



## Recommendations of the Public Defender of Rights on equal access to preschool education

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### A. Foreword

The first recommendations on equal access to preschool education were issued in 2010 by then Public Defender of Rights, JUDr. Pavel Varvařovský. They were his response to complaints raised by parents whose children had not been admitted to a kindergarten. Kindergarten headteachers were making decisions based on criteria the parents considered discriminatory. Consequently, the aim of the recommendations was to assess the most commonly applied criteria in terms of their compliance with the law. In the following years, the number of complaints concerning non-admission of children due to discriminatory criteria fell significantly. Headteachers of kindergartens, as well as regional authorities as the appellate bodies and the Czech Schools Inspectorate, accepted the recommendations and applied their principles. The courts have only dealt with the nature of the criteria rarely, as far as I am aware.<sup>1</sup>

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<sup>1</sup> The Supreme Administrative Court commented on the issue of criteria in its judgment of 2 May 2012, Ref. No. 1 As 35/2012-40, but it only addressed the matter in general terms, noting that admission of children to kindergartens had to be based on pre-determined criteria. The Regional Court in Brno dealt with the matter in more detail in its decision of 22 June 2017, Ref. No. 30 A 106/2015-63, where it reviewed the criterion of age for admission of a child to a kindergarten. In the reasoning of its decision, the court also referred to the recommendations of the Public Defender of Rights on equal access to preschool education.



In 2016, a major amendment of the Schools Act was passed,<sup>2</sup> introducing mandatory preschool education and the right to preferential admission based on age. Just as the other types of education, preschool education, too, must also be governed by the principles of equality and non-discrimination.<sup>3</sup> For this reason, I have decided to update the recommendations to reflect the current legislation in the area. I am authorised to do so under the Public Defender of Rights Act.<sup>4</sup>

My recommendations are intended primarily for headteachers in kindergartens administered by municipalities or associations of municipalities, regional authorities (which hear appeals against decisions not to admit a child), the founders, the Czech Schools Inspectorate, parents and other legal representatives of children, as well as the general public.

Some matters discussed herein (e.g. the catchment principle) do not apply to kindergartens founded by regional authorities, the State, churches or private persons. The obligation not to discriminate, however, applies to all preschool institutions regardless of their founder, and my recommendations thus also apply to these kindergartens, in the relevant scope.

On the other hand, the recommendations do not apply to admission of children into children's groups and micro-crèches as these institutions serve other than educational functions.<sup>5</sup>

These recommendations concern children with and without mandatory preschool education. When considering equal access to education, it is necessary to take into account in which of these groups the child belongs.

## **B. Glossary of terms**

**School district** – municipal area, a part of a municipality, or multiple municipalities that is/are defined by the municipality by means of a generally binding ordinance; often called a “catchment area”.

**Catchment kindergarten** – a kindergarten founded by a municipality or an association of municipalities that is based within the school district in which a child resides, or in which the relevant school facility for the performance of institutional education, protective education or preventive educational care is situated.

**Non-catchment kindergarten** – a kindergarten situated in a school district where the relevant child does not reside.

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2 Act No. 178/2016 Coll., amending the Schools Act.

3 The general prohibition of discrimination in access to education and its provision is included in the Anti-Discrimination Act. The principle of equal access to education free of any form of discrimination is further stated in Section 2 (1)(a) of the Schools Act.

4 Section 21b (c) of the Public Defender of Rights Act.

5 The primary purpose of children's groups (introduced by the Children's Group Act) and micro-crèches (a project supported by the Ministry of Labour and Social Affairs) is to facilitate work-life balance of parents with small children.



**Catchment child** – a child with permanent address within the school district of the kindergarten which the child attends or with which it files an application for admission.

**Non-catchment child** – a child with permanent address outside the school district of the kindergarten which the child attends or with which it files an application for admission.

**Preschool-age child** – a child who has reached 5 years of age; the duty to attend preschool education applies to the child from the start of the school year following the day when the child reaches the preschool age, until the start of compulsory school education.

**Child with the right to preferential admission** – a catchment child to be preferentially admitted to a municipal kindergarten based on age; in 2017, these were children who reached at least 4 years of age prior to the start of the school year; from 2018 onward, priority admission applies to children reaching at least 3 years of age; and 2 years of age from 2020 onward. Children meeting the above criteria have the right to priority admission up to the maximum number of children indicated in the schools register.

**Direct discrimination** – conduct, including omission, where one person is treated less favourably than another person is, has been or would be treated in a comparable situation; the Anti-Discrimination Act prohibits discrimination on the grounds of race, ethnic origin, nationality (*národnost*), sex, sexual orientation, age, disability, religion, belief or worldview; pursuant to the Schools Act, discrimination on the grounds of language, property, social background or other personal status is also prohibited.

**Indirect discrimination** – conduct or an omission where a person is put in a disadvantageous position *vis-à-vis* other persons on the basis of an apparently neutral provision, criterion or practice; in the sense of the Anti-Discrimination Act, such conduct occurs on the same grounds as direct discrimination; indirect discrimination is not at play if the apparently neutral provision, criterion or practice is objectively justified by pursuing a legitimate objective and the means of achieving it are proportionate and necessary.

### C. Summary

#### Recommendations for kindergarten headteachers

- Publish the admission criteria sufficiently in advance – this increases transparency. The criteria should be published both on the kindergarten’s website and its notice board accessible to the public.<sup>6</sup>
- A decision not to admit a child must include proper reasoning. A mere enunciation that the child is not admitted due to capacity reasons or insufficient number of points is not enough.

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<sup>6</sup> This will allow families who do not have access to the Internet or do not commonly use it to find out what the criteria are.



