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# Recommendation of the Public Defender of Rights regarding the fulfilment of the right to equal treatment in access to pre-school education

## I. Introduction

The recommendation of the Public Defender of Rights regarding the fulfilment of the right to equal treatment in access to pre-school education was prepared for the purpose of fulfilling the task entrusted to the Public Defender of Rights by the provision of Sec. 21b (b) and (c) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended, pursuant to which the Defender issues recommendations on issues related to discrimination and carries our research. It is intended in particular for kindergartens and their head teachers who make decisions about an admission of a child to pre-school education but also for other pedagogical staff, promoters of school facilities, and also for the broad public, in particular for the parents of children in pre-school age, as part of raising public awareness.

The following recommendation was prepared in response to an increasing number of complaints received by the Public Defender of Rights from parents whose children were not admitted to pre-school education on the basis of head teachers' decisions, which parents often perceive as unfounded and discriminatory.

The aim of this recommendation is to point out a commonly incorrect procedure of some kindergartens in admitting children to pre-school education and further, it is an attempt to exert influence regarding a change of inappropriate criteria so that they comply with the requirements of the anti-discrimination legislation in force. Owing to this, it is necessary to analyse first the legal framework of pre-school education, the decision-making process regarding admission to kindergartens and subsequently also to look at the influence that a promoter of a kindergarten has over the criteria on the basis of which a head teacher of a kindergarten decides on admitting or not admitting a specific child. The recommendation includes an analysis and an evaluation of the legitimacy and lawfulness of criteria that most frequently appear in practice, with focus on the right to equal treatment. The recommendation is concluded with a model proposal for criteria for admission of children to kindergartens. Its text will be a sample document, which could serve as a guideline for kindergartens.

# DECALOGUE OF EQUAL TREATMENT IN ACCESS TO PRE-SCHOOL EDUCATION

1. The primary goal of kindergartens is to provide education to a child; a child and not its legal guardian is the holder of the right to pre-school education, and this applies despite the fact that secondarily, a kindergarten in fact provides child-care services too.
2. A head teacher decides upon an admission of a child to pre-school education as a state administration body and therefore the decision-making has to comply with not just the provision of the Anti-discrimination Act but also with the Charter of Fundamental Rights and Freedoms, particularly with the prohibition of discrimination contained therein.
3. When admitting children to a kindergarten it is prohibited to make distinction on the basis of the state citizenship of a child.
4. If the requirement of permanent residence of a child in a municipality is a preferential criterion and not an unconditional one, the criterion is legitimate. On the other hand, it is not legitimate to disregard the permanent residence of a child and decide on its (non)admission to a kindergarten based on the permanent residence of its parents.
5. If permanent residence in a municipality is a benefitting criterion for the admission of a child, such preferential treatment should also apply to EU citizens and long-term residents who have their place of residence registered in the municipality.
6. The age of a child is a possible criterion for determining the order of registered children on the list. However, if younger children (especially three-year old children) were to be absolutely excluded in specific cases, it would be appropriate to apply the criterion differentially within specific age groups.
7. With respect to the general trend of integrating all children in the education stream, it is necessary to ensure education for the largest possible number of children in common kindergartens. A general rejection of a child with a disability constitutes direct discrimination in access to education due to disability.
8. Pre-school education is a public asset and therefore a head teacher of a kindergarten should not dispose of it as a means of supporting or favouring certain groups whose (work) activity the head teacher alone regards as more beneficial for the society.
9. A criterion benefitting children whose parents are employed or perform a gainful activity is not discriminatory but, on the other hand, it is not related, without anything further, to a child as the recipient of provided education or to its individual needs. As a result, the Defender recommends that the criterion of employment of parents should not be used when admitting children to kindergartens.
10. If, during the admission process, a child whose mother/father is on a maternity/parental leave with another child is put at disadvantage, it is direct discrimination due to gender (parenthood).

# II. Basic fundamentals and legal framework

## *II. 1. Character of pre-school education*

Pre-school education is regulated by Act No. 561/2004 Coll. on Pre-school, Basic, Secondary, Tertiary Professional and Other Education (the Education Act), as amended. Education is a long-term process within the scope of which the state has a duty to provide also pre-school education,[1] which is regarded as an inseparable part of the overall education system (c.f. the provision of Sec. 1 of the Education Act).

The goal of pre-school education is, according to the provision of Sec. 33 of the Education Act, to support the development of personality of a child by participating in his/her healthy emotional, intellectual and physical development and in his/her acquisition of basic rules of conduct, fundamental life values and interpersonal relations. Pre-school education should bridge the gap between the home and school atmosphere and introduce a child to conditions of the school environment. Especially if the full range of stimuli needed for the development of a child cannot be ensured in a family, a kindergarten represents one of the possibilities to supplement child rearing. A pre-school age child learns primarily on the basis of many-sided contacts with the environment and its own experience. The aim of pre-school education is to guide a child to acquire, within its personal pre-requisites and individual development possibilities, physical, mental and social independence adequate to its age, and fundamentals of competencies important for its further development and learning, for life and education. A child should gradually develop self-confidence and self-assurance, the ability to be true to itself and at the same time to adjust to life in a social community, fundamentals for life-long education and fundamentals for the ability to act in the spirit of fundamental human and ethical values.[2] Pre-school education thus establishes basic pre-conditions for continuation of education and also helps to balance irregularities in children's development before they enter basic education, and provides special pedagogical care to children with special educational needs. Institutions providing pre-school education, or more precisely their teachers, should therefore pursue the following framework targets in their work: [3]

- Development of a child, its education and knowledge;
- Acquisition of fundamentals of values which our society is based on;
- Gain of personal independence and ability to behave as an independent individual exerting influence upon its environment.

The above-mentioned facts clearly show that the primary goal of a kindergarten is to provide education. A kindergarten de facto enables families with

[1] The right to education is in its character a social right the fulfilment of which is connected with a positive obligation of the state. This means that the state must not just respect and protect but also actively fulfil. Boučková, P.: Rovnost a sociální práva, Auditorium, Prague 2009, p. 25 and 35.

[2] See Východiska RVP PV a jejich význam pro předškolní edukaci. Studijní materiál. Hradec Králové**:** Department of Primary and Pre-Primary Education of PdF UHK, 2007, p. 13.

[3] See the Research Institute of Education in Prague: Framework Education Programme for Pre-school Education, p. 11.

little children to combine family and working life;[4] however, this function cannot be regarded as the main purpose of pre-school education. Although the placement of a child in a kindergarten relieves parents of all-day care of their child, which enables them e.g. to perform gainful activities, a kindergarten serves only the child, its healthy development and its integration in the society. With respect to the fact that the goal of kindergartens is to provide education, a child is of course the recipient of the provided asset.[5]

## *II. 2. The Charter of Fundamental Rights and Freedoms*

The provision of Article 33 of the Charter of Fundamental Rights and Freedoms (hereinafter only the "Charter") recognizes at a general level the right of *everyone*[6] to education.[7] The prohibition of discrimination is stipulated in the Charter in Article 3 (1), which guarantees fundamental rights and freedoms (i.e. also the right to education) to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethic or social origin, membership in a national or ethnic minority, property, birth, or other status. The execution of state administration in the area of education needs to be in accordance with Article 33 (1) of the Charter in connection with Article 3 (1) of the Charter. Article 2 (2) of the Charter stipulates that the power of the state may be asserted only in cases and within the limits set by law (i.e. general law and constitutional law) and in a manner determined by law.[8]

## *II. 3. International obligations and European Union law*

The main source is Article 2 of Protocol No. 1 annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms[9] (hereinafter only "the Convention"), which provides that no person shall be denied the right to education. The given fundamental right is of course referred to in Article 14 prohibiting discrimination in the enjoyment of rights and freedoms recognized by the Convention.

