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Education in Ireland: accessible without discrimination for all?

David M. Doyle^a, Marie Muldoon^b and Clíodhna Murphy^a

^aLecturer in Law, Maynooth University, Maynooth, Ireland; ^bTeacher in Modern Languages, St. David's CBS, Artane, Dublin 5, Ireland

ABSTRACT

While Article 13 of the International Covenant on Economic, Social and Cultural Rights articulates a comprehensive right to education, truly accessible education remains elusive in many countries. This article considers the accessibility of education in Ireland in law, policy and practice, drawing on semi-structured interviews with politicians, educators, and representatives of various relevant interest groups. The Irish education system, once described as a 'Church-State co-operative', has historically been controlled by the Catholic Church, but in recent times has been obliged to adapt in order to cater for an increasingly ethnically and culturally diverse school population. The article concludes that a variety of exclusionary practices have facilitated the establishment of a *de facto* two-tiered education system in Ireland, with marginalised groups such as asylum-seekers; religious minorities; and the indigenous Traveller community particularly disadvantaged. A recent process of legislative reform addresses some key issues, such as admission policies, which distinguish prospective students on the basis of religion, past pupil parents, and when their name was placed on the enrolment list. However, it remains to be seen whether these reforms will significantly enhance access in practice.

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Introduction

The right to education is considered to be one of the most important and universal rights in international human rights law. First declared as an international human right in the Universal Declaration of Human Rights (UDHR) in 1948,¹ it has long been recognised as an empowerment right and one that is essential to the promotion of many other human rights.² The significance of the right to education as a means to exercise other human rights has been emphasised in a number of landmark judgments. In the case of *Plyler v Doe* (1982), for instance, the US Supreme Court highlighted how the absence of adequate education fatally undermines the right to vote and affirmed that an education is essential if citizens are to participate effectively in the political system.³ Furthermore, the right to education has been inextricably linked to human dignity as it cultivates life skills such as communication and self-reliance.⁴ In *O'Donoghue v Minister for Health*, the Irish High Court drew on the UN General Assembly Declaration on the Rights of

CONTACT David M. Doyle  david.doyle@mu.ie  Lecturer in Law, Maynooth University, Maynooth, County Kildare, Ireland

Disabled Persons in interpreting 'basic elementary education' as involving 'such advice, instruction and teaching as will enable him or her to make the best possible use of his/her inherent and potential capacities, physical, mental and moral, however limited these capacities may be'.⁵

Various human rights instruments refer to the right to education, among them the European Union Charter of Fundamental Rights (Article 14), the revised European Social Charter (Article 17) and the European Convention on Human Rights (ECHR) (Article 2 of Protocol 1). The strongest articulations of education as a positive right, however, are evident in the UDHR, the UN Convention on the Rights of the Child (UNCRC, Articles 28 and 29), the Convention on the Rights of Persons with Disabilities (CRPD, Article 24) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, Article 13). Article 26(2) of the UDHR, for example, states that 'Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms', while Article 29 of the UNCRC has been interpreted to mean that education 'goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually or collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society'. That said, the most robust, wide-ranging and comprehensive articulation of the right to education in international human rights law is arguably found in the ICESCR. The education rights protected by this instrument are wide-ranging,⁶ not least insofar as it is the only instrument that recognises the importance of financial support for participation in secondary and higher education, referring as it does to 'the progressive introduction of free education'.⁷ Having due regard to parental rights over their child's education, it recognises that secondary, technical and vocational education should be generally accessible and available to all, and that States Parties must strive to progressively make such education free.⁸ Ensuring that education is accessible to all without discrimination places a particular onus on States Parties to take positive steps to prohibit discrimination.⁹ General Comment no. 13 of the United Nations, Committee on Economic, Social and Cultural Rights (CESCR) confirms that 'State parties must closely monitor education . . . so as to identify and take measures to redress any de facto discrimination'.¹⁰

Yet despite such a comprehensive, positive articulation of the right to education, the CESCR has expressed reservations about the implementation of Article 13 of the ICESCR in practice in many States Parties, including in Ireland.¹¹ Ireland provides a useful and interesting case study on the practical implementation of the right to education at the domestic level for a number of reasons. The right to education is strongly protected in the Constitution of 1937, which pre-dates the key international instruments in this area. A natural law ethos 'pervades' the constitutional provision on education, which emphasises the 'inalienable right and duty of parents to provide for' the child's education.¹² The duty of the State is simply to 'provide for' education. This provided a constitutional basis for the pre-existing education system, whereby the State finances denominationally controlled education, with recognised schools receiving State funds but run by the (usually religious) 'patron' through a board of management. Many scholars and commentators have argued that the system enshrines a form of 'religious primacy and state control',¹³

which does not adequately address either the principle of parental choice or that of accessibility for all children.