- All children must receive the specified types of regular vaccinations in accordance with the Public Health Act. This mandatory condition for admission to a kindergarten does not apply in the case of preschool-age children.
- If your kindergarten lacks sufficient capacity, contact your founder.
- Catchment preschool-age children must be admitted preferentially. Next, admit children with the right to preferential admission, i.e. catchment children who reached 3 years of age prior to the start of the school year (from 2018); or catchment children who reached 2 years of age prior to the start of the school year (from 2020).
- Under certain circumstances described later in this document, you can then give preferential treatment to children on grounds of age, presence of siblings in the kindergarten, parents' employment status, the child's social situation and adherence to alternative teaching methods.
- Inappropriate criteria include: the order in which the child's application was received, distance of the child's home or place of permanent residence from the kindergarten, and the child's health. You should avoid using these criteria.

#### **Recommendations for parents and other legal representatives of children**

- Preschool education is mandatory for children reaching 5 years of age prior to the start of the school year. Sign them up for the enrolment procedure, which takes place from 2 to 16 May (you will learn the specific date and time from the kindergarten<sup>7</sup>).
- In justified cases<sup>8</sup>, you may educate your child individually (e.g. at home or in a forest kindergarten not registered in the schools register). If that is the case, your child will only go to kindergarten occasionally for the purpose of checking his or her educational progress under the conditions specified by the school regulations. You are required to make sure your child attends these regular checks. According to the interpretation of the Ministry of Education, however, it is not possible to combine individualised education with attendance in a kindergarten registered in the schools register.
- Register your child for permanent residence at the place where you actually live. This is the only way to ensure your child will have the right to preferential admission to the kindergarten in whose catchment area you live. Registration for permanent residence does not require consent of the building's owner; you only need to document your right to use the premises (e.g. by presenting a lease).
- If the kindergarten you selected lacks capacity to admit all catchment children, its headteacher must preferentially admit preschool-age children or children whose right to preferential admission is stronger than your child's. Among children who have not

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<sup>7</sup> The headteacher shall publish this information in a manner that is usual in the given location, e.g. on the official notice board or in local press. The criteria are also usually published on the kindergarten's website.

<sup>8</sup> Although the Schools Act says that individualised education is only possible in justified cases, it does not make it conditional on any kind of permission or approval; the child's legal representative only needs to properly notify that the child will be educated individually pursuant to the Schools Act.



yet reached the age limit for preferential admission, older children may get priority over younger ones.

- Other forms of differentiation between children are also permissible if they are based on reasonable criteria; you are also allowed to apply for your child's admission to a different kindergarten where your child also has the right to preferential admission.<sup>9</sup>
- You may lodge a written appeal against the decision not to admit your child. The party to the proceedings, i.e. the appellant, is the child – you only represent the child as his or her legal representative.
- If you are dissatisfied with the educational policy of your municipality, rally other dissatisfied parents and contact the founder of the kindergarten or the municipal assembly (the municipality is usually the founder).

#### D. Preschool education

The objective of preschool education under the Schools Act is to promote the development of the preschool child's personality, contribute to his or her healthy emotional, mental and physical development and acquisition of basic rules of behaviour, values and interpersonal skills.<sup>10</sup> It further aims to create essential conditions for further education, reduce differences in the children's development prior to commencement of primary education and to provide specialised educational care to children with special needs.<sup>11</sup>

It is thus clear that **the purpose of kindergartens is to provide children with education that forms an integral part of the entire education system; in other words, the propose is not merely to serve as daycare facilities.**<sup>12</sup> Although kindergartens enable parents with small children to better combine family life with a career, this is not the main purpose of preschool education under the law.<sup>13</sup>

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9 In some municipalities, the catchment areas cover the entire municipality or municipal district. Consequently, if there are multiple catchment kindergartens within the municipality or municipal district, the child has a right to preferential admission to all of these kindergartens. However, I should note that forming multiple-school catchment areas is discouraged by the Ministry of the Interior, which believes that each school (kindergarten) should have its own separate catchment area. For more details, see the Methodological recommendation for local and regional governments. Defining school districts for catchment kindergartens and primary schools. Relevant under the legal situation as of 1 January 2017. Ministry of the Interior, Department of Public Administration, Supervision and Inspection. Prague. 2017. Available at: <http://www.mvcr.cz/clanek/metodicke-materialy-k-zakonnym-zmocnenim.aspx?q=Y2hudW09Mg%3d%3d>.

10 Section 33 of the Schools Act.

11 A child with special educational needs requires supportive measures to develop his or her educational potential. Supportive measures consist in reasonable adjustments in view of the child's health, cultural environment or other living conditions (Section 16 (1) of the Schools Act).

12 KATZOVÁ, Pavla. Školský zákon: komentář (*Schools Act: Commentary*). In: ASPI version 2015 [legal information system]. © 2000 – 2015 Wolters Kluwer ČR, a. s. [retrieved on: 2 April 2017]. ISBN 9788073574123 ASPI ID: KO561\_2004CZ.

13 In contrast to the children's group under the Children's Group Act, which was introduced as a measure supporting work-life balance of parents with small children.



## E. Administrative proceedings

Under the Schools Act and the Code of Administrative Procedure, kindergarten headteachers are solely<sup>14</sup> responsible for decision-making on admission of a child to preschool education, i.e. exercising the right to education.<sup>15</sup> They act in the role of a State (public) authority.<sup>16</sup> Since a kindergarten's capacity may sometimes be insufficient to admit all applicants, the published criteria lay down the facts relevant for the headteacher's decision-making on admission of a child. The criteria help institute an environment of predictability.

The headteacher's decision not to admit a child must include **proper reasoning**. The decision must clearly state all facts as to why the child was not admitted, why other children were admitted preferentially, etc. If the headteacher merely states that the child did not get enough points referring to the published criteria, or merely notes that the child was not enrolled due to capacity reasons, this does not constitute proper reasoning. Such a decision is unreviewable due to shortcomings in the reasoning and the supervising regional authority should cancel it in potential review proceedings.

