



Pre-Budget Submission on Proposed Education Measures to the Department of Education and Science and the Government of Ireland from Northside Community Law Centre (NCLC) – November 2009

Foreword

Northside Community Law Centre (NCLC) is an independent community based legal centre. We work to protect and develop the legal, social and economic rights of individuals and groups. NCLC provides free information, advice and representation to individuals and group's who otherwise would not be able to access legal services and we work to empower the community through education, research and campaigns. NCLC is providing its service for 35 years in Dublin North East and Dublin North Central. NCLC believes in the dignity of each individual member of society. We are committed to working with the community for the creation of a just and tolerant society.

Introduction

This Pre-Budget 2009 submission primarily responds to the fiscal measures proposed in the Report of the Special Group on Public Service Numbers and Expenditure Programmes (hereinafter 'the Special Group'),¹ specifically relating to particular areas of education provision. While it is acknowledged that Ireland undoubtedly faces unprecedented economic conditions, this submission warns against a slash and burn policy aimed at particular education provisions. It is argued here that proposed reforms

¹ *Report of the Special Group on Public Service Numbers and Expenditure Programmes* (Dublin 2009) - <http://www.finance.gov.ie/documents/pressreleases/2009/bl100vol1fin.pdf> - Last accessed 21st October 2009.

should be targeted primarily where they will have as little an effect on frontline services as possible and should be aimed at those who can most afford it. Accordingly, it is strongly urged that policy adjustments should avoid the realm of education, as far as practicable. NCLC does, however, welcome the proposals which have recently emanated from discussions between Fianna Fáil and the Green Party for a Renewed Programme for Government agreed 10th October 2009.² Nevertheless, NCLC remains concerned that proposed measures relating to specific educational entitlements may actually threaten the rights of some of the most vulnerable individuals, either directly or indirectly, with possible undesirable long term consequences for society, extending far beyond the timeline of the current economic readjustment.

The Proposals on Education & Science

The Report of the Special Group recommends, *inter alia*, that there is “scope to reduce the number of Special Needs Assistants (SNA’s) by up to 2,000 ... The Group also recommends a slowdown in the planned recruitment of additional psychologists”. Additionally, the Special Group recommends that the “costs relating to the *School Transport Scheme* should be recouped to a greater extent, with parents required to pay €500 a year for the service (i.e. about half the economic cost) at both primary and post primary level, subject to standard means-tested exemptions. In principle, the Group considers that the very high needs of special needs school transport (typically taxi based) should also be subject to means-tested contributions”.³

Legal Framework of Education Rights

The right of children to receive an education is protected under Article 42 of the Irish Constitution.⁴ Article 42.4, in particular, mandates that the State is obliged to provide free primary education to children. Relevant arrangements for educational provision, including for those children with special needs, are also made under the *Education Act 1998* and the *Education for Persons with Special Needs Act 2004*, with the

² See, Renewed Programme for Government agreed between Fianna Fáil and the Green Party (Comhaontas Glas) 10th October 2009- http://www.greenparty.ie/en/government/renewed_programme_for_government Last accessed 12th October 2009.

³ Report of the Special Group (n 1) 42-43.

⁴ Article 42, *Bunreacht Na hÉireann*, Constitution of Ireland 1937 (Government Stationary Office, Dublin).

Equal Status Act 2000 and the *Education (Welfare) Act 2000* also of some relevance. The function of education was considered in *Ryan v Attorney General*⁵ where Ó Dálaigh CJ defined it as the “teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral”. However, in *O’ Donoghue v Minister for Education*⁶ and *Sinnott v Minister for Education*⁷, the Courts decided not to adopt the position that education should be provided in accordance with what is best individually for a child but, rather, with reference to the aims and structure of the broader education system.

Nevertheless, the *O’ Donoghue* case, in particular, has been recognised as having acted as a catalyst for a reorientation of government policy in the area of education for children with special needs throughout the latter years of the 1990’s and early 2000’s resulting in a more proactive approach toward provision for children with disabilities.⁸ Although, it remains the fact that the strict legal findings in the case law suggest that a child is only entitled the opportunity to be provided with *some sort*⁹ of education by the State irrespective of how severe the particular disabilities of a child might be. The main reason lying behind these findings is that the State has traditionally successfully pleaded that “insufficient financial resources” preclude it from providing a certain standard of education fitted to the individual requirements of children. The Courts have declined, to date, to query this public policy position pursuant to the doctrine of the separation of powers which exists between the Executive, Legislature and Judiciary. It has been suggested that while the State may not deny children, including children with special needs and disabilities, “an education *per se* it could be said to deny children...the most appropriate education.”¹⁰ This legal position may alter somewhat when the appeal in the case of *O’C v Minister for Education & Science & Ors*¹¹ is concluded in the Supreme Court. NCLC awaits the outcome of this case with interest.

⁵ [1965] IR 294.

⁶ [1996] IR 20

⁷ [2001] 2 IR 545

⁸ S Meegan & A MacPhail, “Inclusive Education: Ireland’s Education Provision for Children with Special Educational Needs”, (2006) 25 (1) *Irish Educational Studies* 53, 60.

