# Contemporary Legal Issues for Management and Staff in Educational Settings: Exploring Legislation, Litigation, Approaches and Strategies and Implications for Teacher Education

## Final Narrative Conference Report

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## Introduction

Education and educational institutions in Ireland, both North and South operate in a complex legal environment. They face growing legal challenges and litigation from a variety of sources, including, legislation and regulatory requirements, both national and European, case law, employment/equality law, and data protection. For better or worse the field is rapidly legalising. The rise of a legalistic culture is itself a challenge to all educational institutions and has enormous ramifications on the role and work of principals, teachers, other school staff and Boards of Management/Boards of Governors. In particular, principals and boards of management face severe pressures in addressing the plethora of diverse laws and legal instruments/regulations affecting schools.

In response to requests from undergraduate and postgraduate students to have an increased exposure to legislation affecting education a joint conference between the Education departments of St. Angela's College, Sligo, and Ulster University was organised on Education and the Law. The central questions explored at the conference were:

> How can educational management and staff prepare for, deal with, and respond to a range of legal issues which challenge educational settings today?
>
> What are the implications does this have for teacher education?

To this end a questionnaire, containing quantitative and qualitative elements was distributed at the start of the conference. The data from this research is contained in a separate report.

The conference organisers were Ms Marie Conroy Johnson (Conference Coordinator) representing St. Angela's College, Mr Gareth Parry, representing Ulster University, and Ms Sinead Campbell (Conference Administrator). A range of speakers from the Judiciary, legal profession, and Education were invited to speak on current legal issues affecting Education in both Irish jurisdictions.

The Conference Chair was His Honour Judge Keenan Johnson, Judge of the Circuit Court.

The Conference speakers were:

1) The Honourable Mr. Justice Frank Clarke, Judge of the Supreme Court (Republic of Ireland (ROI)) who practiced for 31 years as a barrister and 10 years as a judge.
2) Dr. Dympna Glendenning, BL, barrister, former school principal, and author of 'Education and the Law', the leading publication on the area in the Republic.
3) Nessa Agnew, Solicitor, Education Authority, Northern Ireland
4) Kathryn Stevenson, Head of Legal Department, Northern Ireland Children's Law Centre, Belfast
5) David Ruddy, BL, Principal of Talbot Senior School, Clondalkin, Dublin. Legal advisor to the Irish Primary Principals Network.

The conference was a joint one-day event and was held at St. Angela's College, Lough Gill, Sligo on 30th May 2015. The theme of the conference was, '*Contemporary Legal Issues for Management and Staff in Educational Settings: Exploring Legislation, Litigation, Approaches and Strategies and Implications for Teacher Education'*. It is believed that this was the first all Ireland conference on Education and the Law. The conference was part financed by the Standing Conference on Teacher Education North and South (SCoTENs) following a successful joint application for funding by the College and Ulster University, one of the SCoTENs objectives being to provide collaboration between teachers North and South.

The conference provided an opportunity to explore current legislation as it relates to education; to review recent litigation; to consider possible approaches and strategies to respond to these issues; and to promote open, inclusive dialogue, and exchange ideas and experiences between interested individuals from both North and South, in particular the implications for teacher educators at undergraduate, post-graduate and Continuing Professional Development (CPD) levels. Furthermore, the Conference provided an opportunity to strengthen the long standing association and partnership between the two Education departments. Around 90 representatives of teacher training institutions, postgraduate students, teachers, members of the Judiciary and the legal profession and government departments attended the

conference. The conference was recognised for accreditation purposes for members of the legal profession.

**Conference Opening**

The Welcome and Introductory Remarks to delegates were made by Mr. Eugene Toolan, Head of Education Department, St. Angela's College, and his Ulster University counterpart, Dr. Sam McGuinness. Mr. Toolan indicated that the conference was one of a number of projects planned this year at St. Angela' College. He also mentioned the long and tangible association between the two Education Departments and stated, "This North-South collaboration between St. Angela's College and the School of Education, Ulster University is another tangible manifestation of the Memorandum Of Understanding relating to Teacher Education which was signed between the two parties in April 2013".

**Formal Introduction**

The Conference was formally opened by Mr Frank Feighan T.D. and Chair of the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement. He stated that in 2013, following a presentation by St. Angela's College and Ulster University to the Oireachtas Committee on the implementation of the Good Friday Agreement, both institutions signed a Memorandum of Understanding to promote collaboration between them, in particular, collaboration in teacher education. He commended the two institutions for having the vision and foresight to organise the event, and hoped that it will be the first of many such conferences.

Deputy Feighan stated that the exchange of views between both jurisdictions will help in meeting the common challenges that they both face - to bring people together and help break down barriers. Furthermore, the exchange of views between the two professions will mean that lawyers will have a greater understanding of the educators' perspective and educators will have a greater understanding of the lawyers' viewpoint. "This can only serve to add to the body of knowledge and understanding of each profession", added Deputy Feighan.

He paid tribute to SCoTENs as an influential cross-border organisation which was recently lauded in an external evaluation for making “a major contribution to the professional development of the teacher education community across the island of Ireland” and for “often in complex and subtle ways, being a significant contributor to the peace process”.

Deputy Feighan went on to outline the work of the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement by stating that the Committee in 2015 had identified Education as a key priority for further investigation. As a result a number of areas, such as Special Needs Education, access to third level education and integrated education were being examined in the context of North-South co-operation.

On a personal note, he mentioned, as part of the Committee’s Outreach Programme visiting Edenderry and Holy Cross Nursery Schools in 2015 and being impressed and humbled by the brave courageous teachers and children in their determination to find an ‘alternative journey’ to the sectarianism and segregation they had grown up with.

Finally, Deputy Feighan reminded the delegates of WB Yeats close connections with Lough Gill and quoted the poet by saying, “Education is not the filling of a pail, but the lighting of a fire”.

The Chair of the Conference, His Honour Judge Keenan Johnson, Judge of the Circuit Court introduced the Keynote Speaker: The Honourable Mr. Justice Frank Clarke, Judge of the Supreme Court, ROI.

