



Submission
to the
Oireachtas Joint Committee on Education and
Science
concerning
Education for Persons with Disabilities Bill 2003

September 2003

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Introduction

1. The National Disability Authority considers that the education of persons with disabilities is of vital national importance. It is important for each individual with disabilities. It is important for the common good. The importance of education is reflected in the fact that the Constitution includes specific references to education. Article 42 represents the promise made by the people of Ireland to future generations of children that the State would provide for free primary education. In recent years the legislature has enacted various pieces of legislation to provide a statutory basis for education. The Education Act (1998), the Education (Welfare) Act 2000 and the current Education for Persons with Disabilities Bill are crucial components of the current and proposed framework for education provision.

Long Title of the Bill

2. The Education Act of 1998 speaks of making “provision in the interests of the common good for the education of every person in the State, including any person with a disability or who has other special educational needs¹....”. The Education for Persons with Disabilities Bill 2003 refers to making “further provision for the education of people with disabilities, to provide that people with disabilities shall have the same right to avail of and benefit from, appropriate education as do their peers who do not have disabilities”. **The NDA considers that the long title of the Bill should incorporate as one of its objectives: the equal effective right to education for all.**

Interpretation (Section 1)

3. Many of the terms in the Bill have the same interpretation as they have in the Act of 1998. The term ‘child’ is defined in the Bill as “a person less than eighteen years” and this definition is consistent with the recommendation in the NDA Submission to the Department of Education and Science: Education for Persons with Disabilities Bill 2002². The NDA welcomes this development and considers that this involves a recognition of the crucial importance of early intervention for certain categories of disabilities. **The NDA considers that the Bill should complement this welcome development with a provision to extend the period of education from 18 years for a further three years in appropriate cases.** The beneficial effects

¹ Long Title page 5

² Page 5

of an appropriate education for the individual concerned and for the common good of society as a whole cannot be overstated. **The NDA restates its position that there exists a need for separate rights-based legislation to address the education of adults with disabilities in the context of lifelong learning**³.

4. The title of the Bill contains the term 'disability'. Nonetheless the term disability is not defined in the Bill. In the Education Act 1998 disability is defined comprehensively.⁴ This definition was included in the Bill of 2002.⁵ This definition is also found in the Employment Equality Acts and in the Equal Status Act. **The NDA considers that the definition from the Education Act should be adopted in the Bill.**
5. The Bill states a "child with special educational needs means a child who has an educational disability"⁶. Educational disability is defined as meaning a "restriction in the capacity of the child to participate in and benefit from education on account of an enduring physical, sensory, mental health or intellectual impairment"⁷. Temporary and episodic conditions may have a devastating effect on the child's ability to avail of, participate in and benefit from education. The NDA is surprised at the introduction of this criterion, which would inevitably restrict the eligibility of some children with special educational needs as currently interpreted to support provision in the future. **The NDA considers that the use of the definition of disability from the Education Act of 1998 in the Bill would render the term educational disability unnecessary.**
6. The NDA notes that there is no interpretation of *education* or *education needs* or of *related services* in the Bill. The reference in the Bill to *non-education needs* begs the requirement for the definition of education needs. The NDA is concerned at the lack of clarity this approach introduces into the Bill. In *Ryan v Attorney General*⁸, O Dalaigh C.J. gave this definition "education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral". In the more recent case of *O Donoghue v The Minister for Health*⁹, O Hanlon J. reinforced the definition when he stated that the task of education was to enable the individual "to make the best possible use of his inherent and potential capacities, physical, mental and moral,

³ *ibid.* Page 8

⁴ Education Act section 2 (1)

⁵ Education for Persons with Disabilities Bill, 2002 section (1)

⁶ Section (1)

⁷ *ibid*

⁸ [1965] I.R. 294

⁹ [1996] 2 I.R. 20 at 62

however limited those capacities might be". **The NDA considers that this approach to a definition would be appropriate.**

Integrated Education (Section 2)

Section 2 provides that integrated education be mandatory unless this is inconsistent with

- The best interests of the child concerned or
- The effective provision of education for the children with whom s/he is to be educated

The NDA is concerned that there is no indication as to how the rights might be weighed in practice and considers that the Bill should clarify the balancing of the competing demands of the various rights, which will arise. **The NDA would prefer the use of the term 'inclusion' rather than the term 'integration'**. The importance of parents' rights in the education of their child and the aspect of parental choice of school should be addressed. A statutory presumption of inclusion and a statutory presumption of placement and pedagogical formation in the least restrictive environment could provide the basis for the practical operation of this section. The principles of the equality of all persons and the right of all to an education should apply.

