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Equality Law – What is Expected of Schools?

This article examines the application of equality legislation, and in particular the Equal Status Act (2000), to schools. Education and equality statutes are interdependent and in the specific matter of provision for students with disabilities, equality legislation uniquely provides for enforcement and redress. Possible developments in the area of “rights based” legislation are briefly discussed.

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EQUALITY LAW, EDUCATION LAW: DEVELOPING, EXPANDING

While statute law is the main focus of this article, it is important to recall that sources of law on both education and equality extend beyond Acts of the Oireachtas and that some key changes have their origins beyond such Acts. Our Constitution, *Bunreacht na hÉireann* (1937), has been the basis of important court decisions in areas of equality (such as *De Búrca v Attorney General* 1976, on the right of women to serve on juries) and of education (notably the *O'Donoghue* and *Sinnott* cases on special needs provision, 1993 & 2000 respectively).

Subordinate legislation is a further source of law and is expressed in forms such as Statutory Instruments, Orders, Regulations and (in equality legislation) Codes of Practice. In addition, primary EU law is contained in the Treaties but secondary law by way of European Regulations and Directives which are transposed into domestic legislation, may be more familiar. There have, for example, been three EU Directives on equality since 2000. In addition, case law involving interpretation of statutes or the setting/following of precedents provides important guidelines.

Glendenning (1999) has confirmed, as many in education have sensed, that: “During the 1990s, educational jurisprudence has developed rapidly and this complex branch of law is likely to continue to expand” (preface). Teachers, as evidenced by participants at the Irish National Teachers Organisation (INTO) Special Education Conference, are concerned about these developments: “Another concern voiced by the group was the possibility of legal action in future years by parents if appropriate provision was not made for their children” (INTO, 2003b, p.77).

NO STATUTE IS AN ISLAND

The central statute for examination here is the Equal Status Act (Ireland, 2000b). In assessing the effects of any piece of legislation, one must however bear in mind the interdependence of Acts of parliament, which tend to list other enactments cited, to amend one another and to cross-refer. A clear example is the fundamental support of the equality legislation in education for provisions relating to persons with disability. The Employment Equality Act (1998c), for instance, makes such interdependence clear in its list of over thirty other Acts referred to therein.

Similarly, Section 4 of the Equal Status Act (Ireland, 2000b), regarding disability-related discrimination, is stated to be “without prejudice to” three listed provisions of the Education Act (Ireland, 1998b); the Equal Status Act also includes a four and a half page Schedule amending and updating the Employment Equality Act (Ireland, 1998c).

The interplay of equality and education legislation may also be inferred from the enactment dates of the most salient Acts. In each of two years, key pieces of legislation were passed in both areas.

In the first of those years,

- the Employment Equality Act is no. 21 of 1998, while
- the Education Act is no. 51 of 1998.

Two years later,

- the Equal Status Act is no. 8 of 2000, and
- the Education Welfare Act is no. 22 of 2000.

In addition to the statutes mentioned, other key pieces of legislation which affect schools (and which are related in particular ways to those listed above) include the Data Protection Act (Ireland, 1998a), the Freedom of Information Act (Ireland, 1998d), the Protection for Persons Reporting Child Abuse Act (Ireland, 1998e) and the Teaching Council Act (Ireland, 2001).

MAIN RESPONSIBILITIES AS STATED IN EDUCATION LAW

Fundamental issues regarding

- provision of education services
- admission to school
- accommodation of special needs and
- the keeping of records/providing information

are set out across a number of statutes. Taking each of these matters in turn, it is useful to recall the main responsibilities of schools. Before looking at what equality law has to say

on admission and accommodation, the provisions of education legislation are summarised.

Provision of Education

The Education Act (1998b) lists among its objects “to provide that, as far as is practicable and having regard to the resources available, there is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people.” (Section 6 b). At Section 9 of the Act, a school is to “provide education to students which is appropriate to their abilities and needs and without prejudice to the generality of the foregoing, it shall use its available resources to “ensure that the educational needs of all students, including those with a disability or other special educational needs, are identified and provided for...” The Education Act requires a school board of management to use its resources “to make reasonable provision and accommodation for students with a disability or other special educational needs...” (Section 15. 2 g).