A child as a party to the proceedings may **appeal** against the decision through his or her legal representative. Applying unlawful criteria in decision-making can also lead to annulment of the decision. Headteachers should therefore be prepared for the eventuality of annulment of the decision on non-admission. Indeed, if in the meantime, the capacity of the kindergarten became full and the child was refused due to insufficient capacity again, such an appeal would be entirely pointless. The maximum capacity of a kindergarten constitutes primarily a limitation for the founders and should not harm the interests of a child whose application was rejected at variance with the law. If the number of admitted children exceeded the kindergarten's capacity, the unlawful state of affairs would only emerge upon the start of the school year. Therefore, if a child is admitted above the capacity based on a successful appeal, it is up to the founder to remedy the state of affairs by increasing the kindergarten's maximum capacity.<sup>17</sup>

If a place frees up in the kindergarten (e.g. because some of the admitted children have opted for a different kindergarten), the headteacher may admit additional children (who were originally "below the line") by means of a new decision in the sense of

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14 In the case of employee kindergartens, the criteria are fixed by the founder under Section 34 (8) of the Schools Act.

15 A fundamental right guaranteed to all by Article 33 of the Charter of Fundamental Rights and Freedoms.

16 Section 165 (2)(b) of the Schools Act.

17 Report of the Public Defender of Rights of 10 May 2013, File No. 3204/2013/VOP, available at: <http://eso.ochrance.cz/Nalezene/Edit/388>. To expand on the report, especially the possibility to keep some places free as a reserve for appeals, I note that since the report was issued, there has been an amendment changing Section 34 (3) of the Schools Act, which newly provides that children with preferential admission are admitted up to the maximum number of children indicated in the schools register. Therefore, I believe that a free capacity can be reserved only in case all other children with the right to preferential admission have already been accepted.



Section 101(b) of the Code of Administrative Procedure.<sup>18</sup> Such proceedings may be initiated by the headteacher acting *ex officio*<sup>19</sup>, and so the legal representatives of the children need not file a new application. If the kindergarten's capacity is still not filled up, the Schools Act permits filling up the free capacity also during the school year.

More information on administrative proceedings is provided in the recommendations on equal access to compulsory school education<sup>20</sup>, which can be analogously applied to proceedings on admission of a child to a kindergarten.

## **F. Compulsory preschool education**

Since 1 September 2017, an amendment to the Schools Act introduced compulsory preschool education for 5-year-olds.<sup>21</sup> Compulsory preschool education starts in the school year following after the day when the child reaches five years of age. It ends with the commencement of compulsory school education.<sup>22</sup>

A child's legal representative is required to sign the child up for enrolment in preschool education, which takes place from 2 to 16 May. If the legal representative fails to do so, he or she may be fined up to CZK 5,000.<sup>23</sup> The specific date and place of the enrolment is specified by the kindergarten headteacher in agreement with the founder. A child goes to his or her catchment kindergarten unless the legal representative chooses a different kindergarten for the child or another manner of conducting the compulsory preschool education. Compulsory preschool education has the form of regular daily attendance of at least 4 uninterrupted hours in the kindergarten during working days. The legal representative is obliged to excuse the child's absence within 3 days of being invited to do so. Other conditions for excusing children's absence and leave are specified by the kindergarten's school regulations.<sup>24</sup>

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18 This provision permits to "overcome the obstacle of ... *res judicata* ... in case of granting an application which has already been rejected with final effect. This situation may occur in cases where the facts and potentially legal circumstances guiding the original rejecting decision have changed." JEMELKA, Luboš, Klára PONDĚLÍČKOVÁ and David BOHADLO. *Správní řád: komentář (Code of Administrative Procedure: Commentary)*. 5<sup>th</sup> edition. Prague: C. H. Beck, 2016. Beck edition of laws with commentary. ISBN 978-80-7400-607-4, p. 564.

19 Cf. Section 102 (3) of the Code of Administrative Procedure and VEDRAL, Josef. *Správní řád: komentář (Code of Administrative Procedure: Commentary)*. 2<sup>nd</sup> updated and expanded edition. Prague: BOVA POLYGON, 2012. ISBN 978-80-7273-166-4, p. 887.

20 Recommendations of the Public Defender of Rights concerning equal access to compulsory school education of 28 February 2017, File No. 14/2017/DIS/VB, available at <http://eso.ochrance.cz/Nalezene/Edit/4926> and on the Defender's website at [http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Doporuceni/Doporuceni-zapisy-do-ZS\\_14-17-DIS-VB.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Doporuceni/Doporuceni-zapisy-do-ZS_14-17-DIS-VB.pdf).

21 Compulsory preschool education applies to citizens of the Czech Republic who reside in the Czech Republic for a period longer than 90 days, citizens of other EU Member States residing in the country for over 90 days, other foreign nationals residing in the country for over 90 days on the basis of a temporary or permanent residence permit, and asylum seekers. It does not apply to children with severe mental disabilities (Section 34a (1) of the Schools Act).

22 Section 34 (1) of the Schools Act.

23 Section 182a (1)(a)(2) of the Schools Act in conjunction with 182 (2) of the Schools Act.

24 For more details, see Sections 34 and 34a of the Schools Act.





Compulsory preschool education can be performed by means other than regular daily attendance: education in a primary school's preparatory class (if the child's compulsory school education has been deferred<sup>25</sup>) or takes place at a foreign school in the Czech Republic.<sup>26</sup> In justified cases, the legal representatives can also choose to educate the child individually, i.e. without regular daily attendance in a kindergarten (e.g. at home or in a forest kindergarten not registered in the schools register). In that case, the kindergarten headteacher shall specify to the legal representative the areas in which the child should be educated and the kindergarten will then check the child's progress. The legal representative has a duty to bring the child for the check. Specific conditions and the date of the check are included in the kindergarten's regulations; the checks take place from November to December of the given school year. Individualised education may be terminated by the kindergarten headteacher only if the legal representative does not bring the child in for the check, not even on an alternative date. According to the interpretation of the Ministry of Education, however, it is not possible to combine the child's individualised education with regular daily attendance in a kindergarten registered in the schools register.<sup>27</sup>