**Keynote Speaker: The Honourable Mr Justice Frank Clarke**

In his introductory comments to his keynote speech Mr Justice Clarke remarked that it was a pleasure to be invited to the conference. Though not an expert in educational law, he had many personal connections with education, since his wife, brother-in-law and sister-in-law were in the education sector. He welcomed the conference since it provided an opportunity to listen to speakers with more detailed expertise than himself, and also to reflect on areas of education which had come into contact with the courts. As a barrister and judge his outlook could be a little warped, since he only saw issues that

had gone wrong and were litigated, and it was useful to get a perspective on how education fits into the court system.

Mr Justice Clarke took as his theme '*Education in the Courts'* and gave an illuminating and interesting exposition of the interaction between the courts and education. He started with the recent Supreme Court appeal case of *Stokes v CBS High School Clonmel* (February 2015) in which a member of the Travelling Community – Mary Stokes – argued that the school's admission policy favouring students who had a family connection of fathers or siblings attending the school was discriminatory. She asserted that the school's policy was indirectly discriminatory against members of the Travelling Community and in breach of the provisions of the Equal Status Act 2000. Mary Stokes argued that the requirement to be a son of a former pupil of the School impacted more heavily on members of the Travelling Community as they had less chance of having received second level education. Her son, John Stokes, had applied for a place in the School for the academic year 2010/2011 but as a result of high demand, with 174 boys applying for 140 available places, he was unsuccessful.

Section 3 of the *Equal Status Act* describes indirect discrimination as arising out of "an apparently neutral provision" which puts a person from a protected class "at a particular disadvantage". However, there is a qualification where the relevant provision is "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". The legislation specifically refers to members of the Travelling Community as one of the protected classes, so the key issues in the case were whether the apparently neutral entry policy of the school placed members of the Travelling Community "at a particular disadvantage" and, if so, whether the policy was objectively justified and proportionate to a legitimate aim.

The *Stokes* case was the first case of indirect discrimination to come before the Supreme Court and the Court was conscious it was being asked to identify the proper means of assessing indirect discrimination not just for the purposes of this case, or for the purposes of admission policies generally, but for the whole general area of indirect discrimination cases which might arise in the future. So while the decision was education specific, it was driven in part by considerations which were much wider.

The Supreme Court dismissed the appeal of indirect discrimination on the grounds that they did not believe that sufficient quantitative evidence or materials were presented to the Equality Tribunal or the Circuit Court to enable a proper assessment to be carried out as to whether the parental rule resulted in a particular disadvantage to members of the Travelling Community compared with non-travellers. It is important to emphasise that the Court did not rule that there was no indirect discrimination, but there was not enough evidence to support the claim. Mr Justice Clarke said there may well have been and that a proper statistical analysis would have demonstrated this. However, the Court held no sufficient analysis had been done to allow for a proper conclusion.

Mr Justice Clarke was at pains to point out that some media reports appeared to suggest incorrectly that the Supreme Court's decision endorsed the admissions policy of CBS Clonmel High School. However, by itself the dismissed appeal did not mean the Supreme Court approved or endorsed the admissions policy adopted by CBS High School Clonmel.

Mr Justice Clarke then went on to analyse some of the considerations arising from the case, and from some of the very generalised terminology used in modern legislation. Legislation is often expressed in very general terms; sometimes with good reason, since it might be too easy to find loopholes if the language is too precise. Using the *Stokes* case as an example he drew attention to the fact that the definition of indirect discrimination requires that the protected class of person be placed at a '*particular*' disadvantage. However, what does 'particular' mean? Does it refer to the degree of discrimination and intended to exclude relatively minor disadvantages? Or does it mean something different altogether? If it refers to the degree of discrimination what level of differential impact is to be regarded as sufficient for the disadvantage to be 'particular'? 1%, 5%, 10%? Until a sufficient number of cases have been heard in the Appeal courts to enable a view on such issues as that to be taken, we just do not know. It was particularly unfortunate from the perspective of the *Stokes* family and Clonmel High School that they ended up being the first case to involve a detailed consideration of at least some of these issues.

**Bullying**

Mr Justice Clarke then went on to deal with other areas of general law which interrelate with education, such as the common law duty of care and the tort of negligence. He took as his next theme the issue of 'bullying', a term which has acquired a great deal of attention in recent years but which has not yet been recognised as a separate stand-alone concept. Schools and teachers have a duty to take 'reasonable care' to ensure pupils' safety. The underlying principle of '*foreseeability*' is the same as in other sectors, but its application might be different in the school situation.

He gave as an example a situation where a school knows or ought to have known a pupil is prone to violence, but does not take appropriate action to minimise the risk, and then the pupil assaults another pupil in a one off incident. This may not qualify as bullying, since it does not come within the accepted definition of bullying which is concerned with repeated activity, but there would be no reason why it would not give rise to liability. A school can only be liable for bullying of a pupil by another pupil if there is no whole school behaviour policy in place or the schools failed to do something it should have reasonably done.

He briefly touched on the issue of the growing number of cases alleging bullying in the workplace. In education, individual teachers have brought claims against the employer of being bullied by other teachers, citing the failure of the employer to take 'reasonable' steps to protect an employee from being injured in the course of employment. At the moment there is a case yet to be decided in the Court of Appeal which may cast light on this area of the law.

Mr Justice Clarke summarised the theme of bullying by noting that there is no new civil wrong called bullying. The relevant civil wrong remains a claim in negligence, and employers can be liable in two different ways, either directly, by failing to put in place proper policies regarding behaviour, or they can be vicariously liable for the negligence of someone they employ. To the extent that bullying now forms part of claims before the courts, it only does so as a

convenient way of describing a particular type of activity which may give rise to a successful allegation of negligence in some circumstances.

**Employment Injunctions to restrain a disciplinary process or dismissal**

A general area of law which may have its own particular application in the educational field is that of employer/employee relationships, particularly in relation to people's contractual rights. Mr Justice Clarke said that this area frequently appears in the courts where an aggrieved employee brings injunction proceedings seeking either to prevent dismissal or to prevent a disciplinary process which is said to be in breach of the employee's contractual rights. The basis of the claim is that something has been done or is about to be done which is in breach of their legal entitlement under their contract. An application for an interlocutory junction by an employee is often the route by which the case first comes before a court. He felt that teachers were amongst the most regular users of the procedure.