Admission to School

Here also the Education Act (1998b) lists responsibilities which include that a school admissions policy provide for “maximum accessibility to the school” (Section 9 m) and that a Board publish policy on matters including “admission to (the school) and participation by students with disabilities or who have other special educational needs...” (Section 15.2 d). The Act also aims to “promote equality of access to and participation in education” and to promote parental choice of school (Section 6, c and e). There is an Appeals Procedure which covers refusal to enrol (Section 29). The Education Welfare Act (2000a) reinforces this parent-friendly approach to enrolment by providing that a Board may “not refuse to admit” except in line with its admissions policy and that it must inform a parent within 21 days of its decision on enrolment (Sections 19.1 and 19.3).

Accommodation of Special Needs

As noted above, Section 15.2 g of the Education Act (1998b) obliges schools to make reasonable provision for students with special needs. In the school plan, it is mandatory to state “the measures which the school proposes to take to achieve those objectives” (Section 21.2). In view of the use of the words “special educational needs” throughout the Education Act, the Act’s definition of these is of some interest; “the educational needs of students who have a disability and the educational needs of exceptionally able students” (Section 2).

School Records and Information

The Education Act (1998b) makes clear the right of parents of a schoolchild to “have access in the prescribed manner to records kept by that school relating to the progress of that student in his or her education “ (Section 9 g). Whereas the entire Education Act has

been commenced, a number of specific matters throughout the Act have yet to be addressed and these include the “prescribed manner” under Section 9.

In line with the openness principle, a board is obliged to “establish procedures for informing the parents of students in the school of matters relating to the operation and performance of the school” (Section 20). The principal and other teachers are required regularly to “evaluate students and periodically report the results of the evaluation to the students and their parents” (Section 22.2 b). The Act is, however, silent on such matters as manner and frequency of reporting.

Schools should also be aware that personal information stored electronically is accessible under the Data Protection Act (1998a) and that reports provided to outside agencies (such as Health Boards) may be accessible under the Freedom of Information Act (1998d). Amendment Acts in respect of each of these pieces of legislation will extend schools’ responsibilities.

THE EQUAL STATUS ACT (2000): FUNDAMENTAL RESPONSIBILITIES

The main responsibilities of schools as outlined in the education legislation are buttressed by the provisions of the Equal Status Act (2000b). This is especially so in the matters of admission to school and in accommodating special needs. The Equal Status Act is essentially a piece of anti-discrimination legislation. Its approach in education is one which prohibits less favourable treatment of students across nine grounds. The Act aims to equalise access to publicly accessible services and places. It is based on the principle that persons should not be refused service on unreasonable, discriminatory grounds. Whereas many cases taken to the Equality Tribunal have concerned access to public houses and hotels, it is important to recall that schools are explicitly included under the terms of the Act. The nine grounds across which discrimination is outlawed are becoming more familiar and include gender, religion, race, disability and membership of the Traveller community.

Increasing Claims

Although no case concerning a school has been heard before the Equality Tribunal since the commencement of the Equal Status Act (2000b), one can anticipate that parents will initiate cases on behalf of their children and that schools will be in a position of defending themselves against claims of discrimination. In its Report for 2002, the Equality Authority referred to a “substantial increase” (p.21) in the number of case files in education and commented that the broad spread of grounds cited “highlights the need for educational establishments to become more inclusive” (ibid). Three potential cases, all resolved, were listed (pp. 32-33). These were related to:

- a third-level institution which agreed to take into account a student’s depression in applying its assessment regulations

- a school which reviewed policy on parent assistance at swimming classes for a pupil with a disability
- an institution making arrangements for a pregnant student to take exams around the time of her expected date of delivery