Identification and Assessment Processes

7. The NDA is very concerned that there is no reference in the Bill to a statutory entitlement to an **independent** assessment of need. The NDA in its earlier submission was critical of this defect in the Bill of 2002¹⁰. **Section 3** of the Bill assigns responsibilities to the principal of a school in relation to the identification of children who may have special educational needs. The linkage of a principal's opinion and the performance of a student is an uncertain basis for special needs identification. The majority of principals in Ireland qualified at a time when special education was not included in undergraduate courses. A need exists to provide in-career development for teachers and for principals in order to ensure that children with disabilities have the same right to education as their peers who do not have disabilities. The qualifications of teachers, principals and all staff involved in the education of persons with disabilities must be appropriate to ensure good practice and good outcomes for persons with disabilities. The availability of adequate numbers of appropriately qualified staff is another dimension of the provision of good education services. The provisions of the Bill provide that five categories of professionals may assist with an assessment. Two of these categories must be appropriately or suitably qualified (social workers and therapists).

¹⁰ NDA submission page 5

The NDA recommends that the Bill should require that all staff contributing to the education of persons with disabilities should be appropriately qualified.

8. **The NDA considers that there should be a statutory entitlement to an independent assessment of need. Where an assessment establishes that there is a disability an education plan should flow from the assessment.** The Bill provides for the opposite approach - for an in-school education plan and a subsequent assessment if the child continues to fail to progress. In this way the Education for Persons with Disabilities Bill legislates for mandatory delays prior to the assessment of children who may have special educational need. At present a principal may request an assessment (with the parents' consent) as soon as concerns emerge in relation to possible special educational needs or a disability. The Bill alters this position. A radical revision of this approach is advised. The Bill should clarify what provision may be made for a child who may have a special educational need in the period between referral and assessment.
9. Many of the references to identification and assessment processes are activated by an 'opinion' of a principal, health board or council. The need for a common understanding of and application of the term 'opinion' across health boards, schools, principals and Council is fundamental in order to achieve an 'equitable' system. The NDA considers that the Bill should provide clear guidance on the interpretation of the term 'opinion'. In many instances the trigger to activate an assessment is the principal's opinion. **The NDA considers that where a principal forms the view that a child may have a special educational need the parent should be informed immediately and should be facilitated in accessing an assessment for the child.**
10. The Bill provides that a statement of the findings in relation to an assessment shall be provided to the parents of the child at their request. The NDA considers that the Bill should provide for the mandatory provision of an assessment report to parents in order to respect the rights of parents as the primary educators of their children. The current Bill also proposes that where an assessment establishes the student has an 'educational disability' the principal is to ensure that guidelines in force are complied with unless there are good and substantial reasons for not complying with the guidelines. There is no requirement that a statement of the reasons for such a departure should be provided to parents. **The NDA considers that this approach marginalizes parents from the education of**

their child. The NDA recommends that the final draft of the Bill should remedy this position.

11. The Bill provides that such resources and supports 'as are necessary to enable him or her to participate in and benefit from education' for the child are to be provided by a health board or the Council¹¹. **The NDA welcomes the statutory provisions and considers that the success of the operation of this section will depend on effective co-ordination between the health board and Council.** The Bill is silent on time limits for the provision of resources for an eligible child and it is recommended that the final draft of the Bill would indicate the relevant time limits. Prompt provision of resources and / or support services is essential to ensure the opportunity to participate in and benefit from education.
12. Either a health board or the Council can call on the other to provide services. Where disputes arise, the issue may be referred within three months to the Appeals Board and the Board will issue a binding determination. There is no enforcement mechanism outlined in the Bill.
13. **The Bill should provide for the continuation of support services to an eligible student when the student with special educational needs is absent from the school for disciplinary reasons.**

The Education plan

14. The Bill does not address the issue of with whom the responsibility for the education plan lies. The Bill clearly states that a plan may be prepared in school or by the Council. However the Bill is less clear on the circumstances, which involve the Council. **The NDA requests that this issue should be clarified.** A principal may request the Council to prepare a plan. In the event of a refusal by the Council the principal or parents may appeal.
15. Another issue arises where a plan is prepared prior to the child attending school. How the 'relevant school' is ascertained in these circumstances is far from clear. Under **Section 9** the Council may designate a school. The designation of a school by the Council is one of the new directions contained in the Bill. The Bill should provide clarification on the designation process and in particular how the designation process will respect and protect the rights of parents in school selection and promote the child's right of access to school.

