

## **The Education for Persons with Special Educational Needs Act 2004 – Response**

**The President of Ireland, Mary McAleese, signed the Education for Persons with Special Educational Needs Act into law in July 2004. The Act is a significant development in education legislation and sets out how students with special educational needs are to be educated in future. The focus of the Act is directed towards first and second level education, with a few brief references to further and adult education.**

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### **OVERVIEW**

In simple terms, the Act does a number of things:

1. It sets out the aims and expected outcomes of education for persons with special educational needs.
2. It outlines key elements of the process by which these ends are to be achieved.
3. It describes the structures for implementing the provisions of the Act and establishes a new body, the National Council for Special Education (NCSE).
4. It provides for appeals procedures in relation to decisions about the education of persons with special educational needs and establishes an Appeals Board.

### **DEFINITIONS**

The key words in the title of the Act are ‘education’, ‘person’ and ‘special educational needs’. The Act does not define education or person but does define the term ‘child’ as, ‘a person not more than eighteen years of age’. The legislation explains ‘special educational needs’ as a, “restriction in the capacity of the person to participate in and benefit from education on account of an enduring physical, sensory, mental health or learning disability or any other condition, which results in a person learning differently from a person without that condition” (p. 6). A welcome aspect of the definition is that it includes participation and outcome (benefit). A less positive aspect concerns the ‘enduring’ requirement. It is unclear how episodic conditions would be considered and also what duration might be necessary to satisfy the ‘enduring’ criterion.

### **AIMS AND OUTCOMES**

The Act acknowledges that persons with special educational needs have the same right to education as their peers without special educational needs. The fact that it was

considered necessary to state this is itself indicative of the historical neglect of persons with special educational needs. This group, like persons without special educational needs, was protected under the Constitution. The promise of free primary education was applicable to all children, irrespective of their circumstances. Until very recently the promise was of little practical value for some children with special educational needs. The 2004 Act seeks to make specific provision for the group. The legislation aims to ensure that children with special educational needs will be enabled to leave school with the skills necessary to participate, to the level of their ability, in society and to live independent lives. This is a significant aim and one that is likely to be welcome. While the aspiration is very positive, it is unclear how this outcome will be realised and how or if the State intends to assess the level of achievement of this objective. If it is achieved it will greatly enhance the lives of people with special educational needs in particular and benefit society in general.

### **SUPPORT FOR INCLUSION AND PARTICIPATION**

The concept of participation is one of the values of the Act. It aims for the participation of school leavers in society and, in terms of students, it aims to include students in mainstream provision. Education is to be 'inclusive' unless there are specific reasons why a specialised placement is required for a child. Two situations are envisaged where inclusion may not occur; firstly, where inclusive education would not be in the best interests of the child concerned, or secondly, where the inclusion of the child with special educational needs would be inconsistent with the effective provision of education for the children with whom s/he is to be educated. The development of an inclusive education system is a positive development for many students. However it will only benefit children with special educational needs when it is accompanied by appropriate supports.

The Act does guarantee supports but these are at all times subject to available resources. The promise given in the Constitution to a free primary education was not restricted by reference to available resources. The restriction introduced by the Act must at least introduce a degree of caution that the resource argument may diminish the educational provision for the child. Securing supports at present is a bureaucratic process. It remains to be seen whether the process will be simplified or complicated by any new structures.

### **SPECIALISED PLACEMENT**

While the promotion of inclusion is welcome, there are and will always be instances where the best interests of the child will require a specialised education placement. At present there are over one hundred special schools and several special classes attached to mainstream schools. The move towards inclusion may result in the closure of some special schools or in their evolution into some other type of provision. Should this occur it is likely that some children who require specialised placements may have to travel very long distances to and from their home to school or may require a residential placement which could remove them for periods from the family setting. The provision of specialised placements in the locality where the need exists should

be a priority and the preference for inclusion should not be allowed to diminish or discourage specialised settings where required.

### **BALANCE OF NEEDS AND RIGHTS**

The Act also envisages the balancing of the rights of the child with special educational needs and the children with whom s/he is to be educated. Once again the Act is clear on principle but silent on how the balance of rights is to be given practical effect and who will be the arbiters of the respective rights of each. It is worth remembering that the NCSE has the power to designate a school for a child (at the request of the parents or on its own volition) and the Act specifies factors for consideration in making the designation. There is no express reference to the balance of rights as one of the factors influencing the designation of a school for a child but there is an express reference to the “needs of the child concerned”.