⁹ Authors Emphasis.

¹⁰ M Smyth, “The Legislative and Policy Context of Special Educational Rights in Ireland”, (2009) 20 *Irish Law Times* 221, 222.

¹¹ [2007] IEHC 170.

Taken together, the legislation and the case law in the area would thus suggest that while there is a definite positive obligation on the State to provide an education, including for those children requiring special needs attention, the obligation is grounded in a kind of “qualified rights” approach.¹² This regime has, however, resulted in the State providing an education to children, especially those with special needs, in line with a particular State approved model. This model is then usually informed by financial concerns and may not be ideal for all individual children in all cases. The provision of education to autistic children in Ireland at present is a prime example of this scenario where the “eclectic” model of education has generally been pursued instead of the internationally recommended ABA model, as emphasised in a 2001 Report on the education of autistic children in Ireland.¹³ This is undoubtedly due to the relatively higher costs which can be associated with providing the specialised and individualist ABA model and the reluctance of the State to pursue this model for that reason.

Position of NCLC

While the current legal position of the State in relation to the exact mechanics of provision of education, and special needs education in particular, is recognised as a reality by the NCLC, it is argued that the proposals in the Report of the Special Group would row back, in a quite drastic way, the already imperfect educational supports for children with special needs and other disabilities. This would further impact upon rights of access to education especially for students with special needs, pushing the disregard for such rights past its reasonable and defensible limits, regardless of financial resources based arguments. The proposals to seriously reduce the number of Special Needs Assistants (SNA’s), to means test special transport facilities and to freeze the recruitment of child psychologists would seriously endanger the abilities of children with special needs and other disabilities from extirpating the most meaningful educational experience with due regard to their specific needs. The reduction in Special Needs Assistants, in particular, would speak for itself in terms of pushing children with special needs into

¹² E Duane, “Children with Disabilities and the Law”, (2004) 7(2) *Irish Journal of Family Law* 8, 14.

¹³ See, generally, Report of the Task Force on Autism, *Examining the Educational Provisions and Support Services for Children with Autistic Spectrum Disorders*, (Institute of Public Administration, Dublin 2001).

larger group sizes which would undoubtedly prove detrimental to them. Access issues are also clearly raised by the Proposal to means test transport for such children.

While, strictly speaking, children of middle to higher income parents may not necessarily qualify for special needs transport on financial grounds under a prospective new means tested regime, this belies the fact that the specific schools which cater to special needs students are often extremely far removed from the place of residence of the child, a difficulty which might not necessarily occur for students without special needs attending a local school which can adequately cater for their needs. The transport requirements are thus not vital to all parents on financial grounds alone, but also substantially due to the sheer transport and accessibility issues which can arise separately for consideration. If these proposals were implemented without due regard to these issues, it is the opinion of the NCLC that this would have an extremely detrimental impact on the requirements of special needs children which would translate access restrictions into a more fundamental crisis in society where such children are sidelined, not to be able to achieve to the full extent of their abilities. Accordingly, later on in life these children may, in some cases, be more likely to be incarcerated at mental health institutions at some considerable cost to the State.

The Renewed Programme for Government

NCLC broadly welcomes the proposed policy positions contained in the Renewed Programme for Government¹⁴ with regard to proposed policy positions on the central role of education generally. In particular, NCLC welcomes the undertaking to recruit 28 additional National Educational Psychological Service (NEPS) psychologists, to maintain NEPS funding and the commitment that every school in the country will have access to NEPS. The stipulation within the Programme promising to implement the Education for People with Special Needs Act in full is also welcomed.

Conclusions

¹⁴ Renewed Programme for Government agreed between Fianna Fáil and the Green Party (Comhaontas Glas) 10th October 2009. http://www.greenparty.ie/en/government/renewed_programme_for_government - Last accessed 12th October 2009.

In conclusion, although NCLC recognises the concessions contained in the Renewed Programme for Government, there remains issues which have not been addressed within it and which remain on the table by virtue of the Report of the Special Group. In particular, the proposal to reduce substantially the number of SNA's and the reforms of the transport scheme for children with special needs raises particular concern with regard to access rights, which although, strictly speaking, may be in line with the current legal prerogatives of the State, cannot be reasonably defended on financial grounds alone. NCLC believes there should not be a return to a situation where education access rights for children with special needs is treated by policy makers as "another charity ball for the disabled."¹⁵ Furthermore, NCLC would agree with the sentiment that an education policy for children with special needs cannot be permitted to boil down to, "resource availability, practicability or ministerial discrepancy..."¹⁶ If the adjustments recommended in the Report of the Special Group are implemented this could have definite long term consequences for the ability of children with special needs to access any kind of appropriate education and may well result in increased litigation in the courts on this matter, inevitably incurring a cost to the State but, more importantly, would speak volumes about how Ireland proposes to deal with vulnerable individuals in society.

¹⁵ E. Ó Murchú & M Shevlin, "The SERC Report: A Basis for Change", (1995) 8 *REACH Journal of Special Education in Ireland*.

¹⁶ Meegan & MacPhail (n 8) 60.