by the Governing Body relating to Mrs D's request and any documents or correspondence, including email correspondence, produced subsequently in connection with it.

Address for Reply and Service of Documents

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Proposed Reply Date

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In accordance with the Pre-action Protocol for Judicial Review, we consider that 14 days is a reasonable period of time, in the circumstances, for you to provide a substantive reply to this Letter Before Claim.

We therefore look forward to receiving a substantive reply from you by the close of business on **1 June 2012**, failing which we reserve the right to commence Judicial Review proceedings without further recourse to you.

Funding

We confirm that we are currently acting for our client under a Legal Help Matter Start. If we are to proceed to issuing Judicial Review proceedings, we anticipate that our client will have the benefit of an emergency public funding certificate.

Yours faithfully,

Leigh Day & Co

CC: London Borough of

DLA EXHIBIT A

The Governing Body
..... School

6 June 2012

Mr & Mrs D

Dear Mr & Mrs D

Thank you both for attending the meeting on Friday 1st June 2012 with myself, Chair of Governors, Mr S, Head Teacher and Ms J, Vice Chair of Governors, to discuss the arrangements for N to undertake Dhuhr prayer (Noon prayer) during school. I write to confirm the details discussed.

..... School will allow N to pray as requested. She will be supervised by a female member of staff, be able to leave lessons at, or shortly after, the correct times as arranged, undertake her ablutions using the sink in the Welfare room and pray in the Rainbow room.

As agreed you will provide the school with the daily prayer times in advance and also a prayer mat. The prayer mat will be kept securely in a cupboard in the Rainbow room. You may also be asked to help N with any work she may miss if the prayer time falls during a lesson.

Whilst School undertake to adhere to these arrangements wherever practicable, there may be exceptions. For example, the Welfare room may be unavailable due to a medical emergency necessitating the use of other washing facilities. Alternative arrangements may need to be made if N is on a school trip or during the afternoon SATs.

As agreed, we will review the situation at the end of the term. The school will contact you nearer the time to arrange a suitable date. In the meantime, if there are any further comments or questions please do not hesitate to contact us.

Yours sincerely,

Chair of Governors