The right to education including the prohibition of discrimination is also stipulated in the Charter of Fundamental Rights of the European Union.[10] Although the European Union does not hold significant powers in the area of education,[11] the importance of European law in this area cannot be disregarded. Access to education is one of basic needs and denying the access would make the exercise of fundamental freedoms considerably more difficult, specifically the free movement of

[4] See the Research Institute for Labour and Social Affairs: Síť zařízení denní péče o děti předškolního věku v ČR [Network of child-care services for pre-school children in the Czech Republic], p. 4.
[5] Compare e.g. the provision of Article 28 (1) of the Convention on the Rights of the Child, which explicitly recognizes the child as the bearer of the right to education.
[6] With respect to the fact that the Charter strictly distinguishes between the rights recognized for everybody and the rights recognized only for citizens; anybody irrespective of state citizenship has the right to education.
[7] It is one of fundamental social and cultural rights, which can be sought merely within the scope of law, by virtue of Article 41 (1) of the Charter.
[8] KLÍMA, K. Komentář k Ústavě a Listině, 2nd edition. Plzeň: Aleš Čeněk, s.r.o, 2009. p. 47
[9] Communication No. 209/1992 Coll. of the Federal Ministry of Foreign Affairs on the Accession to the Convention for the Protection of Human Rights and Fundamental Freedoms.
[10] See Articles 14 and 21 of the Charter of Fundamental Rights of the European Union.
[11] See Article 6 (e) of the Treaty of the Functioning of the European Union.

persons.[12] As a result, the basic principle of European law consisting in the prohibition of any discrimination on the basis of state citizenship shall apply to admission of children to kindergartens.[13] It should be noted that it is a specific prohibition of unequal treatment relating only to the citizens of Member States of the European Union.

## *II. 4. Prohibition of discrimination in access to education at a statutory level*

### II. 4. 1 The Anti-discrimination Act

The prohibition of discrimination at a statutory level is defined in more detail, in connection with the Charter of Fundamental Rights and Freedoms, and international treaties that are parts of the legal order, in Act No. 198/2009 Coll., on Equal Treatment and Legal Means of Protection against Discrimination and on Amendments to some Laws (the Anti-discrimination Act). The Anti-discrimination Act specifies the concept of equality, among others within Article 1 of the Charter, according to which all people are equal in their dignity and in their rights. According to the Anti-discrimination Act, the prohibition of discrimination is based on an assumption that persons may be treated differently on the grounds of their individual characteristics and qualities and not on the grounds of general characteristics, which are often connected with stereotypes and prejudices.[14]

According to the provision of Sec. 1 (1) (j), one of the areas within the applicability of the Anti-discrimination Act is access to education and the providing of education. The provision of Sec. 52 (3) of the Anti-discrimination Act contains a list of prohibited discriminatory reasons; in the areas defined in the provision of Sec. 1 (1) of the Anti-discrimination Act, discrimination means unequal treatment due to race, ethnic origin, nationality, gender, sexual orientation, age, disability, religion or belief or opinions.[15]

### II. 4. 2 The Education Act

The principle of equal treatment and the prohibition of discrimination due to race, colour, sex, language, belief or religion, nationality, ethnic or social origin, property, kith or kin, or the health condition or any other status of a citizen is stipulated in the provision of Sec. 2 (1) (a) of Act No. 561/2004 Coll., on Pre-school, Basic, Secondary, Tertiary Professional and Other Education (the Education Act), as amended (hereinafter only “the Education Act”). The enumeration of discriminatory

[12] See Article 26 (2) of the Treaty of the Functioning of the European Union.
[13] See Article 18 (1) of the Treaty of the Functioning of the European Union.
[14] Likewise, European Union regulations, based in particular on Article 19 of the Treaty, which the Anti-discrimination Act incorporates, honour the human right character of the prohibition of discrimination conceived in this way – compare e.g. the statement of Advocate General Maduro (opinion in case C-303/06) that the values underlying the principle of equality stipulated in Article 19 of the Convention include human dignity and personal autonomy.
[15] In comparison to the discriminatory reasons given in the Charter, this list is enumerative and therefore it cannot be potentially extended.

reasons is almost identical to that in the Charter, and therefore it probably represents only a statutory declaration of the prohibition of discrimination expressed in the Charter in the area of school system administration. On the other hand, the provision of Sec. 2 (1) (a) does not represent *lex specialis* to the provisions of the Anti-discrimination Act. This means that in case of a breach of the prohibition of discrimination, claims may not be asserted within the provision of Sec. 10 of the Anti-discrimination Act, provided the prohibition of discrimination is not breached on the grounds of reasons recognized also by the provision of Sec. 2 (3) of the Anti-discrimination Act.

### II. 4. 3 The list of prohibited discriminatory reasons

As stated above, apart from the Anti-discrimination Act, the principle of equal treatment and prohibition of discrimination is also contained in the Charter and the Education Act. In contrast to the Anti-discrimination Act, the list of discriminatory reasons in these regulations is only demonstrative, which means that discrimination can occur on the grounds of reasons other than just the ones explicitly stated. On the other hand, the list of discriminatory reasons in the Charter, or the Education Act, cannot be expanded without limits and in an arbitrary way.

The concept of the prohibition of discrimination contained in the Charter and the concept in the Anti-discrimination Act are directed against an action that differentiates not on the basis of individual characteristics of humans but on the basis of their affiliation to a certain group (i.e. on the basis of generalization and stereotypes). Affiliation to such group can be freely changed only with difficulty – in principle, a person may not change affiliation (race, ethnic group, gender, disability), or affiliation is changeable only with difficulty and with reservation (belief, religion), or affiliation to a group changes but regardless of the person's will (age). Discrimination on the basis of criteria that presuppose individual qualities of a person depending on the person's affiliation to a certain group therefore also represents a violation of dignity.

The above mentioned facts need to be taken into account when considering whether a criterion based on reasons other than those explicitly provided in the Charter (or the Education Act) may be discriminatory within Article 3 (1) of the Charter (or the provision of Sec. 2 (a) of the Education Act).

## *II. 5. The legal status of a kindergarten*

A kindergarten is a school legal entity and thus a separate legal person different from its promoter. A head teacher is the statutory body of this entity and he or she is competent to decide upon matters concerning the school legal entity. [16] Kindergartens are predominantly established by municipalities or a union of municipalities,[17] and the establishment of a kindergarten is decided on by a municipality council; the tasks of a promoter in relation to it are then fulfilled by a

[16] See Sec. 131 (1) of the Education Act.
[17] See Sec. 179 (1) (a) of the Education Act.

municipal board.[18] The establishment of a kindergarten or the provision of pre-school education is a public service.[19] The above mentioned provision needs to be understood in connection with the provision of Sec. 2 (2) and Sec. 35 (2) of Act No. 128/2000 Coll., on Municipalities (the Municipal Order), as amended (hereinafter only "the Municipalities Act"), according to which a municipality attends to the needs of its citizens, which include the satisfaction of the need for training and education.

### II. 5. 1 Admission of children to kindergartens and the legal character of criteria

Since the beginning of the 1990s, the number and the capacity of kindergartens has been considerably lowered. Demand for education in kindergartens started gradually to exceed supply and therefore the number of turned-down applications for admission of a child to a kindergarten has increased.[20] The most frequent solution to the excess of demand over supply is the issuance of so-called criteria for admission of a child to a kindergarten. They are a set of rules determining what perspective, qualities and facts will be taken into account by a head teacher of a kindergarten in admitting children, and their purpose is to set the rules on the basis of which the order of children applying for pre-school education will be determined. By definition, the criteria gain weight in municipalities or regions where demand for places in pre-school education facilities exceeds supply.

