

What Right Have You? An Examination of the Rights Afforded to Parents of Children with Special Educational Needs in Education in Ireland

This paper begins by outlining key themes in rights afforded to parents in primary education; these include information, choice, participation, assistance and due process. It then examines the position pertaining to parents of children with special educational needs (SEN) and uses the key themes to examine rights afforded to this cohort of parents. Specific articles of legislation are examined. The paper concludes by considering the extent to which rights afforded to parents of children with SEN enhance a partnership between parents and schools.

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INTRODUCTION

Affording rights to parents in education has been a hallmark of educational policy and practice both nationally and internationally since at least the 1980s. A number of key themes permeate parental rights in education including parents' right to educate their own children, their right to choice of school, information about schools and children's progress, participation in schools and due process in the system (Tomlinson, 1981; Beattie, 1985; European Parents' Association, 1991; Mac Giolla Phádraig, 2002). Consequently, towards the end of the last century successive pieces of legislation across a number of jurisdictions have increased parents' statutory rights by providing the right to choice of school, access to information about schools and children's progress and the right to become involved in the management of the school (Riddell, Dyer and Thompson, 1990; Armstrong, 1995).

In the Irish context, despite a constitutional recognition of the primacy of parents in education, the Irish education scene was "a dismal landscape in which parents

had no noticeable place” for much of the twentieth century (Coolahan, 1995, cited in Walshe, 1999, p. 87). Until at least the 1970s, no serious attempt was made to deal with issues pertaining to parental participation, access to information, school choice, assistance, or due process. However, tangible progress has been gradually achieved across all key areas pertinent to parental rights. Provision is made for conveying information to parents at school and national level and parents’ representatives are actively involved in policy making at national level, individual parents serve on school boards of management, establish schools and are encouraged to be actively involved in their children’s education and in the life of the school.

However, despite the advances made by parents in general “there was a perception that, in the area of special educational needs, insufficient emphasis had been placed on parental rights” (Riddell et al., 1994, p. 331). A number of studies germane to parents and special educational needs (SEN), conducted mainly in the UK, indicated that parents of children with SEN were not facilitated in making meaningful contributions to the decisions affecting their children and that when decisions were made, this cohort of parents did not feel themselves to have been sufficiently informed of the reasons for the decision (Tomlinson, 1981; Booth and Statham, 1982). These perceptions reflected the absence of any mechanism for placing parents on an equal footing with professionals and reinforced the principle of benign discretion of professionals, whereby statutory powers were weighted firmly in their favour (Kirp, 1982; Riddell et al., 1994; Armstrong, 1995). Thus, while parents in general began to enjoy a variety of rights within the education system from the early 1980s, the SEN sector was still dominated by a needs model of disability which placed power firmly in the hands of the professionals. It was not until the early 1990s that a social model of disability, with its emphasis on inclusion and parental empowerment came to influence educational theory and practice (Gibson and Blanford, 2005). Key themes of this approach to SEN included the necessity to acknowledge and draw on parental knowledge and expertise in relation to their children and to ensure that parents understood procedures and were aware of how to access support in preparing their contributions (Hornby, 1995; Mittler, 2000).

This paper now examines the situation pertaining to parents of children with SEN in Ireland and assesses the extent to which the rights they enjoy under Irish law enable them to engage in a partnership relationship with professionals. The paper is structured around the key themes of choice, information, participation and due process. It focuses on rights afforded to parents under the Education Act (Ireland, 1998a), the Education (Welfare) Act (Ireland, 2000a) and the Education for

Persons with Special Educational Needs (EPSEN) Act¹ (Ireland, 2004). Consideration is also given to the Freedom of Information Act (Ireland, 1997), the Data Protection Act (Ireland, 1988), the Data Protection (Amendment) Act (Ireland, 2003) and the Equal Status Act (Ireland, 2000b).

CHOICE

In dealing with the right of parents to choose a particular school for their child, Irish legislation makes a subtle distinction between the right to choice and the principle of choice (Department of Education and Science (DES), 1998). The distinction is that classing choice as a right implies a legal basis and further implies a corresponding action that the state is obliged to take, particularly in the area of funding. However when choice is upheld as a principle, then it is held as a basic tenet or ideal, without the same implication for action.