### **PROCESSES FOR ACHIEVING THE AIMS AND OUTCOMES**

#### **Identification of Need**

The need to identify children who may have a special educational need and to take action to address these needs is a core component of the Act. A number of processes are envisaged. These include identification of needs on an in-school basis, assessment by health boards and assessment at the direction of the National Council for Special Education. Where special educational needs are identified, an education plan is to be drawn up for the child and schools will be entitled to additional resources and supports to assist in implementing the plan. After implementation the plan is to be reviewed regularly and the parents and special educational needs organisers (SENO) are to receive reports about the child’s performance.

#### **The Role of the Principal**

The Act assigns the principal of a school an important role in the education of children with special educational needs. In considering this role it should be remembered that few principals have qualifications or expertise in the area of special educational needs. Until very recently there were very few courses available for teachers and although availability has improved, the number of teachers without training in the area outweighs those who have acquired an expertise. Whether or not the principal has expertise, s/he has specific duties in the identification of children who may have special educational needs, in taking steps to address these needs, in arranging for assessments, in consulting parents, in preparing, in implementing and reviewing an education plan and in making arrangements for transfer or transition from one school to another.

#### **The Role of Parents**

The involvement of parents in the education of their children is an important issue. The Act highlights the role of parents in education. Parents are to be consulted about and must consent to their child’s assessment. They also must be informed about the child’s education and progress and be involved on the team for preparing an education plan. The education plan is a key element in the child’s progress through the education system.

The plan is to be prepared by a team including the parents, teacher, the child and other professionals.

Parents have significant insight and information about their child, which can contribute to the education process. However, a degree of caution is necessary in this area. The State is to make provision for education and any attempt to devolve this to parents should be avoided. The education planning process gives a welcome opportunity for collaboration among partners. The plan implementation process is primarily a matter for school personnel and parents should give careful consideration before they would undertake any element of the implementation of the plan. Many parents will of course wish to assist their child with home assignments and or with reviewing work done at school. It is entirely appropriate that this should continue. However, if the role of parents is formally included in a plan (for example through home support) and the child fails to meet the specified goals, the role of parental support may come under scrutiny and ultimately could be a reason for a failure to meet goals.

The Act makes provision for parents to notify the principal that they are of the opinion that their child is not benefiting from the education provided in the school to the extent that would be expected, and in turn the principal is required to take appropriate steps to address the needs of the child. This provision is likely to be used on a varying basis by parents. Parents who are well informed on the education provided in the school and are aware of reasonable standards of achievement will be in a position to use this route to begin a process which may ultimately lead to assessment of special educational needs. Parents who are less informed will not be in a similar position. It may emerge that children from relatively privileged backgrounds may benefit from this while children from less privileged settings may not.

### **Assessment**

The assessment is to be carried out with the assistance of suitably qualified persons as the team will de facto include a variety of expertise. The Health Board or Council is to select from, "one or more of the following:

- (a) **a psychologist;**
- (b) **a medical practitioner;**
- (c) **the principal teacher of the school which the child is attending or a teacher of that school nominated by the principal;**
- (d) **an appropriately qualified social worker; and**
- (e) **a therapist who is suitably qualified to provide support services in respect of the special educational needs of the child"** (Section 5 [1]).

Not all children with special educational needs are in school and the Act provides that where a child is not a student the relevant health board is responsible for the assessment. Where special education needs are confirmed, the health board informs

the Council of the child's needs and a plan is then developed at the direction of the Council.

### **The Education Plan**

The plan is a core element by which the aims of education are to be realised for the child. As in the assessment process, a multi-disciplinary team is to prepare the plan. The team includes the parents (unless they do not want to be included), a teacher or the principal from the school, the child (depending on the child's age and stage of development), a psychologist and a person nominated by the parents or special educational needs organiser who holds a relevant qualification in special educational needs which is recognised by the Council. The Act specifies that the plan must include the child's talents and abilities, special educational needs, level of educational performance, support services, provisions to facilitate transfer from pre-school to first level and first level to second level, where appropriate, and the goals for the child. A comprehensive plan might reasonably have been expected to require that the approaches by which the goals are to be achieved would have been specified and also highlight the accessibility issues which may need to be addressed.

### **Dispute Resolution**

At various stages in the process there are opportunities to refer disputes to the Appeals Board. Various parties may bring an appeal or seek resolution of a dispute, including parents, boards of management, health boards and the Council.

## **STRUCTURES TO IMPLEMENT THE PROVISIONS OF THE ACT**

At present the Department of Education and Science has responsibility for special education. This will evolve as the provisions of the Act come into effect. Three ministers, the Ministers for Education and Science, for Health and Children and for Finance will have roles and must take government policy into account in discharging special education responsibilities. At present health, care and education services operate on a non-coordinated basis. The Act envisages co-ordination between health and education services as they relate to the education of persons with special educational needs. To date, the lack of co-ordination across education, health and care needs has been a serious defect in service provision.