Mr Justice Clarke explained the principle behind the interlocutory junction is that the court is invited to decide, on a short term basis, what is to happen until such time as a full court case can be prepared and heard. In the employment context it is often designed to stop a process where it then stands until such time as there is an opportunity to have a full hearing on the rights and wrongs. By way of example, he stated that in the educational field frequent cases were brought the courts to prevent some disciplinary process from proceeding on the basis of an allegation of unfairness in the process itself.

The key question facing the court is in determining whether to grant or refuse an interlocutory junction is, would there be a greater risk if the injunction was refused but the claimant was ultimately to win, rather than if the claimant were granted the injunction but ultimately were not found to have a good case. In either case there is a clear risk of injustice. In granting an interlocutory injunction the court is doing this without all the information in the case, it does not look at the rights and wrongs of the case, and focuses at what will happen when there is the chance to go through the full procedure.

On balance the courts have tended to focus on whether any irreparable harm could arise from allowing the process to continue its natural course, unless it can be shown that it has gone so much 'off the rails' that there is the prospect of irreparable harm. Courts are more inclined to let the disciplinary process continue and let it take its course, and only stop it before actual dismissal and then hear the case. It is increasingly more difficult to obtain an interlocutory injunction.

**The Role of Constitutional/Human Rights in the Educational Field**

Mr Justice Clarke then proceeded to examine the relationship between the *European Convention on Human Rights* (ECHR) and the *Irish Constitution* 1937. The Republic was one of the last countries to incorporate the ECHR into domestic law by means of the *ECHR Act* 2003. It has a limited effect in Ireland because of the fundamental rights guaranteed in the Constitution. Indeed the Constitution is not necessarily compatible with the ECHR. So if a law is in breach of a Convention right the courts may make a declaration of incompatibility, but it has no effect on the validity and enforcement of that law. The context in which the Convention operates in the Republic is radically different from Northern Ireland because of the pre-eminent role of the Irish Constitution. Government action and legislation in breach of the Constitution is struck down by the courts. Clearly the Constitution has potential to impact in many areas.

**Social and Economic Rights under the Constitution**

Mr Justice Clarke concluded his talk by dealing with some of the difficulties which have arisen as to how enforceable social and economic rights are under the Constitution. He took the view that the courts are not the best forum to decide on how resources should be allocated. While the Constitution provides an express right to 'free primary education', what does this mean outside the context of primary education? What does it mean for pupils with special educational needs? How far can the courts go in defining primary education? He quoted a case where a child's condition required a very high level of

support, but the state argued that the support offered to the child was *adequate/sufficient* and the court agreed.

In summary, Mr Justice Clarke's presentation illustrated how the courts in dealing with matters pertaining to education, endeavour to apply the concept of '*reasonableness'*, allied with a desire to balance the competing rights of the common good against those of individual schools and of individual students.

**Session 2: Nessa Agnew, Solicitor, Education Authority (NI)**

**School Discipline in the Education Authority – The Legal Framework**

Ms Agnew explained that the Education Authority (EA) was established under the *Education Act Northern Ireland 2014* and became operational on 1st. April 2015. It took over all the roles and responsibilities of the former 5 Education and Library Boards in Northern Ireland. The intended result of the change is that education policies will be delivered in the same way in controlled schools, regardless of where you live in Northern Ireland.

The focus of the talk was the new legal framework in relation to the disciplinary policy affecting suspensions and expulsions in controlled schools. Under the terms of *Article 49 of the Education and Libraries (NI) Order 1986* (as amended) the Education Authority is required "to prepare a scheme specifying procedures to be followed in relation to the suspension or expulsion of pupils from schools under their management". The new scheme provides that a pupil may only be expelled by the '*expelling authority'*. For controlled schools the expelling authority is now the Education Authority, for other categories of school (voluntary aided or grant maintained integrated schools) it is the Board of Governors (BoG).

She noted that this situation is similar to that in the Republic, where the expelling authority is the Board of Management, or if it is an Education and Training Board (ETB) school, the ETB.

*The Schools (Suspension and Expulsion of Pupils)Regulations (NI) 1995* (as amended) specify the matters which must be included in such a scheme. This states that a disciplinary scheme must contain the following procedures:

a) Pupil may be suspended only by the principal
b) Initial period of such suspension shall not exceed 5 school days
c) A pupil may be suspended for not more than 45 school days in one year.
d) Where a pupil has been suspended the principal **shall** immediately:
give written notification of the reasons for the suspension and the period of suspension to the parent, EA, chair of the BoG, and if appropriate, the local diocesan office of the CCMS; and
invite the parent of the pupil to visit the school to discuss the suspension.
The principal **shall not** extend the suspension except with the prior approval of the BoG and **shall** in every case give written notification of the reasons for the extension and period of the extension to the parents, EA, chair of the BoG, and if appropriate, the local diocesan office of the CCMS.

Ms Agnew briefly outlined the scheme for suspensions in the Republic, which states that:

- The initial suspension is not to be for more than three days except in exceptional circumstances if the principal considers longer is necessary
- Parents/students should be given an opportunity to respond to allegations before a decision to suspend is approved.

She went on to deal with the right to appeal against suspension, which she stated can only be challenged in Northern Ireland by judicial review. However, in the Republic if a pupil is suspended for more than twenty days in one year then an appeal can be made to the Department of Education and Skills.

Regarding the steps to be followed prior to suspension the school's discipline policy is required to describe the standards of behaviour expected from pupils and to outline the procedures and sanctions to be adopted when these guidelines are not adhered to. A decision to suspend should only be taken by the principal in response to a serious breach, or persistent breaches of the school's discipline policy. Under the Education Authority's scheme suspension should therefore be considered only after:

A period of indiscipline **AND/OR** a serious incident of indiscipline.

