

**Discussion Paper on a Regulatory Framework for School Enrolment
Response from the National Council for Special Education**

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This response is submitted on behalf of the National Council for Special Education.

Discussion Paper on a Regulatory Framework for School Enrolment Response from the National Council for Special Education

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The National Council for Special Education (NCSE) welcomes the invitation extended by the Minister for Education and Skills to respond to the discussion paper on a Regulatory Framework for School enrolment, published in June 2011. The Council supports the Minister’s view that a critical element in ensuring equality of educational opportunity is to have pupils’ access to every school supported by inclusive, transparent and fair enrolment policies and practices. The current system is not working – inclusivity is a moral and legal imperative.

Part One: Background and Context

Section 1.3: Options for Legislation: Guiding Considerations

Guiding considerations for the development of a new framework are outlined in Section 1.3: Options for Legislation. These include the application of the principle of ‘subsidiarity’ whereby decision making is with the Board and patron as far as possible.

While accepting this principle in the broad context of school management, the Council considers that one major deficiency of the current regulatory framework is that a large margin of discretion is left to individual schools as to the content of their enrolment policies and the operation of the admissions process. The Council considers that the current framework does not provide sufficient protection to ensure that “soft barriers” to enrolment are not put in place by schools to ensure that prospective pupils with special educational needs are deterred from applying for enrolment. The Council is aware that schools can use very prescriptive criteria that preclude prospective pupils with special educational needs from applying for enrolment. Often the criteria used are not fair or transparent.– for example, stating that health supports must be in place before a pupil with special needs is enrolled or stating that the school is not in a position to set up a special class or that

available places in a special class must be kept for prospective pupils from a feeder school, thereby limiting the category of pupils with special educational needs who can enrol in the school.

More significantly, while some unfair enrolment practices are prohibited by a number of broad provisions in Irish law, in the absence of oversight, there is no accountability for schools who operate unfair admissions policies or no imperative to adapt their existing practices. The Education Act requires every person concerned in the implementation of the Education Act to promote equality of access to and participation in education¹, to promote the right of parents to send their children to a school of their choice², to enhance the accountability of the education system³ and to enhance transparency in the making of decisions in the education system⁴. The Education Act also gives the Minister the power to monitor and assess schools with regard to the implementation of the aforementioned requirements⁵. The Equality Acts prohibit discrimination in enrolment policies on a number of grounds including disability.

Clearly these provisions are not sufficiently detailed and/or have not been sufficiently enforced to address this issue, to ensure that enrolment policy and practice is equitable and transparent and to realise a truly inclusive approach to access to education in Ireland so as to be fair to all the children of the State. The most recent annual report released by the Equality Authority indicates that 82.85% of all complaints concerning education were made under the disability ground. Just over one third (35.3%) of all cases under the disability ground concerned provision of education.

The discussion paper recognises that schools can present a refusal to enrol as informal ‘advice’ to enrol in another school on the basis that the other school would better meet the needs of the child concerned.⁶ Specifically in relation to special educational needs, it would appear that such schools are assuming a lower level of responsibility than others for the enrolment of students with special educational needs.

The text of mission statements and admission policies can appear to be faultless, but hide the reality of schools where the culture and practice precludes enrolment of students with special educational needs. These schools present themselves as “academic schools” without the expertise or resources to deal with special educational needs. Parents accept this reality and move to other

¹ Education Act, 1998, section 6(a)

² Education Act, 1998, section 6(e)

³ Education Act, 1998, section 6(l)

⁴ Education Act, 1998, section 6(m)

⁵ Education Act, 1998, section 7(2)(b)

⁶ Page 17 Discussion Paper

schools which have a more inclusive ethos. The result is that certain schools are perceived as inaccessible to students with special educational needs and these schools are not held accountable.

Council therefore welcomes the paper's stated intention that a range of appropriate measures should be put in place at local and national level to ensure compliance with regulations.⁷

Part 2: Primary Legislation

Section 2.1.4 Ensuring Compliance

According to the Discussion Paper there are two key areas where regulations could focus specifically: (1) the content of the policy; and (2) the operation of the policy. As a guiding principle, Council recommends that schools should not be allowed to refuse to enrol a child with special educational needs who lives amongst the usual cohort of pupils who are admitted. In principle, if a typical child from a particular area is enrolled so should a child with special educational needs living in that area be enrolled. Neither should a school make the enrolment of a child with special educational needs dependent on the allocation of additional resources. Once a child with special educational needs has enrolled in any particular school, then the process of arranging the supports commences and the NCSE works with the child and the school concerned in this regard.