For its part, the CESCR has expressed particular concern about the de facto accessibility of education in Ireland and, in particular, discriminatory practices faced by children belonging to religious minorities, Traveller and Roma children, migrant children and children with disabilities.¹⁴ Such States Parties' reports are important in determining compliance with the Covenant, but they only 'reveal part of a country's educational picture'.¹⁵ Human rights law 'spells out clear qualitative State obligations related to the right to education'¹⁶ and thus this article builds on methodologies used successfully in previous work on other human rights issues in Ireland.¹⁷ Research connections were established with key stakeholders in education and semi-structured, open-ended interviews were conducted with 30 interviewees. These participants included government and public representatives, parents, school principals, teachers, and NGO personnel with particular expertise on education rights, and provide a critical counterbalance to the 'top-down' reports of States Parties. The majority of these interviews were conducted during extended fieldwork in Dublin and were supplemented with additional interviews conducted across Ireland as appropriate. The interviews were carried out at a location nominated by the participant and the duration varied between 40 minutes and one hour.¹⁸ These unique 'on-the-ground' or 'bottom-up' perspectives are 'often overlooked in traditional doctrinal scholarship',¹⁹ but they open up important, new empirical vantages to explore these areas of concern. This is particularly appropriate in the Irish context where the education system was once described as a 'Church-State co-operative',²⁰ but which has been obliged, over a relatively short space of time since the 1990s, to adapt in order to cater for an increasingly ethnically and culturally diverse school population.²¹

Education in Ireland

The legal framework

The right to education in Ireland is enshrined in Article 42 of the Constitution (1937) and elaborated on by the Supreme Court in a number of seminal cases, including *Crowley v Ireland* (1980); *TD v Minister for Education* (2001); and *Sinnott v Minister for Education* (2002). Article 42, which is worth setting out in full, provides:

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.
2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

This strikes a balance between the positive and negative obligations of the State with regard to the provision of education. The State, in recognising the Family as the primary and natural educator of the child, does not oblige parents to send children to State schools should so doing violate their conscience. On the other hand, the Constitution holds that the State shall provide for free primary education thus straddling both negative and positive obligations.

A statutory right to education is also laid out in the Education Act 1998. S.12 of this Act refers to the annual funding of schools, thereby ensuring the provision of free education in the State. Furthermore, the Equal Status Acts 2000–18 prohibit discrimination in relation to the provision of services, property and other opportunities to which the public generally has access, such as education.²² The substantive prohibited grounds include gender, marital status, family status, sexual orientation, age, religion, disability, race and membership of the Traveller Community.²³ The legislative intention clearly included the prohibition of discrimination in education, not least because ‘service’ is broadly defined as ‘a service or facility of any nature which is available to the public generally’.²⁴ In addition to this more general prohibition on discrimination, Section 7 of the Equal Status Act 2000 was radical in stipulating that an ‘educational establishment’, which includes recognised primary and post primary schools, shall not discriminate in relation to the admission of a student *inter alia*.²⁵ This provision was intended to address systemic discrimination against minority groups in education, but our findings reveal that the existence of equality legislation is not sufficient in and of itself to ensure the prohibition of discrimination in practice. Of course, such discriminatory practices are not a uniquely Irish phenomenon and other jurisdictions may need to follow Ireland’s legislative lead by enacting more targeted legislation outlawing specific forms of discrimination in education.²⁶

The institutional landscape for the provision of primary and secondary education

The role of the State in Irish public education is somewhat unique, with boards of management in charge of the direct running of and decision-making in schools. The autonomy of educational institutions has meant that individual schools have traditionally exercised control over admission and recruitment policies, in line with the ethos of the school. The minimalist nature of the State’s role in the provision of education, envisaged by Article 42, has been consistently upheld by the courts.²⁷ The legal consequences of this approach were seen in the long-standing issue whereby survivors of sexual abuse in schools were barred from taking civil actions against the State due to the absence of direct State responsibility for the running of schools. In its landmark judgment in *O’Keeffe v Hickey* in 2014, the Grand Chamber of the ECtHR found that regardless of how education is organised or who has day-to-day responsibility for schools, the State has a positive duty to protect children from ill-treatment that occurs there.²⁸ However,

in coming to this conclusion, the Strasbourg Court was not required to examine the legitimacy of the Irish education system as such.

The constitutional structuring of the right to education has been interpreted as forming the basis for State funding of a denominational education system whereby children have traditionally been educated in a segregated manner along religious lines.²⁹ In this context, the need for a more diverse educational model is well-documented.³⁰ The exclusionary consequences of this system, together with the degree of control of patrons over admission policies, are explored throughout this article.