According to legislation in force, a decision regarding admission of children to a kindergarten is made solely by a head teacher of a kindergarten. According to the provision of Sec. 165 (2) (b) of the Education Act, head teachers of schools and directors of school facilities established by the state, a region, a municipality or a union of municipalities shall decide upon admission of a child to pre-school education in the area of state administration; the decision areas include, among others, admission of children to pre-school education pursuant to Sec. 34 (3) of the Education Act.[21] From the point of view of the right to equal treatment, within Article 2 (2) of the Charter, head teachers (since they decide upon admission in the area of state administration) are bound in decision-making by the prohibition of discrimination contained directly in the Charter.[22]

A decision regarding an admission of a child to a kindergarten established by the state, a region, a municipality or a union of municipalities is made in administrative proceedings according to the Education Act; in a subsidiary manner, Act No. 500/2004 Coll., the Rules of Administrative Procedure, as amended

[18] See Sec. 84 (2) (d) and Sec. 102 (2) (b) of the Municipal Order.
[19] Sec. 2 (3) of the Education Act.
[20] In 2006, 9,570 unsuccessful applications were recorded in the Czech Republic. In the school year of 2005/2006, the number of children attending kindergartens totalled 282,183, which means that the proportion of unsuccessful applications represents 3.3% of all applications. See Kuchařová, V., Svobodová, K. *Síť zařízení denní péče o děti předškolního věku v ČR.* Prague: VÚPSV, 2006, p. 11, 18. In the school year of 2008/2009 the number of children attending kindergartens totalled 301,620 while the number of unsuccessful applications for that school year reached 19,996, i.e. 6.2%. In the school year of 2009/2010, the number of children attending kindergartens totalled 314,008 while the number of unsuccessful applications for that school year reached 29,632, i.e. 8.6%. In four years, the proportion of unsuccessful applications almost tripled. The full statistics for the individual school years are available at: http://www.uiv.cz/rubrika/98
[21] Further, it decides upon e.g. a trial placement, the length of which may not exceed three months, etc.
[22] See Chapter II. 2.

(hereinafter only "the Rules of Administrative Procedure") is applied. Although the provision of Sec. 183 (2) of the Education Act rules out the application of the Rules of Administrative Procedure in deciding upon admission of children to a kindergarten, according to the legal interpretation of the Ministry of Education, Youth and Sports,[23] the Rules of Administrative Procedure shall continue to be applied – with reference to the provision of Sec. 1 (2) of the Rules of Administrative Procedure[24] and with respect to the fact that the Education Act does not stipulate an alternative procedural method.[25] Even if the Rules of Administrative Procedure were indeed excluded by the mentioned provision of Sec. 183 (2) of the Education Act, some provisions would continue to be applied just the same. For example, according to the provision of Sec. 177 (1) of the Rules of Administrative Procedure, the basic principles of activities of an administrative body contained in the provision of Sec. 2 and Sec. 8 of the Rules of Administrative Procedure shall be always applied; this means also the principle of equality of participants in administrative proceedings and the principle of impartiality of an administrative body, stated in the provision of Sec. 7 (1) of the Rules of Administrative Procedure.

As regards criteria for the admission to a kindergarten, they are not explicitly regulated by the Education Act or any other legal regulation. Therefore, announced criteria only declare in what manner a head teacher will make a decision, and they are subsequently manifested in a future individual administrative act. By announcing criteria, greater transparency is achieved on the one hand; however, at the same time, criteria may discourage parents from trying to register a child in a kindergarten even if they are in violation of law. Therefore, if criteria were, for example, in violation of the Antidiscrimination Act, along with a possible administrative decision the unlawfulness of the criteria alone could be challenged too.

Quite commonly, criteria for admission of children to kindergartens are determined by the bodies of a promoter (i.e. mostly municipalities). As stated above, a head teacher of a kindergarten decides on admission. When making a decision, head teachers are independent and so criteria issued by the bodies of a promoter cannot have a legally binding character; nevertheless, within the provision of Sec. 166 of the Education Act, the promoter of a school appoints and dismisses head teachers and it cannot be ruled out that the character of these criteria could be actually binding. Regardless of the fact whether criteria have the character of a recommendation or are in fact legally binding for the head teacher, only the head teacher is an entity that decides on admission within the Education Act and is responsible for such decision (also with respect to potential discrimination).

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[23] See Právní výklad k postupu při rozhodování ředitele podle § 165 odst. 2 školského zákona (Legal interpretation regarding the procedure in decision-making of head teachers pursuant to Sec. 165 (2) of the Education Act), available at: http://www.msmt.cz/dokumenty/pravni-vyklad-k-postupu-pri-rozhodovani-reditele-podle-165

[24] *"This law (i.e. the Rules of Administrative Procedure) or the individual provisions thereof shall apply unless a different procedure is stipulated by a special law".*

[25] C.f. the provision of Sec. 180 (2) of the Rules of Administrative Procedure: *"In case that pursuant to legal regulations in force administration bodies proceed in a proceeding the purpose of which is not to issue a decision,* ***without the proceeding being regulated by the regulations in a full extent****, they proceed in matters which have to be resolved and which cannot be dealt with according to these regulation according to part four of this law."*

**When deciding upon the admission of a child to a kindergarten, a head teacher performs *state administration* and not *self-administration*. A head teacher decides upon the admission of a child independently of other entities and therefore criteria issued by the bodies of a municipality (a municipality council, a board, a mayor) – i.e. *self-administration bodies* – do not have a legally binding character. With respect to the fact that head teachers are appointed and dismissed by a promoter, in practice the criteria often have a factually binding character.**

**As a result, it is *inadmissible* that municipal bodies should issue criteria for the admission of child to a kindergarten, even if outwardly the criteria have merely the character of a recommendation.**

# III. Assessment of criteria

The following chapter is devoted to the assessment of individual criteria, which are divided into six groups for better clarity; each group is discussed in one subchapter. Before we proceed with the analysis, it needs to be said that the Defender considers appropriate only such criteria that relate directly to a child. A child is the recipient of pre-school education and is an entitled person in the given legal relationship. For that reason, on a general level, acceptable criteria are those that assess the situation of a child and not of its parents.

## *III. 1. The age of a child*

The age of a child is one of the criteria that appear nearly without exception in the kindergarten admission process; simultaneously, it is one of discriminatory reasons according to the provision of Sec. 2 (3) of the Anti-discrimination Act. According to the provision of Sec. 7 (1) of the Anti-discrimination Act, discrimination is not a difference of treatment due to age that can be objectively justified by a legitimate goal provided the means to achieve the goal are proportionate and necessary. The given criterion therefore needs to be considered in this respect. Of course, it needs to be taken into account that the Education Act operates with the age criterion in the provision of Sec. 34 (1); it stipulates, among others, that pre-school education shall be organised for children aged *usually* between three to six years of age. In the rules for admission, the age criterion in principle appears in three forms:

1) Preferential admission of a child during the last year before beginning mandatory school attendance,
2) A higher age of a child as a preferential criterion,
3) Determination of the minimum age of a child.

The first of the above-mentioned criteria is directly based on the provision of Sec. 34 (4) of the Education Act; as a result, a head teacher of a school really has a duty to give priority in the admission process to children in the last year before they begin mandatory school attendance.