### **National Council for Special Education**

The Act provides for three major changes to current structures. In the first place, the provisions of the Act establish the National Council for Special Education. Much of the work currently undertaken by the Department of Education and Science will be transferred to the National Council for Special Education. One of the new developments is that the Council will have the power to designate a particular school for a child, taking specified factors into account.

The Council will have an administrative staff and is also to employ special educational needs organisers who will work at various locations around the country.

### **Departmental Linkages and Co-ordination**

The second significant development is that the Minister for Health and Children and the health boards have specific duties conferred on them in relation to education. The

Act envisages that there will be co-ordination and consistency of approach between health boards and the Council and provides for the role of liaison officers to support this.

### **Appeals Board**

The third development is that an Appeals Board will be established. Until now, if parents were dissatisfied with the provision for their child their only option, if their concerns were not resolved locally, was to go to court.

### **APPEALS PROCEDURES**

Under the Act several types of complaints can be brought to the Appeals Board and the Board will determine these within a specific time period. Parents, schools, health boards and the council can bring complaints to the board. The complaints resolution is complex and there are differing time frames for the submission of various categories of appeals and different parties who can lodge an appeal. Of all the groups, parents are likely to be least informed of the procedures. Schools, boards and principals will probably be involved in some form of professional development about the new processes. Parents may find themselves in an administrative maze which may overwhelm all but the most resilient and persevering people. A greater effort to provide adequate services for persons with special educational needs would reduce the need for an appeals structure.

In addition to the appeals mechanism, the Act also provides for mediation in certain cases. This can arise where a person complains to the Minister that the special educational needs of a person are not being met or where a person proposes to bring, or has brought, legal proceedings in respect of the alleged failure to meet those needs. The Act empowers the Minister for Education and Science to prescribe regulations to make these complaints the subject of mediation. The mediation process will be held in private and there will be limited information disclosed about it or about any outcomes. If a person decides not to participate in the mediation process and goes to court, the court may, when making a decision as to costs, take into account a refusal to participate, or a failure to participate in good faith, in mediation.

### **CHALLENGES AND OPPORTUNITIES**

There are positive aspects in the Act. However, many of the promises in the Act are subject to available resources. This is a key difficulty. The guarantee that resources will be provided to a school for the education of the relevant student is subject to available resources *de facto*, money. The Act is clear that any decisions made by the Minister for Education and Science or the Minister for Health and Children are subject to the approval of the Minister for Finance.

The timeframe for the Act allows the provisions to be implemented over the course of several years. An implementation group will make recommendations and after that the provisions should be in place within five years. In practical terms this means that the provisions of the Act are up to six years away from becoming a reality. In these circumstances the delays that have bedevilled special education provision to date are likely to continue for several years to come.

## **ASPIRATIONAL?**

Many of the aspirations of the Act may remain aspirations only. We may never know whether the stated aim to enable persons to participate to the level of their ability and to live independent lives has been realised, unless some form of evaluation of outcomes is undertaken on a longitudinal basis.

One of the challenges of education provision for persons with health and special educational needs is to ensure that care/medical/health and specific education services are available on a co-ordinated basis. To date, the various services have operated on a parallel rather than integrated platform. While the Act provides for co-ordination across health and education services, it does not demonstrate any great confidence that this will be realised in practice. The Act devotes attention to procedures for the resolution of potential disputes, which may arise where the Council and Health Board are of the view that the other should provide a particular service for a person. It specifies that the issues should be referred to the Appeals Board for determination. It also states that while the resolution is ongoing the services must be provided for the person. However, there is not any obvious mechanism whereby the provision of services is assured and there is not a mechanism to enforce the provision of services in the interim.

The Act is silent on the important aspect of provision for persons with special educational needs through the two official languages. There is a paucity of services through the Irish language and nothing in the Act suggests a commitment to improving the current situation. The *Education Act 1998* speaks of three languages, Irish, English and Irish Sign Language. The Act of 2004 is silent on the matter.

## **NEED FOR REVIEW CLAUSE**

It is unfortunate that the legislation does not incorporate a review clause which would provide for automatic reconsideration of the impact of the Act after a specific time-frame. In the absence of this, if the Act is seen to have less beneficial impact on education for persons with special educational needs than anticipated in view of the expressed aims, revisions will depend on the initiative of the legislature and there is no reason to believe that there might be any enthusiasm to revisit the legislation. It is to be hoped that the Act will achieve its aims for all concerned.