The consequences of inaccessible education

Katarina Tomaševski, former Special Rapporteur of the Secretary General on the right to education, noted that the denial of the right to education leads to compounded denials of other human rights and the perpetuation of poverty.³¹ The Irish-focused literature clearly illustrates the importance of facilitating school completion and ensuring access to education. In 1993, Drudy and Lynch wrote that early school leavers are the most prone to unemployment and stated, importantly, that '[I]t is clear that this group are disproportionately drawn from the working class'.³² This finding has been reconfirmed by the research undertaken by Emer Smyth and Selina McCoy which found that 'even in the boom years, those with low levels of education experienced significant difficulties in accessing paid employment relative to their more highly qualified counterparts' and furthermore that the disparity in unemployment risks between early school leavers and those with higher levels of education is particularly strong in Ireland when compared to many other OECD countries.³³ An elected representative in Dublin, interviewed as part of this study, indicated that those who fall out of the system face an uncertain, often bleak future:

If nobody in the family has gone to school and if the other adults in the family have ended up in prison, and if that's the tradition in the family, it's very hard to break that barrier. A lot of them come from Dublin 1 and Dublin 7 . . . And early school leaving is very much part of that. Early school leaving which then brings them into addiction and then for some there can be mental health issues as well and all those combined, they end up in prison.

An interview with the former Co-ordinator of Education in the Irish prison service revealed similar findings:

Famously . . . the people in Mountjoy [Prison] came from a small number of postal areas in Dublin and I'd say even within those postal areas from some small clutch of areas, yeah, em, so yes, people, not all from the inner city but the inner plus maybe a handful of other locations, make up the great proportion of people in prison and you will get similar patterns, I'm saying this anecdotally but it's fairly evident in Cork and Limerick and so on. In other words, it's poorer areas or more economically deprived areas.

The link between socio-economic deprivation, academic underachievement and incarceration in Ireland has been well documented.³⁴ Material deprivation and limited opportunity create the conditions necessary for the phenomenon of *anomie*, a society which promises much to everyone but inevitably frustrates the desires of many.³⁵ Criminologist Ian O'Donnell, describing this phenomenon in an Irish context, wrote that if the same value is deemed suitable for all members of society and yet only attainable by a few,

then ‘poverty may breed resentment and crime’.³⁶ While advising against stereotyping, the former Co-ordinator of Prison Education acknowledged that:

[y]ou have people from the same deprived backgrounds who don’t end up in prison . . . it’s just that the proportion is very, very high and the likelihood is very, very high and the opportunities to go different routes are much more limited.

O’Donnell wrote that ‘it remains difficult for a poor teenager from a public housing complex to win a place at university and achieve conventional success’,³⁷ which, combined with the fact that the majority of Irish prisoners have left school before the age of sixteen,³⁸ highlights the importance of investment to reduce educational disadvantage. This view is supported by the findings of a unpublished study conducted by the Irish Prison Service (2017) which revealed that just over half of inmates surveyed (52%) had dropped out of school before the Junior Certificate.³⁹ Notably, young adults, aged 18–24, are not only disproportionately represented in the prison population,⁴⁰ they also have the highest rate of reoffending upon release.⁴¹

Having briefly outlined the legal and institutional context of the study and the consequences of inaccessible education, the following sections engage in a thematic discussion of the qualitative findings as they pertain to the concerns identified by the CESCR and other UN monitoring bodies.

Right to education

Children belonging to a religious minority

The Committee on the Elimination of Racial Discrimination (2011), the UN Human Rights Committee (2013) and the CESCR (2015) have all voiced concern about the dearth of non-denominational schools in Ireland,⁴² although moves are afoot to increase the provision of non-denominational and multi-denominational schools.⁴³ Prior to its amendment by the Education (Admission to Schools) Act 2018, s.7(3)(c) of the Equal Status Act 2000 stated that a school does not discriminate where ‘it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination’. It is important to note that a distinction may be drawn between the exception which enabled schools to give preference to children of the school’s own religious denomination in circumstances where the school was oversubscribed (under which the school was never required to demonstrate that this decision was essential in maintaining the ethos of the school), and the other exception whereby schools may refuse admission even where a place is available, although it was necessary that the school demonstrated that this was essential in maintaining the ethos of the school. Glendenning refers to this latter exception as very significant and one that places a heavy onus on schools to justify refusal of access to certain candidates as essential to the maintenance of the school ethos.⁴⁴ The former exception has been largely removed by the introduction of the 2018 Act,⁴⁵ whereas the latter has not been removed by the same Act.⁴⁶ The effects of this so-called ‘baptism barrier’ were keenly felt by children in the Muslim community, as explained by a representative of the Islamic Cultural Centre of Ireland (ICCI):

The school principal may reject children on faith grounds, under the claim of protecting the school ethos . . . It doesn’t sit in peace with the concept of equality . . . I am aware of a number

of parents who used to live in Dublin 14 and they chose a school because of proximity and because of quality education over there and they have been refused on faith grounds.

