Your Rights Factsheet - Legal

Discrimination on the Ground of Disability in Education

Irish Human Rights and Equality Commission

Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

Equality and discrimination law

The **Equal Status Acts 2000 to 2018** ("the ESA"), prohibit discrimination on ten specific grounds in the provision of goods and services, obtaining or disposing of accommodation and in relation to educational establishments.

What is discrimination?

In Irish law, discrimination will be found to occur where a person who has a protected characteristic is treated less favourably than another person, who does not have the protected characteristic, is, has been, or would be treated in the same or similar situation. The ten protected grounds of discrimination covered by the ESA are:

- gender;
- civil status (e.g marital status or civil partnership);
- family status (e.g. parental and caring responsibilities);
- sexual orientation;
- religion;
- age;
- disability;
- race (including colour, nationality, or ethnic or national origins);
- membership of the Traveller community;
- housing assistance (in relation to the provision of accommodation services).

Only the first nine grounds are relevant in relation to educational establishments.

Discrimination in the context of education on the ground of disability, comes with the remit of the ESA. The ESA contains particular provisions relating to schools in sections 7 and 7A.

Disability discrimination in education

The disability ground means that an individual is entitled to equal treatment if they have a disability, in comparison to a person who does not have a disability or someone who has a different disability.

Disability is defined under the ESA (section 2) as:

- the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
- the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- the malfunction, malformation or disfigurement of a part of a person's body,
- a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour;

The disability ground under the ESA includes, but is not limited to, physical, intellectual, learning, cognitive, neurological and emotional disabilities.

There are two types of discrimination dealt with by the ESA:

- **Direct discrimination** on the disability ground occurs where a person is treated less favourably than another person is, has been or would be treated in a comparable situation, on the grounds that they have a disability.
- **Indirect discrimination** on the disability ground may also occur where an apparently neutral provision puts a person who has a disability at a particular disadvantage, unless the provision is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Discrimination by schools

Under section 7(2) of the ESA, schools are prohibited from discriminating in relation to:

- the admission or the terms or conditions of admission of a person as a student in the school;
- the access of a student to any course, facility or benefit provided by the school;
- any other term or condition of participation in the school by a student;
- the expulsion of a student;
- any other sanction against the student.

There are specific rules requiring schools to accommodate students with disabilities and special education needs, but there are also specific exceptions allowing for schools to treat students with disabilities differently to others in some circumstances.

In Ireland, there is a general policy of inclusiveness whereby children with disabilities should be educated in mainstream settings as far as possible. The Education for Persons with Special Education Needs Act 2004 provides that children are to be educated in an inclusive setting unless this would not be in the best interests of the child or the effective provision of education for other children in mainstream education. This policy requires that schools make adaptations to accommodate students with disabilities.

What is reasonable accommodation?

Schools have an obligation to take special steps to facilitate a person with a disability where these steps are needed to allow the person to participate in education. A failure to provide this special treatment, known as reasonable accommodation, amounts to discrimination on the disability ground.

Sections 4(1) and 4(2) of the ESA:

"1. For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such

special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

2. A refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question."

The duty to make reasonable accommodation might require a school to provide, for example, lifts between different levels of a school, assistive technology, sign language interpretation, etc., depending on the needs of a particular student.

Case Study: A mother (on behalf of her son) v A national school DEC-S2016-048 (decision of the WRC)

This complaint concerned a school's refusal to allow one of its pupils, who had a disability, to bring his assistance dog to school with him. The WRC found there was an obligation on the school to provide reasonable accommodation to the pupil in these specific circumstances and that its refusal to do so was in breach of the ESA.

Case Study: Two Complainants (a mother and her son) v A Primary School DEC-S2006-028 (decision of the Equality Tribunal)

In this case concerning a student diagnosed with ADHD, the Equality Officer decided that reasonable accommodation could have been afforded to the child by prioritising him for assessment with an education psychologist and requesting education supports from the Department of education to meet his needs. She directed the school to put in place a system for facilitating early identification of students who have disabilities or learning difficulties.

The duty to make reasonable accommodation imposes a positive obligation, or a proactive duty, on schools to take active steps to provide special treatment or facilities to enable a person with a disability to participate in education in the school.

Case Study: Cahill v Minister for Education [2018] 2 IR 417 (Judgment of Ms Justice Laffoy, Supreme Court of Ireland)

"Taking a realistic view of its provisions, I consider that the opportunity to do "all that is reasonable to accommodate the needs of a person with a disability", in other words, to provide special treatment or facilities to meet the circumstances outlined, under the 2000 Act is not merely permissive, but, in reality, by implication imposes an obligation on the service provider, but only to the extent expressly provided for in s. 4(1) of the 2000 Act, that is to say, to provide special treatment or facilities for the purposes outlined in s. 4(1). If the service provider is to avoid discriminating, it must not refuse or fail to do "all that is reasonable to accommodate the needs of a person with disability" in accordance with s. 4(1). It is prohibited from discriminating by virtue of s. 5(1) and, if it breaches that provision, it may face a claim for redress in accordance with s. 21."