Upholding the principle of choice, Section 6 (e) of the Education Act (Ireland, 1998a) promotes “the right of parents to send their children to a school of the parents’ choice having regard to the rights of patrons and the effective and efficient use of resources”. Section 15 makes specific reference to parental choice of school in the context of SEN by requiring boards of management to ensure that their enrolment policies reflect the “principles of equality and the rights of parents to send their children to a school of the parents’ choice”. Furthermore, the Act makes provision for the minister for Education and Science to make specific regulations on schools’ enrolment policies (Section 33).

Thus, the Act does not unilaterally commit to an unrestricted parental choice of school as issues such as school ethos, accommodation, situation of schools and resources to cater for children’s needs are balanced against the right of parents to choose a primary school for their child. Nevertheless, the general principle of parental choice is supported by the Act.

In regard to choice, the EPSEN Act (Ireland, 2004) promotes the concept of inclusion by stipulating that the education of a child with SEN will take place, as far as possible in an inclusive environment (Section 2). However, similar to the provisions of the Education Act (Ireland, 1998a), the EPSEN Act supports the

¹ While EPSEN contains many rights of value to parents its implementation has been deferred due to financial circumstances. The current position is that the government is committed to developing ‘a costed multi-annual plan to implement some priority aspects of EPSEN focusing on measurable, practical progress in education and health services for children with special needs’ (Ireland 2009, p. 30).

principle of choice without granting an unlimited right of choice to parents. Thus, while education in an inclusive environment is promoted, this is tempered somewhat by stating that an inclusive environment may not be the best option depending on “the best interests of the child” and “the effective provision of education for children with whom the child is to be educated” (Section 2). Equally, while the National Council for Special Education, a statutory body established under the EPSEN Act is granted the power to designate a school for a child with SEN and is required to take cognisance of parental wishes in its designation, it must also take account of the capacity of the school to accommodate the child and to meet his/her needs (Section 10). While parents are granted the right of appeal against the designation of school for their child the decision of the appeals board is binding. Thus, while the concept of parental choice of school is promoted the Act does not provide for unrestricted parental choice of school.

The Equal Status Act (Ireland, 2000b) has profound implications for the right of parents to choose particular schools for their children. Section 7 (3) (c) of the Act allows for schools of particular religious values to refuse access to pupils who do not subscribe to those religious values if refusal “is essential to maintain the ethos of the school”. Further, Section 7 (4) (b) allows schools to treat pupils with SEN differently if the SEN is making the provision of educational services impossible for other students or having a detrimental effect on that provision.

Thus, the issue of parents’ right to choose a school for their child is not at all clear cut in Irish legislation. While the principle of inclusion is reflected in both the Education Act (Ireland, 1998a) and the EPSEN Act (Ireland, 2004), nevertheless, factors such as the specific child’s needs, the resources available to the school and the interests of other children with whom the child is to be educated are allowed to impact on the decision of a school considering enrolment of a student with SEN. For this reason the Catholic Primary School Management Association (CPSMA) advises its members that a clause can be included in a school’s enrolment policy allowing for schools, in exceptional circumstances, to refuse enrolment to a pupil who “has special needs such that, even with additional resources available from the Department of Education and Science, the school cannot meet such needs and/or provide the pupil with an appropriate education” (CPSMA, 2008, p. 7). This position appears to be supported by the High Court where a recent judgement found that “parents do not enjoy an absolute right to enrol a child in the school of their choice” (Carolan, 2009).

Aside from the question of choosing a school for their children, provision is made for a further parental choice under Irish legislation – the choice to send their child

to school or not. Constitutionally, parents have three options in educating their children: to educate their children at home; to enrol them in private schools; or, to utilise schools recognised or established by the state. However, prior to the enactment of the Education (Welfare) Act (Ireland, 2000a), there was little control or regulation over the first two of these options. This Act now vests a supervisory role in the state in ensuring that children who are not educated at state schools receive a certain “minimum standard of education”. The terms of the Act require parents who choose to have their children educated in a place other than a recognised school to register their child on a national ‘Register of Children Receiving Education in a Place other than a School’. Parents must also specify the time and place of their child’s education. The officers of the National Educational Welfare Board, a statutory body established under the Act, are then required to inspect the “premises, equipment and materials” that are used in the provision of education to the child concerned and also to “carry out an assessment of the child as to his or her intellectual, emotional and physical development”.