Such ‘Catholic first’ admission policies are, as a government minister pointed out, the product of a different era when the administration of education was controlled by the hegemonic Catholic Church in a predominantly Catholic State:

It wasn’t set up for the current cohort of people we have in the country . . . now we have a situation emerging where, eh, there’s quite a number of children from various different international backgrounds, ethnic backgrounds and religious backgrounds, all trying to fit into a model that was actually designed for, eh, for one majority faith.

While the representative of the ICCI was quick to acknowledge the important role that the Catholic Church has played in the history of the Irish education system, his views seem to be aligned with groups such as the Humanist Association of Ireland, who, according to Humphreys, have heavily criticised the protection of religious school patronage and called for an absolute ban on school patrons requesting baptism certificates for enrolment procedures.⁴⁷

Under the Education (Admissions to Schools) Act 2018, oversubscribed schools (approximately 20% of schools) are no longer permitted to discriminate on the basis of religion by prioritising enrolment for baptised children, thus removing a ‘pressure’ on parents to get their child baptised so as to gain access to their local school.⁴⁸ The Act provides for a limited exception to this change for certain recognised minority religion schools, in line with the constitutional permissibility of positive discrimination in favour of minority religions.⁴⁹ While this amendment reflects the growing diversification and secularisation of Irish society, the enduring denominational nature of the system remains contentious, not least because approximately 90% of national schools remain under the patronage of the Catholic Church and 5% under that of other religious organisations.⁵⁰

Traveller children

It is not just the question of school patronage that is important in terms of accessing the right to education, but school admission policies in general. A report from the Economic and Social Research Institute in 2009 found that 80% of schools accept all candidates who present for admission, with the remaining 20% relying on admission policies to select, or rather de-select certain candidates.⁵¹ The case of *Christian Brothers’ High School Clonmel v Stokes* (2011) highlights the barriers such policies can create for certain members of society. In proceedings brought by Mary Stokes on behalf of her son, it was argued that the school’s admission policy indirectly discriminated against John Stokes, a Traveller, preventing him access to education in that particular establishment.⁵² The policy of the all-boys school gave preference to the sons of past pupils or those whose sibling had attended the school. It was argued that this policy indirectly discriminated against Traveller children, as the rate of second-level educational attainment was quite low among the Travelling community and therefore parents of Traveller children were less likely to have attended secondary school at all. McCarthy J, in deciding if the policy was compliant with s.3(1)(c) of the Equal Status Act 2000, focused on the disadvantage such a policy placed on Travellers and non-Travellers alike. He found that John Stokes was no more

disadvantaged than a non-Traveller in the circumstances. In February 2015, the Supreme Court dismissed a subsequent appeal by Mary Stokes, with Clarke J finding that there was insufficient statistical evidence to show that the policy in question presented a particular disadvantage to Traveller children. The judgments of the Irish Superior Courts in *Stokes* have been widely criticised in the academic commentary.⁵³ A representative of Pavee Point also articulated the organisation's disappointment with the Supreme Court finding:

We were disappointed with the outcome, that the Supreme Court, eh, you know, vindicated the school in question, felt that they were operating within the law and that may be so, but we think the law is inherently discriminatory and the law should be changed.

In highlighting how Travellers are at a significantly greater disadvantage than settled children in this regard, another interviewee from the Dublin-based NGO explained:

A lot of Travellers would've been nomadic as well, before the Housing Miscellaneous Provisions Act came in in 2002, they would've been nomadic, so they would've travelled around . . . they wouldn't have been historically in the school . . . they never would've established a family history within that school.

He contended that such admission policies perpetuate societal segregation by not facilitating the inclusion of Traveller children in certain mainstream schools:

Laws and policies get developed and designed from a particular value base, from a particular perspective. So in other words, those with power and privilege who get to design these policies and laws will end up designing something invariably that will support and validate their way of life and will then have a negative impact on other communities and that school admissions policy is one example of it.

The 2018 Act partially addresses these concerns by providing that oversubscribed schools will not be allowed to allocate more than 25% of their places to children of past pupils.⁵⁴ However, it remains to be seen what the impact of this reform will be in practice.

While the very existence of the Equal Status Act may seem to suggest that the government is compliant in law with its obligations under Article 13 in ensuring equality of access to education, it is plausible to argue that Ireland falls short of these obligations in practice. This is also evident in the context of ongoing participation in education. In pointing out the State's failure to discharge its duties in this regard, Glendenning references the 2002 Census, which estimated that 45.2% of Irish Traveller children fail to complete primary education and by the of age 15, 63.2% have left school.⁵⁵ More recent Census data also indicates that educational attainment among Travellers remains significantly behind that of the general population.⁵⁶ The negative experiences of older Travellers in schools has perhaps contributed to a reluctance among children in this community to engage with the education system. As one interviewee put it:

A lot of older Travellers are afraid to approach the schools, because they had such a bad time in school, being discriminated against in school . . . there were segregated yards, there were segregated provision (sic) around education in classes . . . some Travellers were put at the back of the class and given crayons, given colouring books and told that they didn't need to learn Irish.