¹¹ Explanatory Memorandum page 4

16. In practice however it would appear that a Board of Management may require an application for admission prior to participation in an education-planning meeting. In this situation a Board is likely to reach a decision on the admission. The decision will either admit the child or refuse to admit the child. Refusals to enrol are subject to appeal under **section 29 of the Education Act 1998**. Designations are subject to appeal to the Appeals Board by the Board of Management of a school. There are two bases for appeal:
- The designation itself or
 - The resources to be given to the school.

The NDA considers that these processes should be clarified. A situation could arise where a parent and board would be involved in separate appeals concerned with the education of the same child.

17. The Bill provides for the transfer of a child from one school to another. **The NDA welcomes this development and considers that it usefully be extended to include the entry of a child to any type of educational provision and also the exit of a child from one stage to another. All stages of transfer should be carefully managed and parents should play a central role in the relevant procedures at each transition.**
18. The Bill outlines the content of the education plan. The statement of the child's abilities as well as his needs, the provision for specific supports and the reference to transition from primary to post primary are positive aspects of the education plan. **The NDA welcomes these aspects of the plan.**
19. The Bill assigns a mandatory duty on a principal to implement an education plan. However there is no penalty for non-compliance. In default of compliance it falls to parents to police the non-compliance and to appeal the failure to implement part or the entire plan to the Appeals Board.
20. There are also grounds for concern in relation to the amendment of the plan. A plan may be amended on transfer from one school to another and without the knowledge of the parents. **A specific section requiring notification to parents where a plan is amended on school transfer and a section requiring consultation between the principal and the S.E.N.O. should be included in the Bill.**
21. The review is the statutory responsibility of the principal. The lack of an independent system for tracking the educational progress of children with disabilities is a major failure of the Bill. The Council has a duty to ensure the progress is monitored and reviewed. This is not

an independent mechanism to track progress. The Bill allows a plan, which has not resulted in the achievement of the goals to remain. This is an unsatisfactory approach. **The Bill should require that an independent review is available and that ineffective plans must be revised.**

22. The Bill requires that the content of the education plan include a statement of the child's abilities and disabilities. The review focuses on whether or not the relevant goals are being achieved and failure triggers certain actions. The reasons for failure are to be recorded. The section should include actions to be taken in view of the relevant attainment over the period covered by the review. A neutral review would better serve the needs of the parties concerned.
23. The current provision **section 14 (3)** deals specifically with (a) the extent 'if any' to which the goals in the previous plan were achieved and (b) reasons for any failure and the effect such failure has had on the development of the child'. All provisions referring to failure should be revised and alternative objective neutral terms used. The provisions are open to the interpretation that failure might be explained as owing to the individual student's condition. The plan should be appropriate as in suited to the needs of the learner. The method of implementation should be effective as in producing positive gains. Any review should encompass an objective assessment of student performance, an objective assessment of programme adequacy, an objective assessment of the adequacy of methodology and an objective assessment of the adequacy of supports / resources provided in practice. The current scope of the provision is highly restrictive. It is difficult to reconcile the provisions of the section with the aim in the long title, which aspires, to ensuring that persons with disabilities have the opportunity to 'benefit' from education.
24. Appeals in relation to a principal's refusal to review an education plans are subject to appeal to the Council. Other matters are subject to appeal via the Appeals Board. A parent might face each appeal route.
25. The NDA is concerned in particular at the central role assigned to the principal in identification, assessment, plan preparation, implementation and review. The approach will inevitably result in inconsistency across the education system. **The NDA considers that an independent body should assess the child, prepare the plan and carry out reviews.** Such an approach would promote consistency across the system for all students with disabilities and special educational needs.

The Board of Management

26. This Bill imposes significant additional duties on Boards of Management. Additional roles are assigned (i) inculcating in students an awareness of the needs of persons with disabilities (2) co-operation with the Council (3) mandatory integration. **The NDA welcomes the recognition of the importance of developing awareness of the needs of persons with disabilities.** The Bill does not address the allocation of time. If Boards and principals devote increased time to students with special educational needs, reduced time remains for other duties and for other students. The balancing of the rights of the two groups referred to in **section 2** is likely to be influenced by the time demands. How this dilemma might be resolved is unclear from the Bill. Clear guidance would be useful.