- **A period of indiscipline**
  The school must maintain a written record of events and of the interventions of teachers, contacts with parent/guardian and any requests for external support from the Education Authority's Education welfare Service, Educational Psychology Service or other applicable EA services; and/or

- **A serious incident of indiscipline**
  The school must have investigated and documented the incident. The investigation should include an opportunity for the pupil to be interviewed and for his or her version of events to be given before any decision to suspend is made.
  *Article 34 of the Education (NI) Order 2006* places a statutory requirement on boards of governors to arrange for the provision of suitable education for pupils when they are suspended.

  Ms Agnew pointed out that schools need to follow the procedures very carefully, otherwise they may encounter difficulties and she referred to some examples from case law. This could well be the situation in schools who are not accustomed to suspending pupils. So schools need to be clear who is responsible for what? Who has to be officially notified? – i.e. parent/guardian, chair of BoG and EA. Also great care has to be taken to be consistent in the language used to describe incidents.

  The practice of sending pupils home to *'cool off'* or allowing younger pupils to go home with their parents/guardians following an incident but not officially recording it as a suspension is not permissible. Informal or unofficial suspensions are unlawful regardless of whether it is done with the agreement of parents/guardians. Any exclusion of a pupil even for a short period of time must be formally recorded.

  Lastly in relation to suspensions, Ms Agnew addressed the position of '*precautionary suspensions'*. The Court of Appeal (NI) had previously

held that a principal teacher must have within his management powers the right to suspend a pupil as a precautionary measure pending investigation by a statutory agency e.g. Police Social Services. However, the Supreme Court in London addressed the issue of 'precautionary suspensions' in *JR1 7 (Education) 2010* and disagreed and stated that no such power currently exists.

Ms Agnew then went on to deal with the requirements for expulsion. In relation to controlled schools, the EA is the *'expelling authority'* and has the sole responsibility for the decision to expel. Boards of governors can only recommend to the EA that a pupil be expelled. The decision to expel a pupil must be lawful, reasonable and fair.
Expulsion can only be used in response to serious breaches of the school's discipline policy. A pupil may be expelled from a school only after serving a period of suspension. The decision to expel a pupil is subject to appeal at an Expulsion Appeals Tribunal and on occasions a judicial review.

Expulsion can only be used in response to serious breaches of the school's discipline policy and only after a range of alternative strategies to resolve the pupil's disciplinary problems have been tried and proven to have failed; and where allowing the pupil to remain in school would be seriously detrimental to the education or welfare of other pupils or staff, or of the pupil himself or herself.
She noted however that there may be circumstances where it is appropriate to expel a pupil for a first or 'one off' offence. These might include:

- Serious actual or threatened violence against another pupil or a member of staff
- Sexual abuse or assault
- Supplying an illegal drug
- Or carrying an offensive weapon.

**Steps to be taken prior to expulsion.**

Ms. Agnew detailed the procedures in cases where a recommendation for expulsion is being considered:

- The principal shall convene a consultative meeting, to be attended by himself/herself, the chair of the BoG, the parent/guardian, the pupil and an authorised official of the EA.
- At least 5 working days' written notice of the meeting and its purpose must be given to the parent/guardian and all other parties required to attend.
- The consultative meeting shall be chaired by the chair of the BoG.
- At the consultative meeting the possibility of expulsion and the implications of this course of action must be discussed. Also the meeting has to consider the future provision of suitable education for the pupil.
- Non-attendance of the parent/guardian at the consultative meeting will not prevent the BoG from considering the future action to be taken.
- The principal must ensure that a minute of the meeting is kept after agreeing it with the authorised official of the EA.
- Following the meeting, the parent/guardian must be informed by the principal that a report on the matter, along with the minute of the consultative meeting will be presented to the next meeting of the BoG.
- The parent/guardian should be invited to the meeting of the BoG.
- At least 7 working days notice should be given to the parent/guardian.
- The parent/guardian should be given a copy of the minute of the consultative meeting, and advised of their right to submit written submissions to the BoG.
- The meeting of the BoG should **normally** take place within 7 working days after the date of the consultative meeting.

- The refusal of the parent/guardian to attend the meeting shall not prevent the BoG from proceeding to request the EA to consider a recommendation for expulsion.
- All the available evidence, including the outcome of consultations, decisions taken and the reasons for it must be recorded in the meeting of the BoG.

Ms. Agnew briefly pointed out that the consultation process is different in the Republic, where this takes place when the Board of Management is of the opinion that the pupil should be expelled. At that stage the Education Welfare Officer is informed.

She then stated that suspensions/expulsions **should not be used** for following reasons:

- Minor incidents, e.g. failure to do homework or bring dinner money.
- Poor academic performance
- Lateness or truancy
- Pregnancy
- Breaches of school uniform rules or rules on appearance, e.g. relating to jewellery, body-piercing, hairstyles etc, except where these are persistent and in open defiance of such rules.

Ms. Agnew then considered the position of children with special educational needs (SEN) who are at a particular risk of suspensions and exclusions. *The Special Needs and Disability (NI) Order 2005 – SENDO* makes it unlawful to treat disabled pupils and prospective disabled pupils less favourably than other non-disabled pupils in all aspects of school life. As such it is unlawful to *discriminate* against a pupil by suspending or expelling him or her for a reason relating to his/her disability. She stated that in England it is recognised that children with SEN have a disproportionately high rate of exclusions. There guidance states that a principal should as far as possible avoid permanently excluding any pupil with SEN. A new protection has been added whereby, on appeal to an Independent Review Panel, the parents have the right to request

the presence of an SEN expert on the Panel. This person would give impartial advice about how SEN could be relevant to the decision to exclude.

In Northern Ireland where a school has concerns about the behaviour of a pupil with SEN; and where there is a risk of expulsion, the school should, in partnership with others, including the EA:

- Consider what additional support(s) or alternative placement may be required
- Assess the suitability of provision for a pupil's SEN
- Where a pupil has a Statement, consider requesting an early/emergency review.