Article 13 places the onus on the State to ensure adequate access to education for all, but the representatives from Pavee Point suggest that many of the existing laws and policies need to be 'equality-proofed'. Budget cuts during the recent recessionary years, for

instance, have seen the withdrawal of visiting teachers for Travellers in secondary schools which sends a negative message to the Traveller Community in terms of the State's willingness to adhere to measures put in place to prohibit discrimination.⁵⁷ The co-director of Pavee Point intimates that economic policy supersedes any desire at government level to appreciate cultural diversity or improve Traveller participation in education:

Schools and the education system, em, you know, is a mechanism that the State has put in place just to produce individuals who are effectively economic units who serve the economy, serve the labour market.

This interviewee also alluded to the lack of cultural diversity in the current curriculum,⁵⁸ which they argued 'reflects primarily a white, settled, probably the middle class view of the world'.

Migrant children: asylum seekers as a particularly vulnerable group

In 2004, Katarina Tomaševski asserted that 'discrimination against non-citizens should be eliminated'.⁵⁹ Depending on their background, migrant children may be adversely affected by the problems created by the 'Catholic first' rule operated in some schools, as well as the past pupil rule and the 'first come, first served' policy, whereby the time and date on which the parents make an application for their child to attend the school is used as a basis for admission. In particular, the upshot of this 'first come, first served' practice is that there are now schools which are predominantly non-national in certain localities, particularly as those from other jurisdictions coming into Ireland do not appreciate the importance of registering their child's name a few years in advance. One interviewee remarked how in Lucan, County Dublin, this practice led to the establishment of an Educate Together school where the pupils 'were almost entirely non-nationals'. She noted how this school became known as the de facto 'foreigner school' and one to which local parents, including some local immigrant parents, were not keen to send their children.

Within the broad category of 'migrant children', one of the most vulnerable groups in Irish society are the 1,647 children currently in state accommodation for asylum-seekers, known as direct provision.⁶⁰ Direct provision has attracted heavy criticism,⁶¹ with Arnold referring to it as an unnatural family environment, which is not conducive to positive development in children.⁶² The children living in these centres are the children of asylum-seekers who, due to circumstances beyond their control, find themselves at the margins of Irish society due to enforced poverty. This system has resulted in lengthy delays in the processing of asylum-seekers applications and as a result, individuals are living in direct provision for longer periods than for that which the system was intended.⁶³ An interview with a government minister revealed his strongly held views on this system:

I'm ashamed of it. Em, I think it's intolerable. I think it's eh, it's effectively inhumane what we've stood over for the last, em, fifteen years and I won't stand over it.

In the United Kingdom, a study carried out at Cambridge University found that children of asylum seekers' enjoyment of the right to education was compromised, because 'the educational needs of asylum-seeker and refugee children have tended to be marginalised or ignored'.⁶⁴ The placement of these families in areas where the local schools had no available places or inadequate resources to meet the needs of these children was in no small part to blame for this problem.⁶⁵ In Ireland, it seems that a lack of suitable

transportation to school has been problematic for children in direct provision centres,⁶⁶ although one interviewee contradicted this view. He stated that ‘families . . . are located generally in the centre of a town . . . There are bus services and . . . those connections have been made’.

Furthermore, unlike in the UK where the Local Education Authorities have responsibility under the Education Act 1996 for the placement of refugees and asylum-seekers,⁶⁷ it is the non-statutory Reception and Integration Agency (RIA) that is responsible in Ireland for sub-contracting the day-to-day running of direct provision centres to private agencies.⁶⁸ Ensuring the child’s right to education is clearly not at the top of the agenda for many of these agencies. In a moving submission to the Oireachtas Joint Committee on Public Service Oversight and Petitions in 2014,⁶⁹ Pako Mokoba gave a detailed account of her six years living in a direct provision centre. Highlighting some of the difficulties pertaining to education she made the following remarks concerning homework: ‘how do you educate a child when there is no table? Where there is no space?’ One of the government ministers interviewed, having visited many of these centres, clearly agreed:

Let’s be frank about it, a child is not supposed to grow up in a direct provision centre . . . so the idea of us having a direct provision centre that is connected to a school kinda misses the point. You know what I mean, they shouldn’t be living there.