Schools' Responsibilities

Section 7 of the Equal Status Act (2000b) is specifically concerned with “educational establishments” which are defined as including institutions from preschool to third-level or “higher-level” whether or not supported by public funds. Section 7.2 prohibits discrimination in relation to four separate matters:

- the admission or the terms or conditions of admission of a person as a student to the establishment
- the access of a student to any course, facility or benefit provided by the establishment
- any other term or condition of participation in the establishment by a student
- the expulsion of a student from the establishment or any other sanction against the student

The remainder of Section 7 deals with certain matters which - notwithstanding the ban on discrimination in admission, access to facilities, terms of participation and sanctions – are not regarded as discriminatory. These include single-sex schools, religious or gender restrictions in admission to establishments which provide “training to ministers of religion” and different treatment on specific grounds by higher education institutions in such matters as fees, places and student assistance. There is, in addition, limited allowance for discrimination at admission on the part of denominational schools (Section 7.3 c). Provision is also made for different treatment on age, gender and disability grounds in relation to sports “to the extent that the differences are reasonably necessary having regard to the nature of the facilities or events” (Section 7.4 a).

As seen, equality legislation and education law are mutually supportive in the areas of admission to school and of accommodating special needs. Equality legislation makes a presumption of mainstreaming but certain exceptions are provided for in relation to students with a disability. In order to discuss the two types of exception specified, it is necessary first to look at definitions in the Acts.

The Equal Status Act (2000): Definitions and Exceptions Regarding Disability

Disability is defined in essentially the same manner in both the Education Act (1998b) and the Equal Status Act (2000b). *Disability* means:

- (a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,

- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person's body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour. (Section 2, Equal Status Act)

Although this definition may be criticised as being overly medical in approach, it is nonetheless quite a broad one. It would appear to encompass a wide range of students from those who might be described as "disruptive" to those with severe general learning disability. There is no specific mention of exceptionally able students.

Reasonable Accommodation and Nominal Cost

Section 4 of the Equal Status Act (2000b) deals with "Discrimination on ground of disability." It specifies the responsibility of service providers to make reasonable accommodation as necessary in order to facilitate a person with a disability. The only case where a service provider can refuse to make such accommodation is where the related cost would be "other than nominal." The Equality Authority indicates that the "nominal cost" exemption may not be available to schools since "it is a question of what is nominal for the State" (Barry, 2002, p.26). This view is reinforced by the Education Act's (1998b) requirement, without mention of cost exemption, that the Minister provide funding and support services in respect of students "including students who have a disability" (Section 7.2.a). (As an aside, Section 7 of the Education Act may bear further study as regards schools', students' and parents' entitlements; particular attention is drawn to the definition of "support services" and to the Minister's function to provide funding "to" students and parents).

Exceptions: "Harm" and "Detrimental Effect"

While the fundamental principle of the Equal Status Act (2000b) is anti-discriminatory, there are two important qualifications which permit different treatment, and these exceptions may be availed of by schools and may be of use in defending potential claims of discrimination. The first of these exceptions is in Section 4.4 and might be referred to as the "harm" exception. The subsection specifies that "Where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination." Schools are, therefore, entitled to take safety factors into account and this might dictate that a student's access to certain facilities, or the placing of conditions on participation would be permissible. In the absence of case law at the Equality Tribunal, it is not possible to be more definitive on this point. A recent, widely-reported case concerning a Cork primary school (*Irish Examiner*, 16 May 2003, p.1) highlighted the dilemma of schools in relation to safety issues specifically where the school

authorities and a particular child's parents take different positions in relation to risks associated with a school outing.

The second exception to the equal status principle is contained in Section 7.4 b and might be referred to as the "seriously detrimental effect" exception. This states that the prohibition on discrimination in the four areas of school life, as previously outlined, does not apply "to the extent that compliance with any of its provisions in relation to a student with a disability would, by virtue of the disability, make impossible, or have a seriously detrimental effect on, the provision by an educational establishment of its services to other students." On the face of it, this seems a wider exception than the "harm" one discussed above. Schools do argue that, in the context of the onerous demands currently being made of them, accommodating a particular additional student who has serious disability would impact negatively on the service which can be given to other students. The test in this provision of the law is whether such an impact would be "seriously detrimental."