The provision of Sec. 34 (4) of the Education Act may be also used when considering the legitimacy of the second given criterion, i.e. giving priority to older children when admitting children to a kindergarten. As a child gets older (and approaches mandatory school attendance), the need for pre-school education rises, which is probably reflected in the given provision of Sec. 34 (4) of the Education Act. As a result, a criterion favouring an older child can be justified by increasing needs of the child as it gets older; e.g. with respect to the social and cultural development of a child, it is desirable that a child should be educated alongside its peers before beginning mandatory school education. In order for the preferential criterion to be really proportionate, then, if a head teacher intends to put it on the list of criteria, it is appropriate to set it in a way so that an older child is given priority in case of equality of points (or equality with respect to other criteria); awarding bonus points, proportionate in relation to other point award criteria, is also possible.

With respect to proportionality of the criterion under consideration, it needs to be emphasised that its limitless application would lead in specific cases to an undesirable effect, when three-year old children, as a result of big excess of demand over supply, would not get in kindergartens at all, which would simultaneously mean the restriction or the exclusion of the right of these children to pre-school education. Then, pre-school education would not actually take place in three grades but only in two grades.[26] Therefore, it would be suitable if giving priority to older children over younger children were applied only within individual grades, i.e. indirectly, for example by reserving a higher number of places in higher grades.

The minimum age of a child for admission to a kindergarten is analogous to the above given criterion. However, this criterion is problematic since it is unconditional – children that have not reached the required age may not be admitted to a kindergarten. Moreover, if the minimum age required for admission, applied arbitrarily and generally, exceeds three years of age,[27] such criterion is not supported by legislation and therefore constitutes direct discrimination due to age in access to education within the provision of Sec. 1 (1) (i), in connection with the provision of Sec. 2 (3) of the Anti-discrimination Act. The minimum age criterion may be based on the mentioned provision of Sec. 34 (1) of the Education Act[28] only on an assumption that the minimum age corresponds to this provision or is lower (than three years).

As follows from the above stated example, differentiation according to the age of a child may be used as one of criteria for admission of children to pre-school education. However, even in such cases they may be applied merely within the boundaries defined above.

**When admitting children to kindergartens, head teachers may apply the age criterion to a certain extent. It is for example generally possible to give priority to an older child in case of equality of points or with respect to other criteria considered.**

**On the other hand, children of a certain age may not be altogether excluded from the possibility to apply for admission to a kindergarten, for example by setting an unconditional minimum age limit for the admission of a child above the limit of three years stipulated in the Education Act. In such case direct discrimination in access to education would occur.**

## *III. 2. The health of a child*

The health of a child is most frequently reflected in the kindergarten admission criteria by the requirement of:

1) Mandatory vaccination,
2) Health condition,
3) A recommendation from a paediatrician or a school advisory facility.

[26] C.f. Sec. 1a (2) of Decree No. 14/2005 Coll.
[27] Stipulated in the mentioned provision of Sec. 34 (1) of the Education Act: *"Pre-school education shall be organised for children aged usually between three to six years of age".*
[28] See footnote No. 26.

The provision of Sec. 34 (5) of the Education Act stipulates that when admitting children to pre-school education, the conditions stipulated by a special legal regulation must be adhered to. This regulation means Act No. 258/2000 Coll., on Protection of Public Health and Amendment to Some Related Acts, as amended. A duty to undergo regular vaccination is stipulated in the provision of Sec. 46 (1) of the Public Health Protection Act. Within the provision of Sec. 50 of the Public Health Protection Act,[29] pre-school facilities may only accept a child who has undergone the required regular vaccinations (or has a certificate that it is immune against infection or that it may not be vaccinated because of a permanent contraindication). If a child is not vaccinated, it follows directly from the law that it may not be admitted to a kindergarten. The given conclusion is not even altered by a recent decision of the Supreme Administrative Court,[30] according to which a breach of the duty to undergo regular vaccination may not be sanctioned by means of administrative punishment. That is, not admitting a child that has not been vaccinated to a kindergarten cannot be regarded as a sanction of administrative criminal law but as a duty arising out of law.

As regards the health condition criterion, it is a criterion formulated very generally and vaguely; the compliance of the criterion with the Anti-discrimination Act will depend in specific cases on the fulfilment of the content of the above mentioned general requirement. If the health condition requirement is interpreted within the provision of Sec. 50 of the Public Health Protection Act,[31] it is the performance of a statutory duty; in that case, the requirement of "health condition" would only need to be specified. An interpretation could be also considered legitimate if it excluded an admission of a child suffering from a serious long-term infectious disease which could threaten other persons coming in contact with this child during pre-school education.[32] However, it is absolutely not possible not to admit a child that is suffering from a common infectious disease (e.g. flu) during the registration on the basis of such criterion.

The criterion of presenting a recommendation from a paediatrician can be put into the same category as "the health condition of a child". Given the fact that it is again a vague criterion with a not entirely clear content, the above interpretation applies to this requirement too.

**The criteria of "the health condition of a child" or "a recommendation from a paediatrician" are very vague in content and therefore it is not appropriate to use them. In the opposite case, their content would have to be specified since they cannot be applied without any limits. For example, it is not allowable not to admit a child to a kindergarten only because it is suffering from a common infectious disease (e.g. flu) during the registration.**

[29] "Nurseries or pre-school facilities may only accept a child who has undergone the required regular vaccinations, has a certificate that it is immune against infection or that it may not be vaccinated because of a permanent contraindication".
[30] A decision of the Supreme Administrative Court of the CR of 21 July 2010, file No. 3 Ads 42/2010.
[31] See above.
[32] In any case, the interpretation adopted and the resulting restriction have to be plausibly supported and justified.

## III. 2. 1 Disability of a child

It is beyond doubt that children with disabilities should not fall under the general criterion of health condition but instead they should be regarded as children with special educational needs according to the provision of Sec. 16 of the Education Act. Children with disabilities should be given education leading to their fullest possible social integration and individual development.[33] Despite that, discrimination of these persons often occurs.[34]

Disability is one of the prohibited discriminatory reasons stated in the provision of Sec. 2 (3) of the Anti-discrimination Act, and the provision of Sec. 5 (6) of the Anti-discrimination Act defines discrimination as *"a physical, sensory, mental or other disability that prevents or might prevent persons from exercising their right to equal treatment in areas stipulated by law, provided it is also a long-term disability that has lasted or is expected to last for at least one year, according to the knowledge of the medical science".*[35] The provision of Sec. 16 (2) of the Education Act regards disability as *"mental, physical, visual or auditory disability, language deficiency, concurrent disability with more defects, autism and development deficiency in learning or behaviour".* In connection with the Education Act, severe disability is defined in the provision of Sec. 1 (4) of Decree No. 73/2005 Coll., on the education of children, pupils and students with special educational needs and exceptionally talented children, pupils and students (hereinafter only the "Decree").

Every child has the same right to education and thus the same right to attend a kindergarten, and so as a general rule, if educational needs of a disabled child can be provided for in a common kindergarten, there is no reason to place the child in any special institution. After all, the provision of Sec. 3 (4) of the Decree stipulates that a pupil with a disability is preferentially educated by the form of individual integration in a common school, if this matches the pupil's needs and capabilities and the conditions of the school.[36] The taxonomy of the provision of Sec. 3 of the Decree, which deals with specific forms of special education of pupils with disabilities, shows that placement in a special school is the least preferred method of special education.