In 2014, Liam Thornton wrote that asylum-seekers exist as a unique category of immigrant insofar as they do not benefit from statutory rights to social support.⁷⁰ Adults in direct provision centres receive €38.80 weekly, with €29.80 also paid for each dependent child. While one minister pointed out that parents are entitled to receive the Back to School Clothing and Footwear Allowance, it has been reported that the aforementioned indirect costs associated with education disproportionately affect these families.⁷¹ Government policy, which until recently prevented asylum-seekers from accessing the labour market (and still makes it very difficult for asylum seekers to do so), has undoubtedly exacerbated this situation.⁷²

In addition to the financial barriers, cultural and social barriers can also prove problematic. The 2015 report of the Joint Committee on Public Service Oversight and Petitions revealed that children from direct provision centres often face bullying and harassment in their schools, and that these children miss out on class time by virtue of the requirement that they must accompany their parents to the RIA when they sign-on.⁷³ Moreover, integrating into a new school environment while trying to follow instruction in a new language is undoubtedly an intimidating prospect. In the UK, an Ofsted report⁷⁴ recognised the positive role many schools played in integrating asylum-seeker pupils, a trend also remarked on by a government representative:

I was in Mosney there a couple of months ago and one of the local schools had a fantastic initiative . . . they got everybody from the class to go back to the [direct provision] centre and they did work and colouring and playing together in the centre. This is these childrens’ homes, so they brought their friends home. It was actually lovely to see it.

A 2014 study of parenting in direct provision centres in the West of Ireland also revealed that ‘parents regretted not being able to have play dates, sleepovers or birthday parties for their children due to their living environment and limited incomes’. The systemic failings

of the education system for this group contrasts with the importance of schools as a site of integration and opportunity: in the 2014 study cited above, despite the difficulties experienced, school was still ‘perceived as a very positive influence in children’s lives’.⁷⁵

Children with special educational needs

The barriers to education faced by learners with special needs has been well documented in the educational literature,⁷⁶ while the inadequacies of the Irish legislative framework have been the subject of domestic and international criticism.⁷⁷ These failings – which include the repeal of s. 32 of the Education Act 1998 pertaining to educational disadvantage⁷⁸ and the reluctance to commence some sections of the Education for Persons with Special Educational Needs (EPSEN) Act 2004 – effectively deny children with special education needs the right to certain services and support measures in mainstream schools.⁷⁹ In *Sinnott v Minister for Education* (2001), for instance, Barr J in the High Court expressed dissatisfaction at the failure of the Executive, specifically the Department of Finance, to act on ‘the constitutional obligations of the State to all sectors of the community and in particular to the right of the grievously deprived in society’.⁸⁰ The plaintiff, who was 23 years old, had been diagnosed with autism and profound mental disablement, and his mother successfully brought a case in the High Court seeking access to appropriate education, claiming that her son’s constitutional right to a free primary education extended beyond the age of eighteen, and furthermore, that the Government’s refusal to provide this violated his rights as well as her right to educate her son according to Article 42 of the Irish Constitution. The Supreme Court overturned the High Court decision, finding that State’s obligation to provide for appropriate ‘primary education’ extends only up to the age of eighteen.

Litigation concerning education for children with autism has proven to be highly contentious and an interview with the parents of a child who was diagnosed with autism at an early age highlights the frustration endured by parents trying to secure access to secondary education for their children.⁸¹ They consider their son lucky to have secured a place in one of the first autism units to be set up in the State. With the appropriate supports in place in a local mainstream secondary school, their son’s future has indeed, to use Kelly J’s words in *TD v Minister for Education*, been ‘influenced for good’⁸²:

He’s part of the community and that’s wonderful because sometimes you feel we live on a little island and there’s nobody, because it is a very isolating condition and that was one of the benefits of him being in the school in his community . . .

He has since graduated from Trinity College Dublin, along with two former classmates from the same autism unit, with a Certificate in Contemporary Living, an achievement his parents feel was made possible as a result of his education in a mainstream setting. Referring to an email she wrote to a former Minister for Education, regarding the positive role the autism unit played in the child’s education, his mother said:

I wrote him a big long email saying [he] had now done his Leaving Cert . . . it had done what it said on the tin and here he was, able to get in and out of the college on his own, and function. I mean, when [he] started in the school . . . I was worried that he’d ever be able to function on his own.

This autism unit has been in operation since 2006, but only has a capacity for six boys at any one time, with the obvious upshot being that a new first year pupil cannot be enrolled

until a sixth year pupil leaves. This shortage of places appears to be representative of the situation nationally. In 2013, Kevin Whelan, Chief Executive Officer of Irish Autism Action, highlighted that with as few as thirty specialised autism units available at secondary level the State is ill-prepared to deal with the ‘explosion of need’ for educational supports for these vulnerable children.⁸³ While such media reports seem to indicate that the State is not prepared for the level of spending that will be required to meet the demand for such units in the near future, unpublished statistics provided by an employee of the Department of Education in 2015 indicate otherwise:

The number of autism units has increased significantly . . . the school year ending in 2011 there were only 41 autism units at post-primary level across the whole country and this school year we’re ending up with 152 of them . . . We’ve made a massive increase in autism units at both levels but it’s more pronounced at second level because the numbers were so low to begin with.