#### **G. School districts**

Municipalities have a duty to create conditions for compulsory preschool education and to facilitate the right of children to preferential admission to a kindergarten.<sup>28</sup> For this reason, municipalities must specify the school districts of catchment kindergartens. If multiple kindergartens have been founded in the municipality or an association of municipalities, the individual school district shall be specified by a generally binding ordinance.<sup>29</sup>

The Ministry of the Interior has issued a methodological recommendation on defining school catchment districts.<sup>30</sup> In the context of equal access to education, the Ministry of the Interior recommends in this document that the municipalities define school districts in a way

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25 A child whose compulsory school education has been deferred need not start going to school after the sixth birthday. An application for a deferral is filed in writing by the child's legal representative. The headteacher shall grant the application if it is based on a recommendation issued by the competent school counselling centre and a specialist practitioner or a clinical psychologist (Section 37 of the Schools Act). Deferral is granted to children who are not physically or mentally developed enough to start going to school.

26 Section 34a (5) of the Schools Act.

27 For example, it is not possible for a pre-school age child to attend a kindergarten registered in the schools register only for 3 days a week. Given its purpose, compulsory preschool education is to take the form of regular attendance in the kindergarten during working days. Any child's absence must be excused. Individualised education without attending a kindergarten is only possible in justified cases where the child's or the family's circumstances make regular daily attendance impossible or unsuitable. Compulsory preschool education was introduced specifically to enable children to get used to and prepare for regular school attendance. If children attended kindergarten only for a part of the week, this would be at variance with the purpose of the legislation. If a child is educated individually, it is possible to combine home schooling with attendance in a different type of facility, e.g. a forest kindergarten.

28 Section 179 (2) of the Schools Act.

29 Section 179 (3) in conjunction with Section 178 (2) of the Schools Act.

30 Methodological recommendation for local and regional governments. Defining school districts for catchment kindergartens and primary schools. Relevant under the legal situation as of 1 January 2017. Ministry of the Interior, Department of Public Administration, Supervision and Inspection. Prague. 2017. Available at: <http://www.mvcr.cz/clanek/metodicke-materialy-k-zakonnym-zmocnenim.aspx?q=Y2hudW09Mg%3d%3d>.





avoiding formation of segregated schools, which in the Czech Republic means schools predominately or exclusively attended by Roma children. Otherwise, they would be violating the Schools Act and the Anti-Discrimination Act. The European Court of Human Rights, too, noted that placing Roma children in schools attended exclusively by children belonging to the Roma community amounted to discrimination and a violation of the right to education.<sup>31</sup> These conclusions can undoubtedly also be applied to kindergartens.

## H. Vaccination

Only children who have received the prescribed regular vaccinations may be admitted to a kindergarten. The only exception applies to a child who has a document proving that the child is immune to the relevant infection or that the child may not be vaccinated because of a permanent contraindication.<sup>32</sup> This, however, does not apply to preschool-age children. The headteachers must admit these children even if they lack the vaccinations.

The document proving a permanent contraindication is important in terms of **substance**, not form. Therefore, the document issued by a healthcare services provider does not necessarily have to include the phrase “permanent contraindication”. The document must clearly indicate that the child’s medical condition permanently prevents the relevant vaccinations. The Constitutional Court has reached the same conclusion.<sup>33</sup> I believe that if kindergarten headteachers or regional authorities hearing appeals proceed at variance with the aforementioned decision of the Constitutional Court<sup>34</sup>, they are making an error.<sup>35</sup> I understand that it can be hard for headteachers without expertise in medicine to decide whether the child’s condition presents a “permanent contraindication” within the meaning of the law if the practitioner does not expressly indicate so in the documents. However, within administrative proceedings, the headteachers must interpret the Public Health Act in compliance with the Constitutional Court’s judgment. The Supreme Administrative Court<sup>36</sup> assumes that when determining contraindications to vaccination, the examining doctor will, under certain circumstances, also take into account the medical condition of close persons (e.g. if there have been serious health problems in the child’s family that could have been related to vaccination and there are indications the child could suffer of similar complications).

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31 Judgment of the European Court of Human Rights of 30 May 2013, *Lavida and Others v. Greece* (No. 7973/10).

32 Section 34 (5) of the Schools Act in conjunction with Section 50 of the Public Health Act.

33 Judgment of the Constitutional Court of 27 January 2015, File No. ÚS 16/14 (N 15/76 SbNU 197; 99/2015 Coll.), available at: <http://nalus.usoud.cz>, paragraph 97; and Report of the Public Defender of Rights of 24 June 2015, File No. 5486/2013/VOP, available at: <http://eso.ochrance.cz/Nalezene/Edit/2972>.

34 E.g. by insisting that parents have to submit a document explicitly including the phrase “permanent contraindication”, even though the documents submitted already indicate that the child’s medical condition permanently prevents vaccination.

35 Report of the Public Defender of Rights of 16 August 2017, File No. 3838/2016/VOP, available under its file name in the Defender’s Opinions Register at: <http://eso.ochrance.cz/Vyhledavani/Search>.

36 Judgement of the Supreme Administrative Court of 29 June 2017, Ref. No. 5 As 317/2016-36 is available at [http://www.nssoud.cz/files/SOUDNI\\_VYKON/2016/0317\\_5As\\_1600036\\_20170713154809\\_prevedeno.pdf](http://www.nssoud.cz/files/SOUDNI_VYKON/2016/0317_5As_1600036_20170713154809_prevedeno.pdf).