Ms Agnew then described the role and function of the independent Expulsion Appeal Tribunal. Briefly, the EA is required by statute to make arrangements to enable the parents or the pupil himself/herself if he/she has reached the age of eighteen to appeal against the decision of the expelling authority to expel. Following the hearing the Tribunal may allow the appeal and direct that the school re-admits the pupil, or dismisses the appeal. She went on to explain the procedures and considerations of the Appeal Tribunal.

**Relevant case law.**

Ms Agnew cited a number of English and N. Ireland legal cases involving pupil expulsion. A recent N.I. 2015 case is worth reporting. A pupil who assaulted another pupil in a classroom was expelled by the BoG for the assault and his previous poor record of behaviour. The school's suspension and expulsions scheme required that the school explore reasonable alternatives short of expulsion. However, the court quashed the expulsion decision since the school could not produce a note, record or minute of having explored alternatives to expulsion.

**Statistics**

Ms Agnew mentioned that statistics and breakdowns on suspensions and expulsions could be accessed on the DENI website. This provides the numbers of suspensions and expulsions for every academic year since 2002/03. For the

most recent year 2013/14 there were 29 expulsions and 3677 suspensions. The website also provides the detailed reasons for suspensions, e.g. gender/type of school.

**Session 3: Kathryn Stevenson, Head of Legal Department, Northern Ireland Children's Law Centre, Belfast**

**Special Educational Needs (SEN) in Northern Ireland**

Ms Stevenson prefaced her talk by producing figures for children with SEN in Northern Ireland (NI). In 2005/6 there were 54,000 children with SEN, of whom almost 12,000 had Statements. The current figure is almost 74,000 with 16,000 children having statements. While 5000 children are educated in special schools, the remainder are in mainstream schools. Children with statements now represent 4.9% of the total school population.

- She then went on to outline the aims of the presentation, which would focus on:
- providing an introduction to the legal framework for identifying and assessing children with SEN;
- the appeals procedures and an overview of judicial reviews on SEN in the courts;
- the involvement of the Children's Law Centre (CLC) in providing legal advice; representation and dealing with queries about SEN and, finally,
- to consider the *Special Educational Needs and Disability Bill* 2015 which is currently under scrutiny in the NI Assembly.

Ms. Stevenson stated that the legal framework relating to SEN is complex and is governed by both primary and secondary legislation. In addition, the regional offices of the Education Authority (EA) use their own criteria, policies and guidelines to allocate resources. Primary legislation is contained in *The Education (NI) Order* 1996 as amended by *The Special Needs and Disability (NI) Order* 2005 (SENDO). The DES provided guidelines as a Code of Practice on the Identification and Assessment of SEN to the Education and Library Boards, now the EA, and also a supplement to the Code of Practice.

Referring to *Education (NI) Order* 1996 Ms. Stevenson said this legislation provides the meaning of 'special educational needs' and 'special educational provision'. Article 3 (1) states that for the purposes of Education Orders, "a child has 'special educational needs' if he has a learning difficulty which calls for special educational provision to be made for him". According to Article 3 (2) a child has a learning difficulty if:

a) He has a significantly greater difficulty in learning than the majority of children of his age.
b) He has a disability which prevents or hinders him from making use of educational facilities.....in ordinary school.
c) Or he is likely to fall within a) or b) when he reaches compulsory school age.

She then proceeded to provide examples of the main categories of SEN. These include:

- Physical or mental disability
- Sensory impairments- visual/hearing difficulties
- Developmental disorders
- Specific learning difficulty – e.g. dyslexia
- Emotional or behavioural problems
- Some medical conditions.

Article 3 (4) defines 'special educational provision' as, "educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in an ordinary school". The additional provisions may include money, staff time and special equipment, for example, classroom assistance, individual teaching materials, literacy support, qualified teachers for children with sensory impairments.

Ms Stevenson then outlined the format of the Code of Practice which addresses the identification, assessment and provision for all children who may have SEN:

**Stages 1 – 3** are school-based stages of assessment and provision. The school is legally responsible for the child's special educational provision

**Stage 3** – This stage provides access to, and involvement of EA specialists

**Stages 4 – 5** are the responsibility of the EA.

Stage 4 is the Statutory Assessment, which may be initiated by the EA, school or parents. It is a very detailed multi-disciplinary assessment to determine what the SEN are and the help required. Reports are sought from various parties including social and medical advice, educational advice and psychological advice. The criteria for statutory assessment are that the child's learning difficulties are:

- Significant and/or complex
- Have not responded to relevant and purposeful measures taken by the school
- May require special educational provision not normally available to mainstream schools.

Stage 5 is the drafting of a formal Statement of Educational Needs. The advice (reports) received from the parents and the multi-disciplinary team are attached to the Statement. The EA is responsible for arranging the special educational provision to meet the child's assessed needs. Then the EA will issue a proposed Statement to the parents of the intended provision. A process of consultation will then take place with the parents, leading to the issue of a finalised Statement.

If the parents disagree with the final Statement they have the right to formally appeal to the Special Educational Needs and Disability Tribunal (SENDIST). An appeal to the Tribunal must be made within 2 months of any disputed decision. The grounds for appeal might include some of the following :

- Refusal to make a statutory assessment
- Refusal to make a Statement
- The parents may disagree with the contents of Stage 2, 3 and/or 4
- Refusal by the EA to change the named school to another school.

The Tribunal is an independent body with no connection to the EA. If a parent does not agree with the Tribunal's decision, they may request the Tribunal to review its decision. The request for review must be made within 10 days of the issue of the decision. The Tribunal's decision is final as far as the facts of the case are concerned, but the parents and EA may ask the Tribunal to state and

sign a case for the opinion of the High Court if it is felt the Tribunal's decision is wrong on a point of law. If a judicial review is ordered the High Court will examine whether the Tribunal acted lawfully in arriving at its decision.

Ms Stevenson then went on to explain the work of the Children's Law Centre (CLC). This independent charity has seen a notable rise in requests for specialist legal advice and representation at education tribunals and SENDIST appeals. She provided some of the main issues in CLC's casework for children with SEN. These include:

- Delays moving between school-based and EA-based stages
- Failure to specify provision in statements , e.g. quantify the number of hours of special educational provision
- Failure to consult with parents around the nature of provision
- Decisions which are resource-based rather than child focused
- Failure to take account of the voice of the child
- Appeal against refusal to carry out a statutory assessment
- Appeal against refusal to issue a Statement
- Appeal against the content of Statement.