In case of a "common" kindergarten, it is inadmissible to have general exclusion of the possibility to admit a disabled child as one of the criteria. If this were the case, a disabled child would have to rely only on special schools; however, a head teacher of a kindergarten is not an entity competent without anything further to decide upon the placement of a child in a special school, which would however de

[33] See Article 23 (3) of the Convention on the Rights of the Child.
[34] See Verheyde, M. *Article 28: The Right to Education,* in: Alen, A., Vande Lanotte, J., Verhellen, E., Ang, F., Berghmans, E., Verheyde, M. (eds.) *A Commentary on the United Nations Conventions on the Rights of the Child.* Leiden: Martinus Nijhoff Publishers, 2006, p. 44.
[35] This is the so-called social model of disability.
[36] For that matter, the assertion of an inclusive educational system follows from international obligations of the Czech Republic, see Article 24 (2) (a) of the Convention on the Rights of Persons with Disabilities, according to which *"States Parties shall ensure that persons with disabilities are not excluded from the general education system on the basis of disability".* See also Verheyde, M. *Article 28: The Right to Education,* in: Alen, A., Vande Lanotte, J., Verhellen, E., Ang, F., Berghmans, E., Verheyde, M. (eds.) *A Commentary on the United Nations Conventions on the Rights of the Child.* Leiden: Martinus Nijhoff Publishers, 2006, p. 44.

facto occur.[37] If, in specific and justified cases, it is truly impossible to admit a child with a particularly severe disability to a kindergarten, the matter can be dealt with individually in the specific situation. Nevertheless, it is not admissible to set a disability criterion as a general reason for not admitting a child to a kindergarten. Such criterion would constitute direct discrimination in access to education on the grounds of disability within the provision of Sec. (1) (1) (i) and the provision of (2) (3) of the Anti-discrimination Act. Simultaneously, the mentioned prohibition of a general refusal to admit a child with a disability limits the application of the above-mentioned general and vague criteria of "the health condition of a child" or "a recommendation from a paediatrician". If the actual purpose of these criteria were to exclude children with disabilities, it would be again discrimination within the given sense.

In general, inclusive education leads to a removal of discrimination; within its sense, educational systems should not regard persons with disabilities as a problem to be resolved. Instead, they should try to search for positive approaches to children's diversity and approach individual differences as a chance to enrich education for all participants.[38] The assertion of the widest possible inclusion of education should be supported by contributions from the state budget to be used for necessary expenditures relating to teaching disabled children[39] or by a possibility to establish the post of a teacher's assistant.[40] Children with special educational needs are also provided necessary special pedagogical support.[41] As has been already said, this support is preferentially given through educating pupils with disabilities by the form of individual integration in a common school.

**A general refusal to admit a disabled child to a kindergarten represents direct discrimination in access to education due to disability.**

## *III. 3. Relationship of the parents of a child to a public authority body*

This chapter analyses criteria whose common feature is that favouring a child in an admission process is connected with a (usually work) relationship of a parent to a promoter or to another public law entity. The following criteria appear most frequently:

1. A parent is an employee of the public sector, i.e. an employee of a municipality, a municipal authority or a school legal person established by a municipality, or is employed in the education system in general,
2. The placement of a child is in the interest of the municipality.

[37] C.f. the provision of Sec. 9 (1) of the Decree: *"The placement of a pupil in some form of special education pursuant to Sec. 3 is carried out by a head teacher of a school with consent of a legal guardian of a pupil or with consent of a pupil of legal age, on the basis of a recommendation from a school advisory facility that includes a proposal for the degree of supportive measures".*

[38] See *The right to education of persons with disabilities.* Report of the Special rapporteur on the right to education. A/HRC/4/29, paragraph 9.

[39] See Sec. 160 (1) (c) of the Education Act.

[40] See Sec. 16 (9) of the Education Act.

[41] See Sec. 1a (6) of Decree No. 14/2005 Coll., on Pre-school Education and Decree No. 73/2005 Col., on the education of children, pupils and students with special educational needs and exceptionally talented children, pupils and students.

### III. 3. 1 Criteria favouring parents employed in the public sector

Criteria of this type cannot be placed under any of the prohibited discriminatory reasons defined in the provision of Sec. 2 (3) of the Anti-discrimination Act. It is appropriate to discuss whether criteria of the given type can be placed under a discriminatory reason based on the social origin of a child; the prohibition of discrimination due to social origin is stipulated both in the Charter and in the Education Act. Since the application of this reason cannot be found in the practice of Czech or foreign or international courts, the Defender uses a definition stated in General Comment No. 20 of the UN Committee on Economic, Cultural and Social Rights, according to which social origin refers to a person's inherited social status manifested by the membership in a caste and analogous systems of inherited status, property ownership or affiliation to a particular social group (e.g. homeless persons).[42] Therefore, employment or other legal relationship of a parent of a child to a municipality or, more generally, to public entities cannot be included under a discriminatory reason based on social origin since it is not an inherited status or other long-lasting status de facto independent of a person's will. Besides that, persons employed by a relevant public law entity certainly do not form a homogenous group or a social class. As a result, it cannot be claimed that for example school or municipal authority employees represent a distinctive social group and that membership in this group is hereditary and determining for the status of the mentioned persons in the society. Employment relationship with a public law entity is not such a major quality to be the basis for safe differentiation of one person from another.

Therefore, giving priority to children of teachers, employees of municipalities etc. does not represent the application of a discriminatory criterion; despite that, such action is in violation of the provision of Sec. 7 (1) of the Rules of Administrative Procedure, which stipulates the principle of procedural equality and impartiality of an administrative body. It needs to be emphasised again that participation in pre-school education is the right of a child and not of its parent. The right of every child to education has the same content and scope. There is no logical reason for a conclusion that children of public sector employees should have a stronger right to pre-school education than their peers whose parents are employed in private companies or are self-employed or unemployed. Access to education is the right of every child,[43] and therefore it may not be derived from the type of employment of its parents.

Criteria of this type are probably determined with respect to the factual, secondary purpose of pre-school education; i.e. a form of help provided to parents. However, even from this point of view it is not justifiable that criteria should favour only children of parents employed in the public sector.

In this connection, there is a question whether it is appropriate for a public law entity during the performance of public administration tasks to dispose of a certain

[42] See Committee on Economic, Cultural and Social Rights: General Comment No. 20, p. 7, 8, 11, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/434/05/PDF/G0943405.pdf?OpenElement

[43] According to the provision of Sec. 21 (1) (a) of the Education Act, pupils shall have the right to education and school services.

public good as an asset serving to remunerate or support a narrowly defined group of persons. Pursuant to Article 2 (2) of the Charter of Fundamental Rights and Freedoms, the power of the state may be asserted only within the limits set by law.[44] No regulation allows favouring some groups of employees on the basis of administrative discretion; on the contrary, criteria like these may be in violation of the principle of impartiality of an administrative body within the provision of Sec. 7 (1) of the Rules of Administrative Procedure. As result, no other conclusion can be reached but that the applied preferential treatment is unjustified.[45] As a final consequence of applying criteria of this type, for example, a child of a mother working as a cleaner in a primary school will be given priority over a child of a mother employed at the same position in a private company. There is no justifiable reason for such action. Public assets should be received by everyone without unjustified differentiation.

### III. 3. 2 Favouring a child that is recommended by a municipality or whose admission is in the interest of a municipality

Another type of the above-mentioned criteria favours children whose admission is in the interest of a municipality. This category in principle includes criteria favouring children whose admission is preferred on the basis of a written recommendation issued by a municipality. Such criteria are again related to the parents of a child applying for admission. The interpretation and the application of the given criteria lead to giving advantage to parents who "deserve it" according to a head teacher of a kindergarten or a promoter.

The right to be provided pre-school education is the right and the interest of a child and not of a municipality or other entity; in other words, it is the interest of a child that within the provision of Sec. 35 (2) of the Municipal Act a municipality provides conditions for the assertion of the right to education; however, it cannot be said that pre-school education of a specific child should be in the interest of a municipality. The interest of a municipality should be the creation of a state when every child – seeking pre-school education – will be given an opportunity to complete this level of education.