## I. Assessment of criteria

Kindergarten headteachers may face a situation where the demand for preschool education outstrips the capacity of their facilities. If this affects catchment children with the right to preferential admission, the headteacher must notify the founder. Where the founder is a municipality, it is obliged to provide for preschool education (e.g. request an increase in the capacity registered in the schools register,<sup>37</sup> redraw school districts, make an agreement with another municipality to form a joint school district,<sup>38</sup> approve a higher number of children in a class,<sup>39</sup> or provide the kindergarten with additional premises<sup>40</sup>). If the founder fails to address the situation in time or if, after admitting the children with the right to preferential admission, the demand still outstrips the capacity, the kindergarten headteacher has to apply certain criteria for admission of further children.

Kindergarten headteachers should avoid setting **directly discriminatory** criteria for admission. These are criteria that discriminate between children based on protected characteristics listed by the Anti-Discrimination Act<sup>41</sup> and the Schools Act.<sup>42</sup> Discrimination based on race, ethnic origin and nationality (*národnost*) is absolutely forbidden. Other protected characteristics may be used as criteria for admission only if their use serves a **legitimate objective** and the means of achieving the objective are **proportionate** and **necessary**.<sup>43</sup> If these conditions (legitimate objective, proportionality, necessity) are met, the use of the criterion does not constitute unlawful discrimination.

Even seemingly neutral criteria may, however, adversely affect children identified by a protected characteristic (pursuant to the Anti-Discrimination Act, this may include e.g. ethnic origin, nationality (*národnost*) or medical condition; pursuant to the Schools Act, this also includes language, social background or other personal status). Such a criterion may constitute **indirect discrimination**. Headteachers should carefully consider whether the criterion they apply follows a **legitimate objective** and the means of achieving it are **proportionate** and **necessary**.<sup>44</sup> If these conditions (legitimate objective, proportionality, necessity) are met, the use of the criterion does not constitute unlawful discrimination.

With the introduction of compulsory preschool education and definition of school districts, admission of children into kindergartens came to closely resemble the admissions into

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37 Section 149 of the Schools Act.

38 Section 179 (3) of the Schools Act in conjunction with Section 178 (2)(c) of the Schools Act.

39 Section 23 (5) of the Schools Act.

40 The last two possibilities deal with the situation where a kindergarten has sufficient registered capacity according to the schools register, but faces a lack of physical space.

41 Section 2 (3) of the Anti-Discrimination Act – race, ethnicity, nationality (*národnost*), sex, sexual orientation, age, disability, religion, belief or worldview.

42 Section 2 (1)(a) of the Schools Act: race, skin colour, sex, language, belief or religion, nationality (*národnost*), ethnic or social background, property, descent, medical condition or the citizen's other personal status.

43 Section 7 (1) of the Anti-Discrimination Act.

44 Section 3 (1) of the Anti-Discrimination Act.



primary schools. For this reason, I approached the assessment of some of the criteria similarly as in my recommendations on equal access to compulsory school education:

- **permanent residence** – suitable; this is a preferential criterion explicitly mentioned in the Schools Act;
- **order in which the application was received** – unsuitable; this is at variance with the Schools Act (legal representatives of children are required to sign them up for enrolment from 2 to 16 May, not as soon as possible) and the principle of equality of parties of administrative proceedings;
- **having a sibling in the same kindergarten** – suitable if the rejected children have the right to preferential admission also in another kindergarten (i.e. have more than one catchment kindergarten);
- **distance of home or place of permanent residence from the kindergarten** – unsuitable; this is at variance with the purpose of the Schools Act (the Schools Act exclusively operates with the term *permanent residence*, which is a term referring to the registered address, unlike *home*, which is the place where a person actually lives; as for permanent residence, the School Act is merely concerned with whether or not the child's permanent residence lies within the kindergarten's catchment area – the distance from the kindergarten is, in itself, irrelevant. Czech laws do not require a person to live at the address of his or her permanent residence and kindergarten headteachers have no authorisation to check whether the actual home differs from the place of permanent residence);
- **adherence to an alternative teaching method** – suitable if rejected children have the right to preferential admission also in another kindergarten (i.e. have more than one catchment kindergarten);
- **lottery** – suitable, but the conditions must be set in advance (who will draw the lots, when and how).

For details, see my recommendations on equal access to compulsory school education.<sup>45</sup> I will address further criteria below.

The application of criteria for admission may be difficult since the Schools Act introduces three different regimes for admission of children into preschool education: one for preschool-aged children, one for children with the right to preferential admission, and one for other children. I highlight the application differences below in discussion of the individual criteria. For greater clarity, I attach a **chart** to these recommendations which should help kindergarten headteachers find the right procedure for admitting children into their facilities.

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<sup>45</sup> Recommendations of the Public Defender of Rights concerning equal access to compulsory school education of 28 February 2017, File No. 14/2017/DIS/VB, available at <http://eso.ochrance.cz/Nalezene/Edit/4926> and on the Defender's website at [http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Doporuceni/Doporuceni-zapisy-do-ZS\\_14-17-DIS-VB.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Doporuceni/Doporuceni-zapisy-do-ZS_14-17-DIS-VB.pdf).



### I.1 Compulsory preschool education

Preschool education is compulsory for children reaching five years of age before the start of the school year, and lasts until the child commences compulsory school education (this means that compulsory preschool education also applies to 6-year-olds with deferred school attendance). If the kindergarten's capacity is not sufficient and the founder fails to address the situation in time, the headteachers should primarily admit catchment preschool-aged children.

This criterion follows a legitimate objective, i.e. the performance of a statutory requirement. Using this criterion is also unavoidable – the kindergarten's capacity is limited and the founder has failed to resolve the issue. I believe that using this criterion is proportionate as well, as in this situation, the children's obligation to attend preschool education outweighs the other children's right to equal treatment. Indeed, a failure of a legal representative to ensure his or her child's preschool education constitutes an infraction subject to a fine up to CZK 5,000.<sup>46</sup> Legal representatives of non-preschool-aged children face no such penalties.