Special needs education forms an integral part of the debate surrounding accessibility to education without discrimination and s.2 of the EPSEN Act 2004 requires children with special needs to be educated in an inclusive environment, unless to do so would not be in the best interests of the child. Regrettably, the failure to implement the remaining sections of this 2004 Act – particularly significant statutory supports such as mandatory assessment, education plans and related services – is not without consequence,⁸⁴ but the Education (Admissions to Schools) Act 2018 did give the Minister the power to compel a school to open a special needs class should the National Council for Special Education identify that the need arises in a given area.⁸⁵ Furthermore, with the government investing almost €1.7 billion in Special Education in 2019, this provision has gone some way to ensuring equality of access to education for certain children with special needs.⁸⁶

Education (Admission to Schools) Act 2018

Admission policies

The common theme running through the reports of the various UN treaty bodies and the interviews was the need to amend the existing legislative framework to eliminate discrimination in school admissions.⁸⁷ In this context, an announcement by the former Minister for Education, Jan O’Sullivan, in 2015, indicating a cap of 10% on school places being reserved for children of past pupils was to be welcomed. While this was undoubtedly a step in the right direction and a noticeable improvement on the 25% suggested by both her predecessor, Ruairi Quinn (and subsequently by her successor, Richard Bruton), concern at such a move was expressed by the Joint Managerial Body (JMB), the representative body of voluntary secondary school management, as well as certain fee-charging schools, such as Belvedere College and Blackrock College in Dublin.⁸⁸ In the final version of the legislation, a cap of 25% was put in place.

Yet aside from the advantage given to children of past pupils when allocating places and the ‘baptism barrier’ discussed above, one of the most contentious issues surrounding schools’ admission policies is the ‘first come, first served’ rule. In 2015, the JMB argued that issues surrounding enrolment only arise in the 20% of schools which are oversubscribed and suggested that the Admission to Schools legislation will amount to Departmental micromanagement of the enrolment process. It contended that the appeals

procedure under s.29 of the Education Act 1998 was sufficiently transparent and effective, providing the example that out of approximately 120,000 enrolments in 2012 there were only 244 appeals, 40 of which were successful.⁸⁹ While keen not to ‘overstate the problem’, a government representative nonetheless pointed out:

... the number of appeals wouldn't necessarily be representative of how many people maybe might have a reason to appeal ... anecdotally you would know that people who don't get into one school just take another place somewhere else.

She continued by giving the example of how the ‘first come first served’ enrolment policies of certain schools in her constituency have had the net effect of populating two Educate Together schools in the locality with a predominantly immigrant, non-national student cohort. In highlighting how children from immigrant families can face barriers of access to their local schools, she stated:

It's that thing of newcomers ... immigrants don't know, they don't know what the story is, they come into the community, they don't know that you have to have your name down straight when the child is born ... or they mightn't arrive on time to do that.

Even if they do get their names down in time, the interviewee pointed out the additional difficulties they may face:

... but then the thing of the Catholic thing might come in, might go against them, or the catchment area as well, or the age, because another thing immigrants want to do is send their kids to school when they're four, or some of them do.

It is, of course, not only immigrants who have felt the effects of such practices, but also people migrating within Ireland, as explained by an advisor to the Minister for Education:

... if either parent gets a job in a new town, or they're transferred from one town to another in their existing job without knowing that was coming, how could they have possibly planned to have their child's name down on a waiting list?

The Education (Admission to Schools) Act 2018 changes this practice by replacing the ‘first come, first served’ rule with an Annual Admissions Notice,⁹⁰ while it will also phase out waiting lists with the intention of making the system more accessible to all. That said, many of the anticipated improvements will be quite difficult to realise in reality. The dilution of the ‘parental rule’ in school admission policies will, for example, conflict with the parents’ right to choose a school for their children, an issue which a government representative suggests might be quite localised:

In our Committee everybody wanted to get rid of it, but I mean, there might be particular TDs in particular constituencies [who might be resistant] ... I think it might be more areas that are affluent and there might be a lot of fee-paying schools, or there might be schools where there's that tradition, so there might be a little bit of resistance in that sense.

Importantly, the 2018 Act applies to all schools recognised under the Education Act 1998, but removing the provision where children have been enrolled from birth to attend a particular school may still prove problematic in certain fee-charging schools where this practice has been long established.⁹¹ As one elected representative put it, eliminating waiting lists, which effectively amount to priority admission, entirely after five years will be ‘very difficult to do in reality ... I think it is easier said than done’.