The provisions of the Education (Welfare) Act (Ireland, 2000a), seen in the context of parental choice, attempt to strike a careful balance between ‘the family state’ where all decisions are made by the state and ‘the state of families’ where education is exclusively in the hands of parents (Gutman, 1987). Prior to the enactment of the Act, the legal balance was firmly in favour of ‘the state of families’; the primacy of parents in education was clearly outlined in the constitution (Ireland, 1937) and the limited role of the state in education was affirmed in various court interpretations of the constitution (Coolahan, 1981). However, the provisions of the Education (Welfare) Act provide the legal framework for the state to satisfy itself that all children receive “a certain minimum standard of education”. It also allows for state intervention in cases where this is not deemed to be the case and thereby enables the state to fulfil its duty of protection to its citizens, including its children, and allows it to intervene where parents fail to fulfil their duties.

INFORMATION

In terms of access to information, the Education Act (Ireland, 1998a) provides parents with access “in the prescribed manner to records kept by the school relating to the progress of that student in his or her education” (Section 9 (g)). Recent guidelines issued to schools make further provision for schools to provide all parents with the results of their children’s standardised tests (DES, 2006). On school-related matters, article 18 provides for parental access to accounts and financial records on request and article 20 requires school boards of management to report to parents on the operation and performance of the school.

At a broader level, the Freedom of Information Act (Ireland, 1997) came into operation in April 1998 and established three new statutory rights: the right for each person to access information held by public bodies; the right for each person to have official information relating to him/herself amended where it is incomplete, incorrect or misleading; and, the right to obtain reasons for the decisions affecting oneself. At present, however, these rights apply only to government departments and schools are not covered by the Act.

Nevertheless, since the Act applies to public bodies, schools are not totally immune from its effects and it may have a particular relevance to SEN as any documentation, which is furnished by a teacher or a school board to a public body such as a Health Service Executive, or an officer of the DES, can be publicly accessible under the Act. A number of parents and teachers have utilised the Freedom of Information Act (Ireland, 1997) to seek and receive letters, reports and notes of telephone conversations which were on the files in the DES (CPSMA, 1998).

The Data Protection Act (Ireland 1998b) and the Data Protection (Amendment) Act (Ireland, 2003) have implications both for schools, in terms of how they maintain pupil data, and for parents, in terms of their rights to access data that schools maintain on their children. While schools are not required to register with the Data Protection Commissioner's Office they must ensure that they comply with the eight rules of data protection (Data Protection Commissioner, 2003).² In order to ensure best practice in the area of data protection the DES advises schools to put a written data protection policy in place, which clearly demonstrates how the school is adhering to the rules of data protection (DES, 2003). Parents, on their children's behalf, have a number of entitlements in relation to data on their children held by a school. They are entitled to a copy of such data, information on the purposes for which the data is used, knowledge of the identity of those to whom the school discloses the data and knowledge of the source of the data.

Aside from the issue of accessing data on individual pupils the Data Protection Commissioner has considered and made recommendations regarding the publication of pupils' personal details on school websites (www.dataprotection.ie case study 10/98). He also made recommendations regarding the disclosure of

² Organisations that maintain data must ensure that they 1. Obtain and process information fairly 2. Keep it only for one or more specified, explicit and lawful purposes. 3. Use it and disclose it only in ways compatible with these purposes. 4. Keep it safe and secure. 5. Keep it accurate, complete and up-to-date. 6. Ensure that it is adequate, relevant and not excessive. 7. Retain it for no longer than is necessary for the purpose or purposes. 8. Give a copy of his / her personal data to that individual on request.

data both to parents and to a school principal in the context of Whole School Evaluations (www.dataprotection.ie case study 04/05).

Thus, in terms of the right to information parents in Ireland enjoy broadly similar rights as their European peers. Through various avenues they can access information concerning their child's educational progress, including their test results, school financial records, reports on the operation of the school, a copy of the school plan and any information concerning them held by the DES or other relevant public bodies. When the EPSEN Act (Ireland, 2004) is fully implemented parents of children with SEN will enjoy the right to a copy of any individual educational plan and assessments or reports concerning their child. At a national level, through the publication of Whole School Evaluation reports on the DES website, parents have access to information about overall school performance in key areas such as management, resources, teaching and learning and SEN.