As a rule, a non-catchment child cannot be admitted at the expense of a catchment child. For this reason, the criterion of preschool age should not be applied indiscriminately to both catchment and non-catchment children. Non-catchment children have a right to preferential admission to their catchment kindergarten.

Situations where a family has their permanent residence registered elsewhere than in the place where they actually live are not uncommon. Often, the reason they give is that the landlord did not consent to the registration of permanent residence. This can put the child's education in jeopardy since the child will not have the right to preferential admission to a kindergarten in whose catchment area the family lives, while the distance does not allow the parents to ensure the child's daily attendance in the catchment kindergarten. This situation can easily affect children from socially excluded environments; as a consequence, their parents (legal representatives) often opt for individualised education, even though these children would benefit the most from preschool education in a kindergarten.

I would welcome if, in that case, headteachers were able to give priority to non-catchment over catchment children, especially preschool-aged non-catchment children over catchment children who are yet to reach preschool age (and thus become required to attend preschool education). Unfortunately, the Schools Act explicitly stipulates the right to preferential admission in connection with permanent residence, not the actual home. Preschool-aged non-catchment children can thus only be prioritised after all catchment children with the right to preferential admission have been admitted.

For this reason, the only recommendation to the legal representatives in this regard is to register their children for permanent residence in the place where they actually live. A person may register for permanent residence in a building that has a land registry number and/or a house number and is intended for residential, accommodation or recreational

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<sup>46</sup> Section 182a (1)(a)(3) of the Schools Act in conjunction with 182 (2) of the Schools Act.



purposes.<sup>47</sup> Consent of the building owner is not required for registration of permanent residence; a proof of authorised use of the real estate (e.g. a lease contract) is sufficient.<sup>48</sup>

**If there is an excess of catchment children, kindergarten headteachers should prioritise preschool-aged children. Non-catchment children can only be prioritised after all catchment children with the right to preferential admission have been admitted.**

## I.2 Age

According to the Schools Act, preschool education is usually organised for children from three to six years of age; the minimum age is two years.<sup>49</sup> From 2017, children of 4 years and older had a preferential right to admission to their catchment kindergartens. Since 2018, this right has been extended to children of 3 years and older. Beginning with 2020, preferential admission will apply to all catchment children of 2 years and older.<sup>50</sup>

Age is (alongside the registered place of permanent residence) the second preferential criterion explicitly mentioned by the Schools Act. However, the Schools Act does not explain how the kindergartens should deal with cases of insufficient capacity (as registered in the schools register) in cases of excessive numbers of catchment children of various age. It is also not clear what role age should play in the admission of other children (non-catchment children or children without the right to preferential admission, i.e. younger than anticipated by the Schools Act).

I believe that if there is an excess of catchment children with the right to preferential admission, the headteachers may give preferential treatment to older children. This is possible because the age criterion follows a legitimate objective: provide preschool education to children, whose need of education generally increases with age. Using this criterion is also unavoidable, since a kindergarten's capacity is limited (if the founder has failed to resolve the issue). However, I also believe that the last condition allowing different treatment, i.e. proportionality, is only met if the rejected children also have a right to preferential admission in another kindergarten (if the children have multiple catchment kindergartens).

I am of the opinion that the kindergarten headteachers may also prioritise older children if they are deciding between non-catchment children or children under the statutory age limit for preferential admission. As a rule, however, a non-catchment child must not be admitted at the expense of a younger child with the right to preferential admission.

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<sup>47</sup> Section 10 (1) of the Population Records Act.

<sup>48</sup> Section 10 (6) of the Population Records Act.

<sup>49</sup> Section 34 (1) of the Schools Act; starting from 2020, this will apply to children from 2 to (usually) 6 years of age.

<sup>50</sup> The right to preferential admission applies to children who have reached the required age before the start of the school year. The right to preferential admission thus also applies to children under the required age at the time of the enrolment (May) who will have reached the required age by the start of the school year in September (Section 34 (3) of the Schools Act).



The criterion of **minimum age of a child** is unsuitable. A criterion preventing admission of younger children is unsupported by legal regulations and, consequently, constitutes unlawful age discrimination. The criterion of minimum age is acceptable only if it complies with Section 34 (1) of the Schools Act, i.e. the required minimum age is 3 years (or lower), or 2 years (effective from 2020 onwards).

**If there is an excess of catchment children with the right to preferential admission, the headteachers may give preferential treatment to older children only if the rejected child has a right to preferential admission to another kindergarten. The criterion of age can also be applied to non-catchment children and children under the minimum statutory limit for preferential admission.**

### I.3 Parents' employment status

The criterion of the parents' employment status ignores the educational purpose of kindergartens and accentuates the kindergarten's role as a daycare facility, i.e. as a service provided to parents. Children would thus be subject to different treatment in access to education based on facts not directly related to their educational needs. For this reason, the parents' employment status must not be used as an indiscriminate criterion,<sup>51</sup> since it does not take into account the child's needs in terms of the right to education. Kindergartens' supplementary role as daycare facilities cannot take precedence over their educational purpose.

This criterion can, in justified cases, be used in a supplementary role (e.g. if several children receive the same number of points). If there is an excess of catchment children with the right to preferential admission, this criterion is only proportionate if the rejected child has a right to preferential admission to another kindergarten.

In practice, kindergarten headteachers sometime give preferential treatment to children also according to **the parent's specific job**. Special treatment is thus sometimes given to children whose parents are employed by the municipality, the municipal office or in a kindergarten founded by the municipality (or in the educational system generally). Any criterion giving preferential treatment to children of parents employed in the public sector is at variance with the principle of equality of parties and the administrative authority's impartiality.<sup>52</sup> Any decision based on such preferential treatment is unlawful (unless it concerns a kindergarten specifically founded for these employees under the Schools Act<sup>53</sup>).