Again, this is territory untested in case law and situations will be judged on their merits. The wording does, however, permit schools in the light of their expert judgement or (perhaps more strongly) of their experience to take into account the effect on other children of how they apply principles of inclusion on the disability ground.

The Equal Status Act 2000: Enforcement and Redress Issues

Tight time limits apply in the case of any person seeking redress under the Equal Status Act (2000b). In the first instance, a complainant is obliged "within 2 months after the prohibited conduct is alleged to have occurred" (Section 21.2) to notify in writing the person alleged to have engaged in such conduct ("the respondent") of the nature of the complaint and of his/her intention, if not satisfied with the respondent's response, to take the matter further. Section 21 also authorises a complainant to seek information from the respondent at the time of notification, and at any subsequent hearing inferences may be drawn from a failure to supply material information (Section 26).

A complainant who wishes his/her case to go for hearing before the Director of Equality Investigations (at the Equality Tribunal) must refer the claim for redress there within six months of the date of alleged prohibited conduct. The case is then dealt with by way of mediation and/or investigation at a hearing. Hearings take place in private before Equality Officers whose decisions provide for redress if in favour of the complainant. Decisions are written and are required to be published; they may be viewed on the website www.odei.ie.

Either or both of two forms of redress may be ordered by an Equality Officer:

- a compensation order, and/or
- an order that a specified "course of action" be taken (Section 27).

Maximum compensation is equivalent to the maximum that can be awarded by the District Court in civil cases in contract.

WHAT IS EXPECTED OF SCHOOLS?

Schools are obliged to take account of a growing list of legislative provisions. While the Education Act (1998b) and the Education Welfare Act (2000a) focus directly on schools, the Equal Status Act (2000b) is among a number of other statutes of particular relevance in education. Barry (2002) has stressed two key potential effects of the Equal Status Act in education:

- First, that the provision whereby an Equality Officer may make orders “could give rise to the types of orders that the Supreme Court were unwilling to make in the Sinnott judgement,” and
- Second, the possibility that the duties imposed in the Education Act, where no remedy is specified, “can be translated into enforceable rights using the accessible remedies available under the Equal Status Act” (p. 26).

Schools, of course, need to be clear on the provisions of equality legislation and this summer the INTO publishes a “Question and Answer” Guide (INTO, 2003a) for schools on both the Equal Status Act (2000b) and the Employment Equality Act (1998c).

At time of writing, schools await publication of another key piece of legislation, the revised Education for Persons with Disabilities Bill. The social partnership agreement *Sustaining Progress* stated that “it is hoped to have” this Bill “enacted by Summer 2003” (p. 61). The Education for Persons with Disabilities Bill is essentially a further part of the equality legislation framework. Teachers will demand that its provisions be realistic in the light of resources, take into account the many pressures on schools and respect professional judgement. Their concerns will address how provisions are to be implemented, but there is no evidence that teachers will object to the rights-based focus, which may be the future direction of equality law, anticipated in this legislation.

The Department of Finance may be the greatest obstacle to a rights-based approach in equality law. It opposed such an idea in its review of the Commission on the Status of People with Disabilities, stating that it “cannot accept these recommendations which imply the underpinning by law of access to and provision of services for people with disabilities as a right.” This would be “prohibitively expensive” (quoted in Dáil Éireann debate, 12 February 2003).

In summary, schools are expected to comply with the terms of anti-discrimination legislation, subject to the exceptions as outlined. Moving towards a “new generation” of equality law may involve a positive duty in the area of equality and a rights-based approach. Teachers know that “doing equality” is not a new undertaking in schools. For years, teachers have sought to accommodate difference and, without denying that there are both issues to be addressed in fully building the concept of “the inclusive school” and uncertainties about the interpretation of the law, it is likely that legislation such as the

Equal Status Act (2000b) will be seen across our schools as a reinforcement rather than an imposition.

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