However, from the perspective of students with special needs it is submitted that the reforms also need to take place in the second area, namely the operation of the policy, along with a third category of oversight, supervision and accountability. Without the third category, the regulating framework cannot bring about change in current exclusionary practices.

In terms of the mechanics of the reform, section 33 of the Education Act provides that the Minister may make regulations relating to all or any of the matters set out in the Act including admission of students to schools. This may enable the Minister to simply pass regulations specifying restricted and permitted criteria for inclusion in admissions policies. However it is submitted that more wide-reaching and effective reform could be achieved by way of primary legislation, particularly in the area of ensuring compliance.⁸

⁷ Page 20

⁸ See page 22, Discussion Paper

Oversight and Accountability: Whilst respecting the principle of subsidiarity and the need for discretion to be maintained by Boards of Management, it is submitted that in order to realise a more inclusive educational system, oversight and accountability is required. The present position where the onus is largely on individual parents to supervise the practices of schools is unsatisfactory.⁹ Audit and inspection of school enrolment and admission policies should be introduced and it is submitted that the NEWB should be given express powers of investigation, and access to documentation in this regard (akin to sections 19(3) and 19(4) of the Education Act, and section 30 of the Welfare Act). A corresponding obligation on schools to maintain records of applications for enrolment, and relating documentation for a specified period would therefore also be required.

Sanctions: Serious consideration needs to be given as to the appropriate sanctions which can be applied in circumstances where enrolment policies and practices are not compliant with law. Consideration should be given as to whether existing sanctions can be enhanced or amended, or whether new sanctions should be introduced. There is a power under the Education Act for the patron (with the consent of the minister) to remove a board of management if it is satisfied that the functions of a board are not being effectively discharged,¹⁰ and the Minister may also require the patron to dissolve the board in certain circumstances¹¹.

It is agreed that consideration should be given to amending these powers to permit intervention to remove enrolment from the Board's control for a defined period and to appoint an independent enrolment officer, where this is deemed necessary¹². It is submitted that the procedure for triggering such a sanction should also include a request from the NEWB on the basis that such body has grounds to believe that the relevant Board has been non-compliant. In terms of the enrolment officer to be appointed, again it is submitted that the NEWB could take on this role.¹³ It is also worth noting that there is a power of "withdrawal of recognition" under the Education Act¹⁴ which permits the Minister to withdraw recognition¹⁵ of a school (and associated funding) where the Minister is satisfied that the school is not operating in accordance with regulations made by the Minister. This is a very serious sanction but could in theory be used if it appeared

⁹ See page 24, Discussion Paper

¹⁰ Education Act, 1998, section 16

¹¹ Education Act, 1998, section 17

¹² See page 25, Discussion Paper

¹³ See page 26, Discussion Paper

¹⁴ Education Act, 1998, section 11

¹⁵ Education Act, 1998, section 12(3)

that a school was flagrantly in breach of any new regulations regarding enrolment policies made under the Education Act, and perhaps consideration should be given as to whether a demonstrated failure to accommodate students with special needs, without good cause should be included as a specific ground for such withdrawal of recognition. Council suggests that the Minister consider other potential sanctions such as withdrawal of capitation funding where it is considered that schools are not providing a level playing field for pupils with special educational needs.

Part 3: Regulations

3.2 Content of an Enrolment Policy

Council agrees that regulations setting out appropriate content for enrolment policies, particularly with respect to over-subscription criteria would be welcome, along with required methods of publication of such documents (Section 3.2). It is further agreed that these criteria should specify that the admission of a pupil should not be based on the pupil's academic or other skills. Any tests, interviews, formal or informal should not be part of deciding whether an applicant should be offered a place in the school.¹⁶

It is agreed that every school should be required to make its enrolment policy publicly available (e.g. online, from the school office, in the local libraries or other public place) and should specify the procedure for amending the enrolment policy including the manner in which notice will be given of such amendment.

Council considers that the starting point of an 'inclusive, transparent and fair' enrolment policy is that all children, including children with special educational needs, are enrolled on the same basis. Therefore enrolment policies should not include statements whereby the enrolment of a child with special educational needs is made conditional on the availability of health or educational supports. Applications for additional educational supports should be made by the school following the enrolment of the child in the school.

As the discussion paper recognises, children with special needs are sometimes not formally refused admission, but rather are "encouraged to enrol in another school on the basis that the other

¹⁶ See page 34, Discussion Paper

school would better meet the needs of the child concerned.¹⁷ This perceived incapacity of a school to accommodate a child with special needs can be considered a “soft barrier” to admission, because a parent is unlikely to send their child to a school which holds itself out as being unable to meet the child’s needs or where the parent considers that the school would not be a welcoming and inclusive environment for their child. Parents should be aware that all schools can apply for resources to support children with special educational needs and all schools will be resourced on the same basis. Council therefore recommends that every school should be obliged to include, as part of their enrolment policy, an unequivocal statement that they welcome enrolment applications in respect of children with special educational needs and that such applications will be processed on the same basis as for any other child.

