

Declined request for dispensation regarding school Transport Entitlement Zone

Legislation	Ombudsmen Act 1975
Agency	Board of Trustees
Ombudsman	Leo Donnelly
Case number(s)	460099
Date	2 March 2018

Summary

A family asked the Board of Trustees (the Board) of School A for dispensation to allow their child to access bus services to attend School B. The Board refused the family's request, and on the same date resolved to adopt a policy refusing in principle to grant any such future Transport Entitlement Zone (TEZ) request. The Board's previous policy had allowed TEZ requests to be considered on a case by case basis.

The Ombudsman acknowledged the Board's concerns about balancing the needs of the school community against those in the wider community who might seek dispensation to access network bus services and travel through the school's TEZ. However, he concluded that the Board's policy was unreasonable as it did not permit the individual circumstances of a family to be considered, and improperly fettered the discretion of the Board by predetermining the outcome of any TEZ request.

The Ombudsman formed the opinion that TEZ Bus Policy created by the Board was unreasonable, and that the Board's decision in respect of the family's request was unreasonably coloured by the adoption of the 'refusal in principle' policy at the same meeting in which the family's request was considered.

The Ombudsman suggested that the Board should reconsider the family's request under its previous 'case by case' policy, and amend its TEZ Bus Policy to reflect that the Board would consider relevant 'exceptional circumstances' raised by a family. The Board agreed to the Ombudsman's proposal, and in those circumstances it was not necessary for the Ombudsman to make a recommendation.

Background

1. TEZ maps are created by the Ministry of Education based on the halfway point between schools of the same type that offer the same year level education. TEZ maps are used to establish the nearest school for a student, bus route design, and 'Directly Resourced' school transport.
2. A student seeking to access network bus services to attend a school, other than their nearest school, and who would travel through the TEZ of another school to do so, is deemed an 'ineligible student' in terms of Ministry transport funding. They must provide written authority to the bus service provider from any school affected by the operation of the daily bus route. The student will also be required to pay to access the bus services.
3. In this case, the family made a request for dispensation to School A's Board of Trustees to allow their child to access bus services to attend School B. At the time of the request, the Board's policy in respect of TEZ requests was to consider the individual circumstances of the requesting family on a case by case basis.
4. The Board resolved, in the course of considering the request, to adopt a new TEZ policy which specified that the Board *'refuses in principle to grant permission to any family living within our TEZ to be transported out of our TEZ to attend another school'*. The Board subsequently advised the family that following *'robust conversation'* it had declined the family's request for dispensation.
5. The family made a complaint to the Ministry of Education about the Board's decision. The Ministry advised the family of the Ministry's position that it is *'a discretionary matter for a BOT to grant or refuse permission. The Ministry won't interfere with these decisions and we would not ask a Transport Service Provider to bypass the requirement to seek this permission in their contract with us'*.

Investigation

6. Following receipt of the complaint, enquiries were undertaken with the Board. The Board was of the view that:
 - a. the Ministry had charged Boards of Trustees with making decisions about whether 'ineligible students' should be permitted to travel outside their TEZ to attend another school;
 - b. the Board's previous 'case by case' TEZ policy was too subjective, and the amended 'refusal in principle' was enacted in order to create a fair and consistent approach; and
 - c. the Board was charged to act on behalf of, and in the best interests of the school community and had to balance the needs of the school community against those in the wider community who might seek dispensation to also use the bus service and travel through the TEZ.

7. The Ombudsman advised the Board of his provisional view that the current policy, as worded, was unreasonable as it did not permit the individual circumstances of a family to be considered, and improperly fettered the discretion of the Board by predetermining the outcome of any TEZ request.
8. The Ombudsman noted the Board's concerns about balancing the interests of the school community against the wider community, and indicated to the Board that if he confirmed his provisional opinion as final, he would likely recommend that the Board amend the policy to allow the Board to consider relevant 'exceptional circumstances' that may be raised on a case by case basis. It was noted that exceptional circumstances might include, but are not limited to, providing '*reasonable accommodation*' for persons with disabilities¹ and other relevant international conventions and legislation which agencies have a duty to consider when making decisions.
9. In respect of the family's request, the Ombudsman considered that the Board's decision was unreasonably coloured by the adoption of the 'refusal in principle' policy at the same meeting in which the request for dispensation was considered. The Ombudsman advised the Board that he had not formed a view as to whether the original request should have been approved or declined, and proposed to recommend that the Board issue a new decision to the family which addresses:
 - a. the Board's findings on the points raised by the family in support of the request;
 - b. a reference to the relevant policy under which the decision was reached, being the previous 'case-by-case' TEZ Policy; and
 - c. confirmation of whether the request is approved or declined under that policy, as well as the reasons for the decision.

Outcome

10. The Board accepted the Ombudsman's provisional opinion, and agreed to make amendments to the TEZ policy and to issue a new decision to the family.
11. The Board noted that it considered 'exceptional circumstances' might also involve matters related to student welfare such as bullying or abuse, as well as compliance with court orders, or relocation into a TEZ where a student's learning would be disrupted by changing schools. The Board agreed to amend the TEZ policy to be that:

If a family making a TEZ request feel that they have circumstances of an exceptional nature ('To be exceptional, a circumstance... cannot be one that is regular, or routinely or normally encountered' – In R v Kelly (1999) 2 ALL ER 13

¹ Article 2, United Nations Convention on the Rights of Persons with Disabilities

at [20]² i.e. parental convenience is not deemed to be an exceptional circumstance) for why the request should be granted, they should put these in writing to the Board of Trustees.

12. The Board also agreed to reconsider the family's TEZ request in accordance with the previous 'case by case' policy, and confirmed it would issue a new decision to the family. The Ombudsman confirmed his opinion, but did not need to make any recommendation.

² In *R v Kelly* [1999] 2 All ER 13 at [20], Lord Bingham of Cornhill stated, when construing a reference to 'exceptional circumstances', that: '*We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly or routinely or normally encountered.*'