There is one important exception in parents' right to information and this concerns performance tables on local schools. In the UK, parents' right to such information is enshrined as a key right in 'The Updated Parents Charter' (Department for Education and Employment, 1994). However, Section 53 (a) of the Education Act (Ireland, 1998a) empowers the minister for Education and Science to "refuse access to any information which would enable the compilation of information...in relation to the comparative performance of schools". The decision to include this section in the Education Act was a policy decision of the DES and it enjoys the backing of all the education partners including the National Parents' Council (NPC) (Burns and Battles, 1999).

PARTICIPATION

When the EPSEN Act (Ireland, 2004) is fully implemented provision will be made for broad participation by parents in the education of their children. In ensuring that children with SEN benefit adequately from educational services, parental involvement will be facilitated at all stages in the process, in identification, planning and review. Parents will have the right to initiate initial investigation of their child's progress in schools should they have concerns regarding their development; they will be enabled to request an assessment of their child; their participation in the assessment will be facilitated and they will enjoy the right of appeal against an assessment (Section 3). Consultation with parents will also be a required part of the process of devising an educational plan to cater for children's needs and parents must be given a copy of the completed plan (Section 8). Finally, parents may request a review of an educational plan, and appeal against a decision not to review the plan (Section 11).

At a general school level, parental participation is facilitated both through parents' associations and boards of management. Section 26 of the Education Act (Ireland, 1998a) is devoted to parents' associations. This section establishes parents' right to establish such associations, requires boards of management to facilitate and assist these associations and delineates the functions of a parents' association, one of which is to "adopt a programme of activities which will promote the involvement of parents"(Section 26 (2) (b)).

The existence of parents' associations at school level provides the vehicle for parental involvement at national, systems level. Here, parental involvement is chiefly in the area of policy formation and is mediated through national associations of parents and parents' associations. The most recently published report of the NPC testifies to the involvement of parents in a diversity of national educational initiatives including in-service training for student teachers, national steering committees on curricular issues and involvement in the review and updating of existing curriculum initiatives (NPC, 2007, p. 9).

Finally, continued parental involvement in the management of schools is confirmed through Section 14 (1) of the Education Act (Ireland, 1998a) which guarantees the right of national parents' associations to be consulted about the composition of school boards.

DUE PROCESS

Irish legislation makes good provision for parents' right to due process through affording parents the right to appeal both to school authorities and to the DES in Sections 28 and 29 of the Education Act (Ireland, 1998a). The former section allows for appeals against a decision of a teacher or other member of staff and the latter refers to appeals against decisions in certain key areas including pupil expulsion and refusal to enrol pupils. A similar delineation of due process and associated rights of appeal are afforded to parents of children with SEN through the provisions of the EPSEN Act (Ireland, 2004). While these mechanisms, particularly appeals taken under Section 29 of the Education Act (Ireland, 1998a), have been frequently utilised,³ the extent to which they are of assistance to parents in gaining adequate provision for their children has yet to be evaluated.

³ Figures available from the Department of Education and Science indicate that in the period 1 Jan 09 – 20 Oct 09, 293 appeals were taken under Section 29 of the Education Act.

CONCLUSION

Since the early 1990s considerable progress has been made in giving a legislative basis to key parental rights in education. Issues such as choice of school, information provision to parents and rights to participate and to enjoy due process within the system are now provided for under various aspects of Irish educational law to the extent that some commentators have claimed that “the principle of partnership has become firmly rooted in the educational landscape” (Walshe, 1999, p. 209).

However, the mere existence of these provisions does not guarantee that a partnership approach will be implemented. Indeed, in the UK context, some have argued that increasing parental power served merely to increase existing power inequalities amongst parents by adding to the power of those parents who already have access to the mechanisms of power and further disadvantage those who have limited access (Deem, 1988). This is of particular concern in the area of SEN where many have highlighted the crucial importance of nurturing a professional–parent relationship that not only recognises parental rights but also affords an equivalent status to the parents in the relationship (Cunningham and Davis, 1995; Hornby, 1995).

In order to achieve this delicate balance, careful attention must be paid to the processes that are implemented in order to achieve specific legislative goals. Thus, processes that are established at local and national level to allow for parental access to information, parental participation in schools or parental choice of schools must reflect a shared sense of purpose between parent and professional and must be characterised by mutual respect and a genuine willingness to share information and to negotiate openly and honestly (Pugh and De’Ath, 1989). Therefore, while legislation may allow for a partnership with parents, it is the structures and procedures that are established in order to give effect to the legislative requirements that will determine how firmly rooted the principle of partnership really is.

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