It is submitted that a proposed solution would be to introduce a requirement for all schools to put themselves in a position to meet the needs of students with special needs, and to document same in a “capacity document” outlining in practical terms the accommodations available for children with special needs. This would supplement in a very practical way the “inclusivity” statements in the enrolment policies¹⁸. Note that the basis for this may in fact already exist in the requirement of the Education Act for every school to have a “school plan” stating the objectives of the school relating to equality of access to and participation in the school and the measures which the school proposes to take to achieve those objectives including equality of access to and participation in the school by students with disabilities or who have other special educational needs¹⁹.

Section 3.2.4: Enrolment of pupils with special educational needs

This section deals specifically with the enrolment of pupils with special educational needs into special schools and classes. The discussion paper acknowledges that schools catering exclusively for children with special educational needs, or schools that have special classes for pupils with disabilities or special educational needs, may need to have separate criteria for enrolment of pupils to the school or classes concerned – for example, it would be normal for children to travel some distance to attend their nearest special class; the criteria for entry into a special class should reflect the need to broaden a catchment area.

¹⁷ See page 17, Discussion Paper

¹⁸ Education Act 1998, section 15(2)(d)

¹⁹ Education Act, 1998, section 21(2)

The Council has recently submitted policy advice to the Minister for Education and Skills (February 2011) which addressed a number of issues relevant to the enrolment of children into special schools and classes, as below:

- In the future, special schools should serve those pupils within the community who require special school placement rather than be limited to any specific category of disability. Children enrolled in special schools and classes should be those with complex needs, as defined in the policy advice paper.
- The composition of special classes should be determined in response to the needs of children with special educational needs within particular local communities, taking into account local demographics and the ongoing feasibility of maintaining the special class.

If these aspects of the policy advice are accepted, there will be implications for enrolment policies and practices which should address these issues.

In light of the above advice, Council considers that enrolment policies for special school/classes should not contain statements which prohibit enrolment for certain sub-categories of disability. For example, an enrolment policy should not state that the school/class accepts children with autism but only if the child has a mild general learning disability and not if the child has a moderate general learning disability.

The NCSE has the responsibility to identify where a special class is required to serve the needs of a particular cohort of children within an area and to establish the class when required. There is currently an imbalance in the number of special classes across the primary and post-primary sectors. Recent figures show that there are currently in the region of 500 special classes established – 90 of which are at post-primary level. It is likely that there will be a need to address this imbalance over the coming years. Enrolment policies should be sufficiently flexible to facilitate the establishment of special classes in areas where a need has been identified by the NCSE.

Council suggests that the Minister should consider legislating to empower the NCSE to oblige a school to establish specialist education provision e.g. a special class to cater for a specific, or range of, special educational need(s). This will ensure that all pupils from within a community have the option of enrolling in local schools and that local schools will be able to be resourced to cater for all pupils, including those with special educational needs.

Section 3.2.5

Oversubscription

The discussion paper sets out a range of oversubscription criteria that might be accepted in the new regulatory framework. One of these criteria is distance from schools, geographical boundaries and feeder schools. The paper sets out advantages and difficulties associated with each of these criteria.

The operation of catchment areas can give rise to a particular difficulty for the enrolment of children in special classes attached to mainstream schools. There may be an insufficient number of children within the mainstream catchment area to establish and maintain a special class. It then becomes necessary to extend beyond the school's catchment boundaries in order to find a viable number of children to establish the class. Schools are concerned that if they extend the catchment area in this manner for children enrolling in the special class, they may be required to act in a similar manner for children enrolling in mainstream classes, thereby infringing the catchment arrangements agreed. Due to the uncertainty surrounding this issue, schools may refuse to accept children from beyond the catchment area into the special class. The enrolment policy then acts as an unintended barrier to the enrolment of children into the special class.

In this instance, the school's enrolment policy in relation to the operation of the catchment area should have a specific exemption which allows the boundaries to be extended for children enrolling in the special class.

Section 3.3

Operation of the enrolment process

It is agreed that regulations should specify the procedural aspects of the process in terms of timing, notification requirements, application process, decision-making process and appeals process.