**The criterion of the parent's employment status cannot be applied indiscriminately. It is inadmissible to give preferential treatment to all children whose parents are employed. The parents' employment status can only be used as a supplementary criterion. It is not**

51 Such an application of the employment status criterion would put unemployed parents into a difficult situation: their unemployed status would not allow them to place children in a kindergarten, while their job searching prospects would be diminished by the need to take care of children at home.

52 This principle is established, e.g., in Section 7 (1) of the Code of Administrative Procedure.

53 Section 34 (8) of the Schools Act.





**permissible to give preferential treatment to children based merely on a specific job carried out by their parents.**

#### I.4 Social situation

The criterion of social situation most often declares that kindergarten headteachers will take the child's social circumstances into account. This is legitimate and desirable since some elements of preschool education are more beneficial to children in adverse social situations (e.g. taking into account their healthy emotional development and socialisation).

The criterion is formulated very generally and it is desirable to supplement it with a **non-exhaustive list of situations** constituting adverse social circumstances (e.g. children is raised by a single parent, is orphaned or at risk of social exclusion<sup>54</sup>). This list may be gradually expanded to reflect situations and requests encountered by the headteachers. The list of adverse social situations gives the child's legal representatives an opportunity to prepare documents proving the adversity. This always contributes to the transparency and predictability of the process. Conversely, using an exhaustive list is not recommended as it would not allow to reflect all possible forms of adverse social situations.

If there is an excess of catchment children with the right to preferential admission, this criterion can generally be considered proportionate only if the rejected child has multiple catchment kindergartens. I do not exclude the possibility of deviating from this principle in some serious situations.

Kindergarten headteachers are obliged to observe the principle of predictability and legitimate expectations, i.e. ensure that no unfounded differences occur in decision-making in cases based on the same or similar facts. If, for instance, they give preferential treatment to a child in a specific adverse social situation, they are obliged to extend the same preferential treatment to other children in identical or similar situations.

With regard to the principle of co-operation among administrative bodies, it is desirable for the headteacher to request assistance and information on the child's social situation from administrative bodies<sup>55</sup> which monitor the child's family, i.e. especially the body for social and legal protection of children.<sup>56</sup>

**Taking the social situation of children into account by headteachers in the admission to preschool education is legitimate. If there is an excess of catchment children with the right to preferential admission, this criterion can, as a rule, only be used if the rejected child has a right to preferential admission to another kindergarten.**

<sup>54</sup> Within the meaning of Section 3 (f) of the Social Services Act.

<sup>55</sup> Section 8 (2) of the Code of Administrative Procedure.

<sup>56</sup> Pursuant to Section 51 (5)(a)(1) of the Social and Legal Protection of Children Act, a body for social and legal protection of children has a duty to provide administrative authorities with information necessary for administrative proceedings.





### I.5 Medical condition

The child's medical condition is reflected in the criteria in the form of requirements for the child's medical fitness, recommendation from a paediatrician or a school counselling centre. This is formulated very broadly and compliance with the prohibition of discrimination depends on the concrete implementation in specific cases.

If the medical fitness requirement is interpreted as the need for the child to have received mandatory vaccinations, then it merely reflects the relevant statutory duty (see part H of the recommendations). It is also legitimate to interpret the requirement as a possibility to exclude a child suffering of a serious long-term infectious disease that could endanger persons coming into contact with the child inside the kindergarten.<sup>57</sup> Nevertheless, criteria associated with the child's medical condition are generally too vague to be recommended.

If a different treatment was based on a **disability**, this could constitute discrimination within the meaning of the Anti-Discrimination Act.<sup>58</sup> By ratification of the UN Convention on the Rights of Persons with Disabilities, the Czech Republic assumed the obligation to ensure that persons with disabilities are not excluded from the education system because of their disability.<sup>59</sup> Consequently, children with special educational needs have the right to supportive measures provided by the school.<sup>60</sup> Kindergarten headteachers cannot reject children because of their disability.

**The criterion of medical condition is generally unsuitable due to its indeterminate nature. Rejecting or disadvantaging children because of their disability is, as a rule, discriminatory.**

### I.6 Permanent residence

The place of permanent residence plays a crucial role in admissions of preschool-aged children and children with the right to preferential admission based on age. This criterion is explicitly mentioned in the Schools Act. However, there may be cases where a kindergarten has admitted all these children and has some spare capacity left. It is a question then whether a headteacher may prioritise children with permanent residence within the kindergarten's school district (but have not yet reached the age of preferential admission under the Schools Act).

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<sup>57</sup> In any case, the interpretation and the resulting restrictions must be based on reliable medical data.

<sup>58</sup> Cf. Section 5 (6) of the Anti-discrimination Act, according to which disability means a "physical, sensory, mental or other form of impairment which prevents or may prevent persons from exercising their right to equal treatment in the areas stipulated by the Act; simultaneously, the disability must be long-term, lasting, or being expected to last based on the findings of medical science, for at least one year." This is the "social construction" of disability.

<sup>59</sup> By ratifying the UN Convention on the Rights of Persons with Disabilities, the Czech Republic recognised the right of disabled persons to education and assumed the obligation to create an inclusive education system comprising all levels of education. The Czech Republic assumed the obligation to ensure that persons with disabilities are not excluded from the education system because of their disability (Article 24 of the Convention on the Rights of Persons with Disabilities).

<sup>60</sup> Section 16 (1) of the Schools Act.



Under these conditions, prioritising children with permanent residence in the municipality is legitimate. Municipalities establish kindergartens to fulfil one of the fundamental functions of local governments. In so doing, they create conditions to meet the needs of their citizens, including education.<sup>61</sup> Kindergarten headteachers performing State (public) administration are not bound by the local or regional government's tasks, but it is not the purpose of State administration to hinder the activities and tasks of local and regional governments. Children of foreign nationals should also receive the same preferential treatment, provided they have their place of residence registered within the relevant school district.<sup>62</sup>

According to kindergartens' reports, legal representatives often change their children's permanent residence address to ensure their children get the right to preferential admission to a kindergarten they consider the best, despite living in the catchment area of another kindergarten. As this may result in a lack of the kindergarten's capacity to admit all the catchment children, it primarily affects children who actually live in the catchment area.