Ongoing education

27. Planning for future education needs of persons with disabilities is a matter of national importance. There appears to be little justification for delaying important decisions until the child is within one year of majority. **The NDA submission¹² called for planning for the transition from formal education for persons over 14 years. The NDA restates this position.**
28. An appropriate system of accreditation / certification / qualification is an essential component of an Education for Persons with Disabilities Bill which purports to assist persons with disabilities to leave school with the skills necessary to participate in the social and economic life and to live independent and fulfilled lives. Many students with disabilities will participate in the national examinations with appropriate supports and modifications and in this way will have the 'same right' to this aspect of education as their peers without disabilities. Other students may be accredited via the NOAI / FETAC frameworks. **The NDA considers it essential that the language used throughout the Bill would be neutral and objective.** Terms, which suggest failure, should be removed and replaced with objective terms.

Co-ordination

29. The Bill refers to co-ordination across the Departments of Education & Science, Health & Children and Finance. Effective co-ordination is essential for the successful provision for the education of persons with disabilities. Official(s) are to be appointed by the each Health Board and by the Council. **Section 6** outlines the process for the

¹² October 2002 p4 and p8

Council to request assistance from the Health Board in the preparation or in the implementation of an education plan and the circumstances in which the Health Board may refuse to comply with the request and finally the possible appeal by the Council against such a position. This section has the potential to create a battleground between the Council and a health board.

30. **The Bill provides for high-level cross-departmental co-ordination. The NDA considers that this approach should also be continued at ground level. It is critical to develop structures to promote and facilitate effective co-ordination at every level, from local to national. The NDA considers that the final draft of the Bill should be amended in accordance with this recommendation. The NDA also considers that the final version of the Bill should clearly indicate that while consultation and co-ordination across departments is important, the final responsibility for the provision of education rests ultimately with the Minister for Education and Science.**

The National Council for Special Education

31. The National Council for Special Education has a variety of functions. The Council is required in **section 38** to keep records. The record keeping function assigned to the Council arises only in relation to those children who are receiving special educational supports services. The record keeping function does not extend to all children with disabilities and special educational needs. The Bill creates a restrictive hierarchy of eligibility for the inclusion of students in any record keeping system. **The NDA position is that the Bill should incorporate provisions on a comprehensive record system, which would include those in receipt of services, those referred for assessment, those awaiting services and should have regard to matters of privacy and confidentiality in record keeping systems.**
32. **Section 19(e)** requires the Council to ensure that the progress of students with special educational needs is monitored... There is no requirement for independent tracking of the progress of students. **The NDA position is that there should be a statutory entitlement to an independent system of assessment and review.** It is also recommended that the dissemination of information to schools should include a provision requiring "the development of guidelines".
33. Membership of the Council: Twelve ordinary members and a chairperson will be appointed by the Minister from persons who have a special interest in or knowledge relating to the education of

children with disabilities after consultation with relevant groups. The Minister shall appoint 2 members from among nominees of the NDA and 2 members from among nominees of the Department of Health and Children.

34. The provision expressly refers to gender balance. **The NDA recommends that specific provision be made for people with disabilities.**

Consultative forum

35. The Council will consult with the consultative forum in relation to the performance of its functions or elements of its functions. An implementation report must be prepared outlining the steps, which must be taken to implement the Act. The period must not exceed five years from the establishment day. **The time frame is a matter of concern.**

Staff of the Council

36. A Chief Executive Officer of the Council will serve for a seven-year term. The C.E.O. is accountable to the Committee of Public Accounts and other Oireachtas Committees and is not permitted to question or express a view on any policy of government. The appointment of staff is one of the critical functions of the Council. In order to undertake and discharge its duties the Council will require adequate numbers of qualified staff throughout the country. It is imperative that staff numbers and staff qualifications would be appropriate to the role and functions of the Council. The NDA notes that persons appointed as Special Educational Needs Organisers will have such qualifications, expertise and experience relevant to the education of children with SEN as the Council considers appropriate. **The NDA requests that this matter be clarified.**

Curriculum

37. The NDA commented in a submission to the NCCA on the Draft Guidelines for Teachers of Students with General Learning Disabilities¹³ on a striking number of references to difficulties students might encounter. **The NDA recommended that a greater emphasis should be placed on isolating the skills required to master a task and developing teaching solutions as to how these steps might be achieved.**¹⁴ The NDA is concerned that

¹³ NDA May 2003

¹⁴ Check reference

official curricula and the Bill include a high proportion of references to difficulties and failures.