The CLC, while it offers impartial legal advice, does not have a casework budget and does not fund individual legal cases.

Ms Stevenson then proceeded to present a series of NI court cases involving SEN. Among the issues most commonly arising are:

- Challenges to the form or content of the Statement
- Compliance or enforcement of Statements
- Disputes over the use of resources/funding issues
  Blanket policy v individual need
- Parental representation in statutory assessment process.

Ms Stevenson concluded her talk by detailing the draft *Special Needs and Disability Bill* 2015 which is currently under scrutiny at the NI Assembly. This Bill seeks to amend the law in relation to special education needs and discrimination in schools. The CLC has provided written and oral evidence to the Education Committee of the Assembly. Among the new proposals in the Bill are the following:

- New duties on schools to prepare and keep under review personal learning plans with respect to children with SEN
- Duty of the EA and BoG to seek and have regard for the views of the child
- Reduction in timeframe for SEN assessments
- Introduction of new appeal rights to SENDIST for over-16s.

The DES intend to issue new Regulations and a revised consolidated Code of Practice.

**Session 4: Dr. Dympna Glendenning**

**Squaring the Circle: Balancing Church-State Interests in the Education (Admissions to Schools) Bill 2015.**

In her introductory remarks Dr. Glendenning stated that fundamental change to Article 41 (the Family) of the ROI *Constitution* 1937 was being embodied in the new Bill on school admissions. (N.B. Article 41 describes the family "as the natural primary and fundamental unit of society" and states it is a "moral institution possessing inalienable and imprescriptible rights".) As a result substantial powers were now moving from church to the state.

She pointed out that education systems generally reflect a church-state relationship. In Ireland the approach adopted has been, "*a co-operative model where church and state provide education in a spirit of partnership".* This is seen in the character of the education system where churches and religious denominations own 96% of primary schools. Also, approximately 50% of second level schools are voluntary schools, which are owned by churches or religious orders and are recognised by the Minister for Education and Skills under the *Education Act* 1998. They are not state schools but they are publicly funded recognised schools.

Alongside the schools established by churches/religious orders other school governance models exist. Local authority schools, under the Education and Training Boards Act 2013 are providers of education at primary and secondary

levels. The Education and Training Boards (ETBs) educate approximately 28% of second level pupils in Gaelcholáistí, Educate Together sectors.

Turning to the specific issue of school admissions, Dr. Glendenning stated that at the moment schools have considerable discretion from a range of criteria if they are over-subscribed. At present approximately 20% of schools are over-subscribed. Under Section 9 (m) of the *Education Act* 1998 it is mandatory for a school to establish and maintain an admissions policy. In cases where the BoM refuse to enrol a pupil, Section 29 of the Act permits an appeal to the Secretary General of the Department of Education and Skills (DES). In the case of schools under the governance of ETBs the appeal would be to the relevant ETB. In the *Education (Admission to Schools) Bill* 2015 some existing criteria are retained while others are prohibited.

The presentation then went on to consider some of the relevant Constitutional provisions in relation to denominational schools. For example, Article 44-2-4 prohibits the State from discriminating between schools under the management of different religious denominations, and Article 44-2-6 guarantees that the property of "any educational institution shall not be diverted save for the necessary works of public utility and on payment of compensation". However, as Dr Glendenning observed Constitutional rights are **not absolute** and may be curtailed in the interests of the common good. The Bill under consideration has been cited as being in the interests of the common good.

She proceeded to say that the Supreme Court have in a number of cases, e.g. *Crowley v Ireland* 1980 interpreted Article 42 (Education) and Article 44 (Religion) as conferring implied constitutional rights on denominational schools.

In an increasingly secular society which contains large numbers of immigrants of different faiths, many parents contend that their children are failing to access their local school because admission policies that favour one specific religious denomination over others, or those with no faith. The Bill in aiming to make school enrolment more structured, fair and transparent and attempts to balance the competing interests of school autonomy, whereby denominational schools preserve their own ethos, and parental rights and choice.

Dr. Glendenning cited the main Acts which have clauses relating to school admissions. These are:

- *Education Act 1998* (as amended by primary legislation)
- *Education (Welfare) Act* 2000 (as amended by primary legislation)
- *Equal Status Acts* 2000-2012
- *Education for Persons with Special Educational Needs Act* 2004.(EPSEN)

Turning to the *Education Act* 1998 she referred to the statutory aims in s. 6 as including, among other things, the clauses:

> c) the promotion of equality of access to and participation in education, and
>
> e) the promotion of the rights of parents to send their children to a school of their choice.

Dr. Glendenning queried, in the light of the Minister's statutory authority under the Act to promote equality of access and promote parental choice, how did this affect and impact on denominational schools?

Where parents are refused the right to enrol their child in a school of their choice the Act only provides 2 remedies:

a) a s.29 Appeal to the Secretary General of the DES; and
b) where functions of a BoM in relation to school admissions are not being effectively discharged –dissolution of board by the patron (s 16) or by the Minister (s.17).

The Act details how schools are to accomplish the task of pupil enrolment under Section 9 (m) by establishing and maintaining an admissions' policy which provides for maximum accessibility to the school, and according to s.15 (2) (d) to publish the policy in..."**such manner as the board with the agreement of the patron considers appropriate..."** Dr Glendenning emphasised the powers of the patron and the BoM in this matter.

According to the s. 33(g) of the Act the Minister has, among other things, a general power to regulate the 'admission of children' following consultation with the partners in education.

*The Equal Status Acts* 2000-2012 then received attention from Dr Glendenning. as they apply to school admissions. This legislation prohibits discrimination on 9 grounds: gender, marital status, family status, sexual orientation, religion, disability, race, and Traveller community ground. Section 7.1 provides that an educational establishment shall not discriminate, among other things, in relation to the admission of a person as a student to the establishment on any of these grounds with certain exceptions –

Single sex schools may discriminate on the gender ground

Denominational schools may give preference to persons of one religious denomination than to others or refuse to admit as a student a person who is not of that denomination, if it can prove that the refusal is essential to maintain the ethos of the school.