Moreover, the wording of the given criterion is very vague and therefore its application is non-transparent and arbitrary. It is also based on a total misconception about the essence and the recipient of the right to education. One could imagine a situation in which the application of this criterion would be even discriminatory. This would apply to cases when on the basis of the criterion under scrutiny e.g. only children of certain nationality would be generally given priority, etc. Although the criterion is not discriminatory on a general level, again there is a question whether equality and impartial decision-making are not breached within the provision of Sec. 7 (1) of the Rules of Administrative Procedure; such vague provision may in practice support favouritism (in case of providing "sponsor gifts" etc.) or even corrupt behaviour.

[44] Similarly in Article 2 (3) of the Constitution of the Czech Republic.

[45] The conclusion was also reached by the Supreme Administrative Court in a judgment ref. No. 7030/31, which states that senior officials of state administration and officials are not entitled to grant civil servants privileges not stipulated in law. The case in question related to a slightly different matter but the unacceptability to grant privileges beyond the scope of law is explicitly stated.

The same conclusion applies to a recommendation issued by a municipality. It is a non-transparent tool, which may favour parents of a child on the grounds of services provided for the municipality, etc. In addition, a criterion like this one is to a certain extent contested by the provision of Sec. 165 (2) (b) of the Education Act, which clearly stipulates that a decision upon an admission of a child to pre-school education is made by head teachers. No other entity is entitled to interfere in the decision-making.[46] In this connection, it is therefore not important whether a head teacher treats the municipality's recommendation as a non-binding document or as a binding basis for a decision. In any case, the existence of a recommendation represents an unlawful interference of a third person in the decision-making of a head teacher.

**When admitting children to kindergartens, head teachers must not give priority to children on the basis of social or work status of their parents. It is inadmissible for a state administration body to dispose of a public asset as a means of rewarding or favouring (arbitrarily) certain groups of persons or occupations whose benefit to the society is supposedly higher according to the head teacher than in case of other groups or occupations. Although it is not discrimination on a general level, such criteria are in violation of the principle of equality of participants in proceedings and the principle of impartiality of an administrative body within the provision of Sec. 7 (1) of the Rules of Administrative Procedure.**

## *III. 4. Employment (gainful activity) of a parent*

Giving priority to children whose parents are engaged in a gainful activity is problematic in principle when deciding upon admission to a kindergarten; this criterion disregards the educational function of kindergartens and assigns them primarily the function of child-care service provided to children's parents (legal guardians). As shown above, the Defender uses an assumption that kindergartens fundamentally fulfil the educational function; regarding access to education, however, children are divided on the basis of this criterion according to facts not directly related to them.

Employment of parents in itself is not a discriminatory reason within the provision of Sec. 2 (3) of the Anti-discrimination Act, and thus the use of the mentioned criterion does not represent direct discrimination in access to education. In theory, the criterion could be included in the demonstrative list given in the Education Act; nevertheless, it is not possible to include the employment criterion under prohibited reasons such as "social origin" or "property". The Defender works with an

[46] Pursuant to legislation in force, the decision of a head teacher can be influenced by the statement of a third person only in two cases. A head teacher should base his or her decision on the findings of a school advisory facility regarding special educational needs of a child and also on the recommendation of a doctor within the scope mentioned in the foregoing text.

assumption that the characteristics of the employment criterion do not correspond to the general characteristics of discriminatory reasons as described above.[47]

Although the facts mentioned above show that the required criterion is not discriminatory, it is not ruled out that this requirement contains elements of arbitrariness. It could be objected that the criterion follows the interest of a child since a parent who is not engaged in a gainful activity can himself of herself provide education to a certain extent. However, this argument does hold completely since pre-school education fulfils a whole range of functions, which a parent cannot fully replace; for example, it can contribute a great deal to the socialization of a child, etc.[48] That pre-school education also provides elements of education which a family cannot completely replace is also confirmed by the fact that children in the last year before beginning mandatory school attendance are given priority during admission to kindergartens. It cannot be completely ruled out that in a specific case it is possible to give priority or give preference to a child whose parents are employed because its individual need of education may be indeed higher. However, this criterion may not be unconditional or generalized; a decision of a head teacher of a kindergarten based on this criterion could be in violation of the provision of Article 33 (1) of the Charter since it does not take into account individual needs of a child with respect to its right to education but assesses a fact that a child may influence only with difficulty. An individual need of a child for pre-school education can be, without anything further, hardly influenced merely by the fact whether a parent is employed or not.[49]

Beyond the matters mentioned above, it needs to be said that even if we admit that kindergartens in fact perform a secondary function of a child-care service for parents, such criterion does not have a completely rational basis. When searching for employment, an unemployed parent of a child must adapt to a situation when the child is either in a kindergarten or not, i.e. whether the parent has to look after it. In that case, the parent would get in a vicious circle since the child will not be admitted to a kindergarten due to its parent's being unemployed; on the other hand, due to the parent's care of the child, his or her situation in searching for employment deteriorates.

[47] Although the affiliation of a person to a group of unemployed persons can be often actually changed only with much difficulty, the difficulty to freely change affiliation to this group is not as fundamental as in case of traditional discriminatory reasons (race, ethnicity, gender, age etc.) – see Chapter II. 4. 3

[48] Compare e.g. Úkoly předškolního vzdělávání In. Rámcový vzdělávací program pro předškolní vzdělávání. The Research Institute of Education, Prague: 2004, p. 5.

[49] It needs to be added that if the employment criterion in fact excludes a child whose parent is on a maternity/parental leave within the provision of Sec. 197 and subseq. of Act No. 262/2006 Coll., the Labour Code, as amended, discrimination due to gender occurs since the situation is very similar to the case regarding a criterion analysed in Chapter III. 6. 1.

**A requirement that parents have to be employed cannot be a legitimate criterion when deciding upon admission to a kindergarten. A child and not its parent is the recipient of pre-school education. The criterion does not consider individual needs of a child; quite the contrary, it restricts its access to education on the basis of facts that not only are not related to education but cannot be influenced by the child in any way. A child is therefore "sanctioned" for potential unemployment of its parents. Although this criterion is not discriminatory, it could comprise elements of arbitrariness and thus be in violation of the provision of Article 33 (1) of the Charter.**

## *III. 5. Permanent residence*

The criterion of permanent residence or permanent address of a child is a frequent distinctive criterion, and priority is given to children with a permanent address in the municipality where the kindergarten is located. Sometimes, even both parents are required to have a permanent address in the municipality. The Defender assumes that a permanent address, if such a term is used in the criteria, means a place of permanent residence within the provision of Sec. 10 of Act No. 133/2000 Coll., on Register of Population and Birth Certificate Numbers and on Amendments to Certain Acts, as amended (hereinafter only "the Population Registration Act"). According to this law, a place of permanent residence means an address of residence of a citizen in the Czech Republic,[50] and the registration character of permanent residence is highlighted by the fact that no rights to property or to the owner of the property arise just from registering permanent residence by a citizen.[51] However, the requirement of permanent residence is not discriminatory without anything further[52] since the list of discriminatory reasons given in the provision of Sec. 2 (3) of the Anti-discrimination Act does not include permanent residence as a discriminatory reason and it cannot be a discriminatory reason pursuant to the Charter or the Education Act either; it does not match the characteristics of discriminatory reasons contained in these regulations.[53] Despite that, the criterion is not entirely problem-free, also from the point of view of discrimination.