Conclusion

A variety of exclusionary practices, which to date have been legally permissible, have helped to facilitate the establishment of a *de facto* two-tiered education system in Ireland. Tomaševski emphasised that the challenge of access ‘requires halting and reversing exclusionary policies and practices, not only countering their effects’.⁹² This requires commitment at government level to a human rights based approach to policy formation. It is vital to ensure that the State does not rely on mere compliance with its international obligations in law, but also that those commitments translate into practice. A human rights approach to the design and implementation of admission policies, in particular, is vital to the elimination of discriminatory practices and to the creation of equal opportunities for social mobility.

It is evident from this study that the Education (Admission to Schools) Act 2018, although undoubtedly a significant step in the right direction, does not go far enough in ensuring accessibility without discrimination to schools in the Irish State. Although the removal of the so-called ‘baptism barrier’ for admission to Catholic primary schools is to be welcomed,⁹³ the decision to limit the number of places that can be reserved for children of former pupils to 25% is problematic as it retains this exclusionary practice, albeit to a lesser extent than before. Moreover, while the ministerial power to order the opening of a special class has been exercised,⁹⁴ it is difficult to see how this power alone can address the dramatic shortfall of places and inequality of educational opportunity that exists for some children with special educational needs.⁹⁵ That said, one of the most positive effects of the legislation will be the phasing out of waiting lists for places in schools, along with other sharp practices, which according to one government official, were ‘designed to weed out foreigners’, such as compulsory attendance at open days, interviews or the payment of a fee to hold a place for a child in a school will be forbidden under the new legislation.⁹⁶ Importantly, however, previous experience with rights-based legislation in this area (the EPSEN Act 2004) shows that the promulgation of progressive legislative rules is meaningless if never technically brought into force. Most sections of the 2018 Act have, however, been commenced at the time of writing.⁹⁷

Tomaševski notes that the rationale behind the parental right to choose their child’s education ‘is to prevent any state’s monopoly of education and to protect educational pluralism’.⁹⁸ Given the strong protection of parental choice in Article 42 of the Constitution, it is striking that many interviewees highlighted that the laws governing education in Ireland were formulated to reflect a particular type of society. Moreover, the ICCI representative remarked that while Ireland is no longer a culturally homogenous society, many Muslim children and children of various ethnic minorities who have grown up in Ireland are still considered to be foreigners. In remarks echoing those of the Traveller NGO, he questioned the motives underlying policies which permit the exclusion of citizens who are members of the Traveller community from certain schools, asking ‘Do we want to establish superiority and inferiority?’ This interviewee also argued that educational exclusion is a fundamental layer of social exclusion and one that impacts seriously on the future of our society. Pimentel warns that an education system which enables discrimination on the basis of religion, language, race, and gender creates and perpetuates a divided society.⁹⁹ In this context, it is particularly important to ensure that all of the partners in education uphold the fair and

transparent implementation of the 2018 legislation and do not seek to undermine its provisions through cleverly worded admission policies or unprincipled practices.

One final conclusion that emanated from the interviews conducted in the course of this study is that the law itself can serve a dynamic social purpose. Although the principal aims of legislation are, *inter alia*, to bring the law into line with contemporary social values and convictions, and to address deficiencies which have come to light through judicial interpretation or monitoring frameworks, the educative or rhetorical role of law cannot be ignored.¹⁰⁰ The law can lead schools on the values that should inform individual, collective and organisational behaviour with regard to the inclusion of children with disabilities and equality of access for children from ethnic minority or socially disadvantaged backgrounds. Furthermore, law reform has the potential to focus public opinion on important aspects of contemporary education and to provoke considerable discourse about equality of access to education in Ireland. Such debates suggest that the challenge facing our government doubtlessly lies in adapting the system currently in practice to the exigencies of an increasingly secular and diverse school population.¹⁰¹ As Glendenning points out, it falls to this generation to ensure that the legislative programme for education in this country can accommodate the needs of all the people on this island within the framework of national, EU and international law commitments.¹⁰² It is, however, imperative that this generation ensures that it is implemented in practice too.

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Notes on contributors

David M. Doyle is a lecturer at Maynooth University Department of Law. David's research focuses on criminal law, education law, intellectual property law and legal history.

Marie Muldoon is a teacher in Modern Languages at St. David's CBS, Artane, Dublin 5. Marie holds a MEd in Leadership and Management from Trinity College, Dublin, and a Diploma in Legal Studies from the Honorable Society of King's Inns.

Clíodhna Murphy is a lecturer at Maynooth University Department of Law. Clíodhna's research focuses on migration law and human rights.