Dr Glendenning felt that Section 7.3(c) seems to envisage both:

a) Positive discrimination, in that religious affiliation can be used to determine priorities in the case of over-subscription at a denominational school and
b) Negative discrimination, in that a school which has the capacity to enrol a student refuses on the ground of the student's religion. In such case the school must prove that the refusal was essential to maintain the character and ethos of the denominational school.

The presentation then proceeded to examine the background to the Bill, and Dr. Glendenning mentioned the great deal of preparatory work and lengthy consultations which preceded publication of the Bill in April 2015. This included, not only a Draft General Scheme 2013, but also two sets of Draft Regulations 2013. These were produced to facilitate discussion, and were referred to the Oireachtas Joint Committee (OJC) on Education and Social Protection to allow a full public discussion, including inputs from parents and the education partners, and try to arrive at a consensus. The OJC's report was published in March 2014,

The objective of the Bill is to ensure that how schools decide on who is enrolled and who is refused a place in schools is more structured, fair and transparent. Dr Glendenning stated that the Bill is flexible and very detailed

and this has led to an allegation of 'micro-management' by the Joint Managerial Body (JMB), the body which represents two thirds of post-primary boards of management.

The Bill contains repeals, amendments and substitutions for existing legislative provisions, as well as certain new substantive provisions;

The Bill provides for drafting procedures for admission policies, their approval by the patron, the timeline for such approval, the content of the policy, permissible (lawful) and non-permissible (unlawful) selection criteria to be applied in the case of over-subscribed schools;

The Bill provides for review of the policy, the frequency and manner of review, for appeals and appeals procedures and for written arrangements to be made by the school in the admission policy for any students who do not wish to attend religious instruction.

Among the proposed repeals in the Bill are:

s.33(g) of the *Education Act* 1998, this will repeal the Minister's existing powers to make regulations for the 'admission of students to schools' , and

repeal of s.29.1 (c) which currently confers the right of appeal by a parent or guardian to the Secretary General of the DES where a BoM refuses to enrol a pupil, or in the case of an ETB school to the ETB.

The Bill proposes to amend Section 23.2(a) of the *Education Act* 1998 and transfer responsibility for the implementation of the school's admission policy to the principal and he or she shall be accountable to the board of the school for that management. So the Bill proposes to place a statutory function on the principal regarding school admissions.

Similarly, the Bill proposes to transfer responsibility for appeals against a decision to refuse admission from the DES to the school's BoM in accordance with procedures to be prescribed by the Minister. The BoM may uphold or dismiss an appeal and its decision is final. But as Dr. Glendenning stated concerns were raised with the OJC about the absence of an appeal from the BoM. The OJC Report 2014 recommended that if s.29 is to be replaced, there

should be **an independent and transparent appeals process in place (from the BoM) possibly on a regional basis. This is being re-examined.**

Since the BoM has no statutory function in the decision to admit a student, it is envisaged that the proposed statutory function relating to appeals will ensure impartiality when hearing an appeal. The Minister's intention is to replace the existing appeals procedure with one that is "....*less burdensome, less adversarial and more cost-effective".*

Dr. Glendenning then considered the Minister's powers relating to admission policies. Provision is made in the Bill for the Minister to prescribe the content of the admissions policies and, in the case of over-subscription, to prescribe non-permissible admissions criteria. As the Bill passes through the Dail and the Seanad there may be amendments for the Minister to grant derogations in relation to 'past pupil criteria' or 'pre-existing waiting list' criteria, allowing them to be applied as part of the over-subscription criteria.

She cited the recent *Stokes* case which featured the legality of the 'past pupil criteria' and stated that if this right is restricted in the interests of the common good it will need to be proportionate, balanced and reasonable. Dr Glendenning posed the question whether the imposition of an annual cap or quota of 10% or 25% of past pupils on denominational schools will meet this test? (**N.B.** The Ombudsman for Children stated that the past pupil derogation was 'unjustifiable given its impact on travellers and immigrant children.)

Further light may be cast on the 'past pupil criteria' and the 'pre-existing waiting list' criteria in an ongoing High Court action involving Muckross Park College. The Dublin secondary school has said that the DES Appeals Committee's decision (under s. 29 Education Act 1998) was wrong in finding that its BoM could not refuse a place to a girl who was placed on a waiting list in 2005, when the child was 2 months old. The school changed its admission policy in 2011.

Among further provisions in the Bill is the Minister's right to appoint a person independent of the school, following a court order, to operate the school's admission policy in certain circumstances e.g. if significant non-compliance issues arise. A similar provision is made in the Bill to enable the patron to

appoint a person independent of the school to operate the school's admission policy in certain circumstances.

Dr. Glendenning then briefly outlined the following non-permissible criteria likely to be contained in the Regulations relating to the admission policy of over-subscribed schools:

- The payment of admission or enrolment fees (some derogations)
- Requesting parents to attend interview, open days or other meeting **as a condition of admission**
- A student's academic ability, skills or aptitudes
- The occupation or financial status of a parent(s)
- The date on which the application for admission was received
- A student's prior attendance at a specified category of pre-school or pre-school service
- A student's connection to the school by virtue of his/her relationship with a specified category of person.

Dr Glendenning noted that the Bill provides powers previously contained in the *EPSEN Act* 2004 to designate a particular school (or centre) for a child with SEN who has no school place, and also provisions for a child who does not have SEN but cannot find a school to admit him/her. Further the Bill provides for an appeal by BoM to an Appeals Committee against such a designation.

Before the Bill becomes law it has to pass through various stages in the Dail and Seanad where she anticipates that substantial amendments will be made. When this is complete the Bill will be referred to the President for his signature under Article 26 of the Constitution. If he feel that any parts of the Bill are repugnant to the Constitution he will make an Article 26 referral to the Supreme Court.