The requirement of permanent residence of a child in a municipality may be legitimate to a certain extent. A municipality (or a union of municipalities) is most frequently the promoter of kindergartens, and therefore it fulfils the basic tasks of local government within the provision of Sec. 35 (2) of the Municipal Act, according to which a municipality with separate powers attends to the fostering of conditions to the satisfaction of the needs of its citizens in its territorial district, in particular – among others – the need for education.[54] However, a kindergarten is an entity different from

[50] As regards children, within the provision of Sec. 10 (4) of the Population Registration Act, the place of permanent residence of a mother shall be the place of permanent residence of a citizen at the time of his or her birth, unless agreed otherwise by parents.

[51] Permanent residence is not just registration data, however, and certain rights may be connected to it, albeit indirectly; permanent residence is for example a prerequisite for citizenship in a municipality – c.f. for example the provision of Sec. 16 (1) of Act No. 128/2000 Coll., on Municipalities (the Municipal Order), as amended.

[52] For an exception, see Chapter III. 4. 1.

[53] See Chapter II. 4. 3.

[54] After all, the Education Act also reflects the duty of a municipality to ensure that the need for education of children who have permanent residence in the municipality is satisfied. E.g. according to the provision of Sec. 34 they have a duty to ensure that a child that cannot be admitted to a kindergarten in the last year prior to its

its promoter and when deciding upon an admission of a child, a head teacher performs state administration and not self-administration, and therefore is not bound by the tasks of self-administration. On the other hand, the task of state administration is not to hamper the activity of self-government or the fulfilment of its tasks and therefore, the criterion favouring permanent residence of a child in the territory of a municipality seems to be fine. However, if the requirement of permanent residence were an unconditional criterion (i.e. no child without permanent residence in the municipality may be admitted under any circumstances), the legitimacy of such requirement may be doubted on reasonable grounds since, as has been already mentioned, a head teacher acts from the position of state administration and the legitimacy of an unconditional criterion cannot be based on the stated tasks of self-administration, regulated by the provision of Sec. 35 (2) of the Municipal Act.

As regards the requirement of permanent residence of parents (legal guardians), it needs to be borne in mind that from the point of view of the provision of Sec. 35 (2) of the Municipal Act, a municipality ensures, within the tasks of self-administration, the satisfaction of the need for education of children and not of parents (see above). If a head teacher, when deciding upon an admission of a child (i.e. during performance of state administration), requires the parent of the child to have permanent residence in the municipality, one can no longer speak of taking into account the tasks of self-administration; on the contrary, in specific cases the categorization of citizens of a municipality (children) according to permanent residence of their parents might be in fact taking place. The legitimacy of such categorization is very questionable and it could be a criterion directly in violation of the provision of Article 33 of the Charter.[55]

**If the requirement of permanent residence is not an unconditional criterion for not admitting a child to a kindergarten, it can be regarded as a legitimate requirement. The requirement is not legitimate if one of the criteria for admitting a child to a kindergarten is permanent residence of one or both parents (legal guardians) in the municipality since it is not a criterion relating to a child as the recipient of the right to education.**

### III. 5. 1 A criterion of permanent residence as discrimination due to state citizenship

As stated above, the Defender assumes that the criterion of permanent address means permanent residence of citizens within the provision of Sec. 10 of the Population Registration Act. Foreigners, including EU citizens, reside in the territory of the Czech Republic on the basis of Act No. 326/1999 Coll., on the Residence of

mandatory school attendance due to reasons of capacity will be admitted to another kindergarten. It needs to be emphasized, however, that this is a duty of a municipality and not of a kindergarten.

[55] Possibly also of the provision of Article 4 (4) of the Charter, which in principle limits the administrative discretion of a head teacher: *"When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted".*

Aliens in the Territory of the Czech Republic and on Amendments to Some Acts, as amended (hereinafter only "the Aliens Residence Act"), and their "residence status" is different as a result; a foreigner merely reports the place of his or her residence in the territory of the Czech Republic within the provision of Sec. 93 and subseq. of the Aliens Residence Act. The criterion of permanent residence therefore favours citizens of the Czech Republic and if it is exclusive, it can altogether prevent access of children of foreigners, including EU citizens, to education in kindergartens. As opposed to the Anti-discrimination Act, the prohibition of discrimination due to state citizenship is stipulated in the primary law of the European Union; specifically the provision of Article 18 of the Treaty on the Functioning of the European Union (hereinafter only "the Treaty") prohibits discrimination on grounds of state citizenship within the scope of application of the Treaties.[56]

The criterion of permanent residence could be as a discriminatory criterion considered in the matter under scrutiny from the perspective of the mentioned provision of Article 18 of the Treaty, and in a subsidiary manner also from the perspective of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens to move freely (hereinafter only "the Directive"). Article 24 of the Directive states that *"subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty".* It is clear from the quoted provision of the Directive that the principle of equality of EU citizens shall apply if the conditions and criteria for residence set by the Directive and national regulations incorporating them are met.

The EU regulation outlined above is reflected at a statutory level, among others also in the provision of Sec. 20 (1) of the Education Act, which stipulates that citizens of the European Union and their family members shall have access to education and school services pursuant to the Education Act under the same conditions. According to the provision of Sec. 20 (2) (c) of the Education Act, foreigners from third countries who have the right to reside in the territory of the Czech Republic for a period exceeding 90 days (long-term residents), or who reside in the territory of the Czech Republic on the basis of other permits shall also have access to pre-school education under the same conditions as EU citizens,[57] provided they are persons entitled to reside in the territory of the Czech Republic.

If the criterion of permanent residence really pursues giving priority to children – citizens of a municipality in which the kindergarten is located – such preferential treatment should also relate to children of EU citizens who reside in the territory of the Czech Republic and have reported the place of their residence[58] in the territory of the relevant municipality, and also to foreigners from third countries who are staying in the territory of the Czech Republic for a period exceeding 90 days, or on the basis

[56] Furthermore, the prohibition of discrimination in access to education due to state citizenship follows from the provision of Article 14 and the provision of Article 21 (2) of the Charter of Fundamental Rights of the European Union.

[57] This means persons residing in the territory of the Czech Republic for the purpose of research, asylum seekers, persons enjoying subsidiary protection, applicants for international protection or persons enjoying temporary protection.

[58] Pursuant to Sec. 93 (2) and in connection with Sec. 87n (2), or Sec. 87r (2) of the Aliens Residence Act.

of other permits, provided they have reported the place of their residence in the territory of the municipality.

**The requirement of permanent residence in the territory of a municipality may put foreigners at disadvantage (including EU citizens) in access to pre-school education; hence a breach of the provision of Sec. 20 of the Education Act may occur and it could also be a case of discrimination due to state citizenship within the provision of Article 18 of the Treaty on the Functioning of the European Union and Article 14 in connection with Article 21 (2) of the Charter of Fundamental Rights of the European Union.**

## *III. 6. Criteria related to a child's sibling*

Problematic criteria may include those that look upon a child according to the situation of its sibling, and they may have various forms. For example, there are conditions which de facto disadvantage a child whose younger sibling is in the care of a mother on a maternity leave or, on the other hand, conditions that favour a sibling of an already admitted child.

### III. 6. 1 Disadvantaging children whose parents are on a maternity (parental) leave with another child

As far as the first criterion is concerned, it appears in several variations: in order for a child to be admitted, a maternity leave of its parent with a younger sibling can be directly excluded, or much fewer points may be awarded than in case of a parent going to work, or a maternity leave is a disadvantaging criterion with respect to a place on a list. The essence of this criterion is probably based on an assumption that a mother on a maternity leave taking care of a little child may as well take care of a child seeking admission to a kindergarten. In fact, a child is sanctioned for another maternity of its mother. It is not possible to assess an individual need of a child for pre-school education just by taking into account whether one of its parents stays home or not and subsequently, on the basis of this perspective, make generalizations about the need of the child. Furthermore, in specific cases, a mother of a child that she is taking care of during her maternity (parental) leave may have actually much less time for its older sibling seeking admission to a kindergarten since she has to give all her care to the younger child. In a specific case, the individual need of a child to be admitted to a kindergarten could be in fact much higher.