Special Education Appeals Board

38. The Special Education Appeals Board shall stand established on the establishment day. **Section 34(4)** states the Appeals Board shall be independent in the performance of its functions. In order to ensure the independence of the Board the provision should be extended to end with “and shall exclude persons in direct provision of services from inclusion on the Board”.
39. A mediation facility is to be made available for parties and where hearings are heard they are to be heard with the minimum of formality. The time limit for hearing an appeal is thirty days from the date of receipt. It is recommended that a time limit for the issue of the determination is included. The time frames for the **section 29** appeals could be applied pro rata.
40. **The NDA welcomes the mediation processes as a forum for the resolution of differences.** There are, however, concerns that an excessive number of appeals might arise which would not be in the best interests of the child with disabilities. A number of issues arise and a critical issue to be addressed concerns what provision is to be provided for the child while an appeal is pending. The variety of routes of appeal is a further concern. There are appeals to the Council and to the Appeals Board and possible other appeals under the Education Act of 1998. The Bill does not provide for any enforcement mechanisms for determinations, which might not be accepted by the party to which it is addressed. It then falls to parents to take action to address any such failure. A significant burden of ensuring the adequacy and the implementation of the plan is placed on parents. An independent review system would address these matters.

The NDA proposes that the Bill should also address the following Issues:

Advocacy and access

41. The Bill is devoid of reference to advocacy services and devoid of references to access. **The NDA considers that appropriate advocacy services should be incorporated.** The NDA would favour a wide interpretation of advocacy and this should allow for a friend or relative to accompany a parent to any or all of the various meetings, which would arise. **The NDA considers that a wide**

interpretation of access should also be used and should include physical, information and communications accessibility and also include reasonable accommodation. Relevant provisions should be incorporated in the final version of the Bill.

Language

42. The NDA considers that services should be available through the child's first language whether Irish, English or Irish Sign Language.

Enforcement procedures

43. The Bill is notable for the absence of enforcement procedures. References to accountability are absent from the Bill. The Act of 1998 refers to the **accountability of the system to parents, students and the state. The NDA considers that a similar provision should be incorporated into the final version of the Bill.**

Review of legislation

44. **The NDA recommends that the legislation should be reviewed within a specified time frame, no greater than five years.** Rights and Resourceshe NDA notes that Bill has many references to available resources. The NDA wishes to state that the right to free primary education is a socio-economic right specified in the Constitution. The promise of free primary education is a constitutional principle. The provisions of **section 12** and the provision of **section 36 (3) (c)** refer to the use and availability of resources. Each section represents a limitation on the rights of which the Bill speaks. The promise of the right is counterbalanced by the availability of resources. A stark example is contained in **section 36 (3) (c)**, which discusses a request from the Council to the health board. The section states, "A board...shall comply with the request unless it considers that (c) having regard to the resources available to the board it is not reasonable to comply with the request". **The NDA recommends that the final draft of the Bill would contain a greater recognition of the right and a greater acceptance that resources must be made available to provide the right in practice.** As the Bill currently stands there is an entitlement to services. **The NDA considers that an entitlement to services should not be confused with the right to an education.**

Children educated in out-of-school settings

45. The NDA recognises that the majority of children are educated in recognised schools. However there are some children educated in

home based and out-of –school placements. The Bill should refer expressly to this group of children. In some instances a child’s school attendance may be interrupted for disciplinary reasons. **The NDA considers that services should not cease in such a situation. The Bill should also address the needs of this group of out-of-school students.**

Delays

46. The NDA is concerned that the approach proposed for in-school identification of children with special educational needs will delay the assessment process. The NDA considers that the taking of in-school measures should include a referral for an assessment as soon as cause for concern arises. The NDA is also concerned that delays can arise in the provision of resources to an eligible child, as this issue is not assigned any time scale in the Bill. Further delays will arise owing to disputes between health board and the Council and the appeal process itself has the potential to cause further delays. **The NDA considers that amendments should address these matters.**

Timeframe for consultation on the Bill

The NDA notes that the Bill was launched in July and that submissions will be accepted until September 8, 2003. The NDA considers that the time frame is particularly short in view of the education calendar.