In concluding the talk, Dr Glendenning said that if the Bill becomes law it will affect a substantial movement of control from church to state in denominational schools in the area of school admissions, transform a number of established educational structures in first and second level schools, and increase the administrative burden on principals particularly teaching principals in primary schools.

She recommended the delegates to follow the progress of the Bill and participate fully in the formulation of educational policy/regulations and consultations relating to the Bill over the summer, otherwise the existing system of school admissions may become too legalistic. She felt that a balance needs to be achieved in regulating admissions to denominational schools. Dr Glendenning ended on an apprehensive note feeling that an Article 26 referral will be made to the Supreme Court by the President.

**Session 5: David Ruddy, BL, Principal of Talbot Senior School, Clondalkin, Dublin**

**Avoiding Litigation in Schools**

In a wide ranging talk Mr Ruddy examined some of the areas of school life which can give rise to legal action. He illustrated the talk by referring to relevant cases from both sides of the border. In essence, the talk explored the increasing complex relationship between the legislation/legal instruments/amendments and educational leadership. Showing that the bulk of educational law and other legislation is having a major effect on the role of the principal, and at times leading to legal challenges.

Mr Ruddy took as his first example the many mandatory policies that schools have to devise and implement, such as: Admission and Participation, Code of Behaviour, Anti-Bullying Policy, Child Protection Policy, Health and Safety Statement, Discipline and Grievance procedures, School Plan, Data Protection Policy. Great care has to be taken in the drafting of such policies to ensure that they are fair, reasonable and legal. Principals, BoM and others have to also make sure that they are familiar, not only with the content of such policies, but also, with the guidance/procedures provided for their implementation in the day-to-day life of schools.

One area of school life that often leads to appeals or legal challenges is that of the disciplinary sanction of pupil suspension and expulsion. Mr Ruddy presented figures from the National Education Welfare Board (NEWB) Annual Report 2011 which showed that in 2010/11 there were 14,000 post primary

and 1,200 primary suspensions for greater than 6 days, and 136 post primary and 16 primary expulsions. He briefly touched upon the NEWB Guidelines 2008 for the grounds for suspension/expulsion. The Guidelines set out a framework of good practice to assist primary and post-primary schools in developing their codes of behaviour, or strengthening their existing code.

Mr Ruddy's next theme concerned Employment Issues. There is a huge body of employment and equality legislation which affects schools. Much of the law is complex. In addition, schools must be aware of circular letters from the DES, statutory instruments and agreed procedures drawn up between management bodies and trade unions. He provided the example of Circular 60/2009 (section 34 (3) Education Act 1998) – *Revised Procedures for Suspension and Dismissal of Teachers.* The essential elements contained in the Procedures are that they are rational and fair, the basis for disciplinary action is clear, the penalties that can be imposed are well defined, and that there is an internal appeal mechanism. These principles are based on natural or constitutional justice.

Mr Ruddy then cited a number of relevant employment cases, for example, *McSorley v Minister for Education and Skills and Kilkenny VEC* 2012, where a principal successfully appealed her dismissal since the court felt that the sanction was disproportionate and unreasonable. In *Ruffley v BoM of a Special School (High Court)* 2014 the disciplinary process against a special needs assistant was grossly unfair and she was denied a constitutional right to natural justice and fair procedures. The flawed process amounted to workplace bullying and harassment and she suffered a psychiatric injury. She was awarded compensation of 255,000 euros for her pain and loss of earnings.

Family Law was the next theme briefly examined by Mr Ruddy. Schools are frequently faced with problems, questions and issues concerning the communication of school information when relationships between parents break down. He produced figures showing the increase of divorced and separated parents between the years 2006 -2011. He cited instances where a separated parent challenged school policy on parent/teacher meetings to the Equality Tribunal in 2009, and in a High Court case 2013 where separated parents were in dispute over the choice of post primary school for their child. The father choosing a non fee paying school, whereas the mother choose a fee paying institution.

Mr. Ruddy introduced the *Children and Family Relationships Act* 2015, which was signed into law in April, but was not in force at the time of the Conference. This Act reforms domestic law relating to guardianship, access and custody of children and represents a major advance in this area of law. For example, the Act provides for automatic guardianship for a natural father who has cohabited with the child's mother for one year, including a period of 3 months after the birth of the child. In addition, the Act entitles a person who is not the parent of a child, but who is a step parent or civil partner for a period in excess of 2 years to apply for the guardianship of the child. In the case of a cohabitant the period is in excess of 3 years.

The last major area of law visited was that of Data Protection. *The Data Protection Act* 1988 and *Data Protection (Amendment) Act* 2003 places significant obligations on schools in respect of data held by the school. This is necessary since schools gather so much information in paper and electronic forms that it is necessary to be mindful of who has access to the information. Mr. Ruddy cited Circular 0017/2014 which explains how some of the personal data on pupils in primary schools and special schools will be recorded in the Primary Online Database (POD). Principals acting as the Data Controller for their schools should be aware of four of the eight rules for fairly processing data as presented in the Circular. These are:

- Obtain and process information fairly
- Keep it only for one or more specified, explicit and lawful purposes
- Use and disclose it in ways compatible with these purposes
- Keep the information safe and secure.

He went on to touch on the following issues, - the difference between sensitive and non-sensitive data; who may lawfully request information, and the importance of retaining important information indefinitely.

Lastly, Mr Ruddy provided the following rules for principals to follow when dealing with difficult issues:

- Follow the policy blindly and do not deviate from it
- Develop a mindset that isn't personal
- Trust your judgement
- Importance of competent advice

- Schools that don't manage get into trouble.

**Addendum**

In response to the challenges facing the education sector the Education Department at St. Angela's College, Sligo has instituted a new Postgraduate Certificate/Diploma Programme entitled '*Education and the Law*' and aimed at all those who work in, or in partnership with educational institutions. This includes Management and teaching staff in schools, Teacher educators, Members of Governing Bodies and Diocesan Bodies, legal practitioners and others. The Programme will be comprised of 4 modules which can be taken part-time over 2 years. The Programme will be taught through weekend lectures/workshops allied to online learning and self-directed study.