According to the provision of Sec. 2 (4) of the Anti-discrimination Act, discrimination due to pregnancy, maternity or paternity is regarded as discrimination due to gender (which is a prohibited discriminatory reason according to the Anti-discrimination Act). If the aim of kindergartens were to provide child-care services to parents, it would be clearly a case of discrimination of parents in access to services on the grounds of gender. However, it needs to be emphasized again that kindergartens do not provide child-care services and that their task is to provide pre-school education to children. A child with hampered (restricted) access to education due to maternity/paternity of its parents can be a possible victim of discrimination,

although a child alone of course is not the bearer of the mentioned discrimination attributes (maternity or paternity).

The Anti-discrimination Act needs to be interpreted in accordance with the Charter, international treaties and European Union regulations which it incorporates, and therefore also in accordance with judgments of the Court of Justice of the European Union (hereinafter only "the Court of Justice") interpreting these regulations; in this respect, it is possible to rely on the judgment of the Court of Justice in the *Coleman* case.[59] In the given case, an employer forced an employee to leave employment due to a disability of her son. Although the complainant was not the bearer of the discrimination attribute herself, the Court of Justice deduced that *"the prohibition of direct discrimination … is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination … "*[60]

Of course, the mentioned situation is not completely analogous to concrete situations that may occur as a consequence of a criterion for admission of children to a kindergarten.[61] Despite that, potential common features cannot be disregarded; in both cases, the potential victim of discrimination is not the bearer of the discrimination attribute, yet the less favourable treatment is due to a discriminatory reason. The relationship between the bearer of the discrimination attribute and the victim is in both cases a relationship between a parent (legal guardian) and a minor. This means, among others, that the connection of the child with the discriminatory reason is even closer since a close family relationship between a parent and a child is in essence constant and therefore it is not possible to "get clear" of a discrimination attribute freely and easily".[62]

The above mentioned facts mean that a criterion disadvantaging a child whose parent is on a maternity or a parental leave with another child, or directly excluding admission of such child is in violation of the principle of equal treatment and the prohibition of discrimination; it is direct discrimination in access to employment due to gender (within the sense of maternity or paternity).

[59] A judgment of the Court of Justice in case C-303/06, *S. Coleman v. Attridge Law and Steve Law*
[60] See paragraph No. 56 of the given judgment.
[61] Firstly, the situation described in the judgment concerned employment while the criterion set by kindergartens can be considered from the point of view of access to education, and secondly, the discriminatory reason in question was disability and not gender.
[62] The stated conclusion is also backed by Article 2 of the Convention on the Rights of the Child, according to which States Parties undertake to respect and ensure the rights set forth in the Convention to each child without discrimination based on race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or ***other status of the child or of its parents or legal guardians***.

**When admitting children to a kindergarten, head teachers should not take into consideration to the prejudice of a child whether either of its parents is on a maternity/parental leave with another child. Owing to this reason, it is not adequate to differentiate in terms of awarded points between a parent on a maternity/parental leave and an employed parent.**

## III. 6. 2 Preferential admission of a sibling of an already admitted child

A criterion according to which priority is given (or more points awarded) to a child whose sibling has been already admitted to the kindergarten is explained (if it is explained) most frequently as an attempt to support cohesiveness among siblings. Although this criterion is connected with the status of a sibling of the child seeking admission, it takes into consideration especially the child's specific situation because in most cases the presence of a sibling will probably have a positive impact on the admitted child. Therefore, it is generally rational to take this situation into consideration when admitting a child to a kindergarten. However, there are certainly limits to this; preferential admission of a sibling of an already admitted child can be considered legitimate in case of equality of points. Likewise, it is possible to give preferential treatment to a child by awarding points for this criterion; however the points awarded should not be significantly disproportionate to other assessed criteria.

As regards a potential discriminatory character of the criterion, it cannot be included under any of the discriminatory reasons stated in the Anti-discrimination Act or the Education Act. Although it might seem at first glance that it could be a specific form of discrimination due to maternity/paternity (namely, disadvantaging a child due to the fact that its parents have a lower number of children), the institute of protection of maternity/paternity and its inclusion under a discriminatory reason based on gender really pursues the protection of existing parenthood only.[63]

[63] Maternity relates to a discriminatory reason based on pregnancy, which is also included under gender since in case of disadvantaged pregnant women it was difficult in the past to find a so-called "comparator" (i.e. a person in a comparable situation), necessary in order to establish discrimination. The prohibition of discrimination on the grounds of maternity protects biological motherhood (i.e. pregnancy, a period shortly after giving birth and breast-feeding) and the sociological aspects of motherhood (i.e. consequences of work related to child care). C.f. BOUČKOVÁ, P., HAVELKOVÁ, B., KOLDINSKÁ, K., KÜHN, Z. KÜHNOVÁ, E., WHELANOVÁ, M. Antidiskriminační zákon – 1st edition. Prague: C.H.BECK, 2010. p. 143. Therefore it cannot be inferred that the antidiscrimination law would protect the "absence of motherhood" in the same manner.

# SAMPLE CRITERIA FOR ADMITTING CHILDREN TO PRE-SCHOOL EDUCATION

The head teacher of a kindergarten XY has set the following criteria, which will be used, on the basis of the provision of Sec. 165 (2) (b) of Act No. 561/2004 Coll., on Pre-school, Basic, Secondary, Tertiary Professional and Other Education (the Education Act), as amended, to decide upon an admission of a child to pre-school education in the kindergarten in cases when the number of applications for admission to pre-school education in the given year exceeds the specified capacity of the maximum number of children for the kindergarten.

**I.**

Pre-school education is provided to children from the age of 3 years until the beginning of mandatory school attendance.

**II.**

When admitting children to the kindergarten, the head teacher bases his or her decision on criteria stated in the following table. Children with a higher number of total points will be given priority.

| **Criterion** | | **Points awarded** |
|---|---|---|
| Application filed (repeated applications) | 1 year ago | 1 |
| | 2 years ago | 2 |
| | 3 years ago | 3 |
| Permanent residence of the child* | Permanent residence in the municipality | 3 |
| | Permanent residence in contractual municipalities | 1 |
| Age of the child** | 4 years of age | 2 |
| | 5 years of age | 3 |
| Individual situation of the child | Kindergarten is attended by a sibling of the child | 2 |
| | The child is applying for a full-day programme | 1 |
| | A child with specific educational needs | 3 |

* Giving preference also relates to children of European Union citizens or citizens of third countries who have reported their residence in the territory of the municipality. Citizens of third countries are obliged to present a permit to reside in the Czech Republic within the provision of Sec. 20 (2) (d) of the Education Act.

** Regardless of the points awarded, within the provision of Sec. 34 (4) of the Education Act, priority will be given to a child in the last year before beginning mandatory school attendance.

**III.**

In case of equality of points (meeting the same criteria), a gainful activity of the child's parent may be taken into consideration in isolated and specific cases if another child's parent who is not engaged in a gainful activity is able to provide education and care to the child in the necessary extent by himself or herself. However, a gainful activity will be disregarded if the child's parent not engaged in a gainful activity is on a maternity/paternity leave with another child.

JUDr. Pavel V a r v a ř o v s k ý
Public Defender of Rights