Section 3.3.1

Timescales for enrolment in schools

The discussion paper proposes that it would be helpful to parents if there was some standard timeframes that schools would be required to follow in relation to the enrolment process. An option would be for the regulations to specify the earliest date for the commencement of the enrolment process for the following school year. Under this option schools would still have flexibility in relation to when they commence their enrolment process but it would have to be after the earliest date set out in the regulations.

The Council agrees that the imposition of a standard timeframe on the enrolment process would have the benefits outlined in the paper and particularly welcomes the abolition of waiting-lists which should result. Council wishes to emphasise that any commencement date set must take into account the particular circumstances of children with special educational needs and allow sufficient time to facilitate their enrolment. In the case of children with special educational needs, time is required to prepare for their enrolment so that necessary elements are put in place. These necessary elements can include provision of:

- Access to training for teachers in particular areas of special education, for example, Deaf education, autism-specific interventions etc.
- Necessary refurbishment to school buildings to allow access for all e.g. accessible toilets; hoists; wheelchair ramps etc
- Sanctioning and procurement of necessary assistive technology, specialist furniture and/or equipment.

School enrolment policies and practices must be sufficiently flexible to ensure that admission is confirmed in sufficient time for the necessary applications for the above supports to be submitted, sanctioned as appropriate and the supports to be in place when the child arrives in the school. This can take up to a year in certain instances. Where should supports are put in place and significant costs incurred, parents should be requested to commit to placing the child concerned in this particular school.

3.3.3: Application Process

Council welcomes the proposal that every parent should be given the option of completing an application form, even when the school is advising the parent that the needs of the child would be better met elsewhere.²⁰ It is agreed that the regulations should specify that schools can only seek relevant information sufficient to enable a school to make a decision on an application for enrolment. It is submitted that the regulations should prohibit the seeking of information in relation to any disability or special needs of the student in advance of enrolment.

It is agreed that schools should state the number of applications received in the previous school year and the number of places offered to those applicants in order to indicate the likelihood of

²⁰ See page 36, Discussion Paper

oversubscription. It is also submitted that schools should state the maximum number of pupils that can be enrolled, so that it is clear to all when the school is full.

Completed application forms, along with a record of the decision of the Board of Management on admission should be retained for a specified period of time in accordance with the provisions of the Data Protection Acts, 1988-2003 and an amendment to section 18 of the Education Act may be required in this regard.

3.3.5 Appeals Process

Council agrees that the current situation where the only avenue of appeal for parents is through section 29 of the Education Act is unsatisfactory. The Section 29 procedure consists of an appeal against a decision of a Board of Management to the Secretary General of the Department of Education and Skills (or to the VEC initially in the case of a school maintained by a VEC). The appeal involves a full hearing by an independent appeal committee which then makes a recommendation to the Secretary General as to the action to be taken. The appeal process is transparent and procedurally fair but is daunting and cumbersome for parents. Council understands that the only basis for adjudication by the Section 29 committee is to determine whether or not the school acted in breach of its own enrolment policy – rather than determining the equity or fairness of such a policy or whether it is in breach of the spirit/letter of governing legislation.

Council agrees that provision should be made for an enhanced local appeals process combined with an external appellate process in those cases where a pupil can get no place at all. The local appeals process should be conducted in accordance with recognised principles of procedural fairness and consideration should be given for training of boards of management in this regard.²¹ Appeals boards and schools should be aware that the NCSE resources all schools in the same manner, in accordance with the Minister's policy parameters. It is not valid for a school to refuse to enrol a child because of their special educational needs or because the school considers that the quantum of resources to be sanctioned is insufficient and the Minister should ensure that the appeals board cannot uphold a school's refusal to enrol where these are the reasons given or implied.

Conclusion

²¹ See pages 17 and 38, Discussion Paper

A key objective for the proposed regulatory framework is stated to be the provision of a statutory basis that can “ensure that schools’ enrolment policies and procedures are non-discriminatory and are applied fairly in respect of all applicants” with a view to bringing about “greater transparency and consistency through regulating both the content of enrolment policies and the operation of the admission policies”. Council submits that this process also potentially holds great promise for the access to education by children with special needs.

The EPSEN Act, 2004, states that “*A child with special educational needs shall be educated in an inclusive environment with children who do not have such needs unless the nature or degree of those needs of the child is such that to do so would be inconsistent with the best interests of the child as determined in accordance with any assessment carried out under this Act or the effective provision of education for children with whom the child is to be educated.*”²²

This is a unique opportunity to take steps to make a real practical difference to the experience of pupils with special needs and their parents, without significant implications in terms of the State’s resources. The Council would welcome an opportunity to engage further with this process in the future.

²² Education for Persons with Special Educational Needs Act 2004, section 2