In my opinion, any such disingenuous changes in the child's permanent residence constitute an evasion and abuse of the law and should not be encouraged. Unfortunately, the law gives headteachers few possibilities to prevent the aforementioned behaviour. Some headteachers stipulate in their admission criteria that children must have their registered permanent address in the same place as at least one of their legal representatives, or they request a proof that the child actually lives in the indicated place of permanent residence (e.g. a lease executed by the child's legal representatives documenting use of a flat/house at the given address).

While I understand the reasons behind this procedure, I believe the Schools Act does not permit it. Belonging into a kindergarten's catchment area is only determined based on the place of permanent residence. According to Czech legislation (especially the Population Records Act), this place need not correspond to the person's actual home. Not admitting a child with permanent residence in the catchment area of a kindergarten because the child does not live there, or prioritising children whose legal representatives prove that they actually live at their permanent residence address, is not justified in terms of the Schools Act. It is an open question how the regional authorities or courts would decide in such cases (e.g. if a rejected child appealed against the kindergarten's decision), and especially whether they would also take the potential evasion of the law into account.<sup>63</sup>

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61 61 See Section 35 (2) of the Municipalities Act.

62 Cf. section 34 (3) of the Schools Act effective from 1 September 2017, or Section 34a (2) of the Schools Act.

63 I am not aware of any court decision involving purpose-driven changes of permanent residence address to get a child admitted to a kindergarten or another kind of school. While the Constitutional Court has already dealt with purpose-driven registrations of permanent residence address before (cf. judgment of the Constitutional Court of 4 May 2011, File No. Pl. ÚS 6/11), it only addressed the issue in terms of registration of a large number of people to manipulate local elections. The Constitutional Court concluded that where permanent residence is a criterion crucial for the right to vote and stand as candidate in municipal elections, it has to be inquired – on account of the seriousness of possible consequences – whether or not the registration is a purpose-driven act, i.e. whether its only purpose might be obtaining the right to vote; if this is the case, the act constitutes an evasion of the electoral law. The Constitutional



**After admitting all catchment children with the right to preferential admission, kindergarten headteachers may prioritise children with the permanent residence, or the right of residence in the case of foreign nationals, within the kindergarten's school district.**

### I.7 Lottery

If, even after applying the recommended and other criteria which are not at variance with the Schools Act or the Anti-Discrimination Act, it is still impossible for the headteacher to choose a child in situations of exceeded capacity, he or she may organise a transparent lottery for school places. While parents may consider this selection method harsh, it is the most objective and fair course of action under the aforementioned circumstances.

However, it is necessary for the headteachers to set the lottery conditions in advance. Specifically, they should inform the legal representatives of children sufficiently in advance when and where the lottery will take place so that they can be present at the act. It should also be clear sufficiently in advance who will be conducting the lottery (e.g. the kindergarten headteacher) and in what manner. The headteacher should explain this to all legal representatives present prior to the commencement of the lottery. I also recommend to make a video recording of the lottery.

### J. Conclusion

The role of founders and headteachers of kindergartens is not easy. An amendment to the Schools Act has brought significant changes which will have to be implemented in practice. I hope that the founders will be able to increase the capacities of kindergarten enough so that the headteachers need not use the criteria at all.

These recommendations do not aim to identify and evaluate all situations that can possibly occur. I hope that the parties concerned will take these recommendations as a guideline designed to help them avoid discrimination in situations involving admission of children to preschool education. Courts shall always have the final say as to whether discrimination occurred in any given case. I am prepared to re-evaluate these recommendations if I receive further questions and suggestions. I am aware that life brings myriads of situations which cannot be exhaustively covered in a single document.

Finally, I would like to thank the teachers, headteachers and other educational specialists working in kindergartens for their work and sacrifice. They are the ones who place the key role in building a good education system for our children.

In Brno, 22 March 2018

Mgr. Anna Šabatová, Ph.D., signed  
Public Defender of Rights  
(the Recommendation bears an electronic signature)

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Court believes there is no reason to place the right to choose the permanent residence address above the right of the citizens of a community to ensure that only members of the community have a say in its governance.





## **K. Relevant legislation**

**Anti-Discrimination Act** – Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws (the Anti-Discrimination Act), as amended

**Charter of Fundamental Rights and Freedoms** – Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., promulgating the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, as amended

**Code of Administrative Procedure** – Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended

**Schools Act** – Act No. 561/2004 Coll., on preschool, primary, secondary, higher vocational and other education (the Schools Act), as amended

**Convention on the Rights of Persons with Disabilities** – Memorandum of the Ministry of Foreign Affairs No. 10/2010 Coll. Int. Tr., on adoption of the Convention on the Rights of Persons with Disabilities

**Preschool Education Decree** – Decree No. 14/2005 Coll., on preschool education, as amended

**Population Records Act** – Act No. 133/2000 Coll., on population records and birth identification numbers and on amendment to certain laws (the Population Records Act), as amended

**Municipalities Act** – Act No. 128/2000 Coll., on municipalities (the municipal order), as amended

**Public Health Act** – Act No. 258/2000 Coll., on protection of public health and on amendment to some related laws, as amended

**Children's Group Act** – Act No 247/2014 Coll., on childcare services in a children's group and amending certain related laws, as amended

**Social and Legal Protection of Children Act** – Act No. 359/1999 Coll., on social and legal protection of children, as amended

**Social Services Act** – Act No. 108/2006 Coll., on social services, as amended

**Public Defender of Rights Act** – Act No. 349/1999 Coll., on the Public Defender of Rights, as amended