The *Cahill* case concerned a complaint that the Minister for Education had failed to make reasonable accommodation and discriminated against the complainant, a Leaving Certificate student who suffered from dyslexia, in that it had afforded her an exemption from assessment of spelling and grammar but had annotated her Leaving Certificate results with explanatory annotations in relation to the exemption. The Circuit Court, High Court and the Supreme Court in turn held that the respondent had not discriminated against the complainant and had made reasonable accommodation in accordance with section 4(1) by affording her an exemption while preserving the integrity of the exam system. The Supreme Court said that the standard of reasonableness in section 4(1) of the ESA requires that a balance be maintained between the needs of the disabled person and the effect of providing special treatment or facilities on the service provider in the overall context. In order to do "all that is reasonable" to accommodate children with disabilities, schools must apply for any relevant grants or educational supports that are available to it.

Two Complainants (a mother and her son) v A Primary School DEC-S2006-028 (decision of the Equality Tribunal)

"[T]he provision of special treatment or facilities in the context of Section 4 of the Act would have placed an obligation on the respondent to provide all reasonable assistance to Mrs. C in her attempts to obtain or source the services of an SNA [special needs assistant] to assist J in her Montessori school, and in circumstances where sanction was obtained for the appointment of such a person, there would also be an obligation on the respondent to facilitate the appointment and integration of this person into her school so that the appropriate assistance could be provided for."

Are general policies enough?

When a person requires special treatment or facilities, a school must assess their needs individually, and may have to adjust rules, standards or policies to meet the specific needs of a student with a disability. The person requiring reasonable accommodation, or their parents, should request to meet with the school to discuss what special treatment or facilities they may need. A high standard of consultation is expected of schools to enquire into the specific needs of a person with a disability.

What is a nominal cost?

As can be seen from section 4(2), the duty to make reasonable accommodation is limited to measures that do not give rise to more than a nominal cost.

Where a school intends to refuse to take reasonable accommodation measures on the basis that they would give rise to more than a nominal cost, it is for the school to demonstrate that the costs involved are more than nominal. What amounts to more than a nominal cost depends on a number of factors, including the size of the service provider, its resources and whether there are grants or funding available to it.

Case Study: A Complainant v Marks and Spencer DEC-S2009-005, paragraph 5.6 (decision of the Equality Tribunal)

"Service providers must be cognisant of the fact that every nominal cost issue will be assessed depending very much on whether the requested special treatment and/or facility is a necessary and reasonable request from the complainant, the size of the organisation in question, its resources and whether [any] grants, etc are available".

This means that even though a special facility might involve a large cost, it may not be more than nominal if the school can apply for a grant to fund its provision.

What duties do schools have to facilitate students with disabilities?

Various duties are placed on the Minister for Education, schools and boards of management to act proactively to make education accessible to students with disabilities.

Section 7(2)(a) of Education Act 1998:

"(2) Without prejudice to the generality of subsection (1), each of the following shall be a function of the Minister:

(a) to provide funding to each recognised school and centre for education and to provide support services to recognised schools, centres for education, students, including students who have a disability or who have other special educational needs, and their parents, as the Minister considers appropriate and in accordance with this Act"

Section 9(a) of the Education Act 1998:

"9. A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to—

(a) ensure that the educational needs of all students, including those with a disability or other special educational needs, are identified and provided for."

Section 15(2)(g) of the Education Act 1998:

"15. (1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that board has responsibility.

(2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall—

…

(g) use the resources provided to the school from monies provided by the Oireachtas to make reasonable provision and accommodation for students with a disability or other special educational needs, including, where necessary, alteration of buildings and provision of appropriate equipment."

In 2018, a new power was granted to the Minister for Education (by section 8 of the Education (Admissions to Schools) Act 2018) to compel a school to open a special class following a number of steps, where the National Council for Special Education has identified a need for such provision within an area.

What exceptions allow schools to treat students with disabilities differently?

Because a person's disability, or measures to accommodate a person with a disability, can sometimes affect other people, the ESA creates a number of exceptions from the general discrimination rules.

Under section 4(4) of the ESA, where a person has a disability that, in the circumstances, could cause harm to that person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.

In addition to this general "harm to others" exception, section 7(4)(b) of the ESA creates a specific exception in the education context to prevent a detrimental effect on the education received by

other students. It provides that the prohibition on discrimination by education establishments does not apply "to the extent that compliance with any of its provisions in relation to a student with a disability would, by virtue of the disability, make impossible, or have a seriously detrimental effect on, the provision by an educational establishment of its services to other students".

Furthermore, section 7(4)(a) of the ESA creates an exemption for schools specifically in relation to sport. It provides that the prohibition on discrimination by education establishments does not apply "in respect of differences in the treatment of students on the gender, age or disability ground in relation to the provision or organisation of sporting facilities or sporting events, to the extent that the differences are reasonably necessary having regard to the nature of the facilities or events".

How do these exceptions work?

The above exceptions have been relied on by schools in a variety of circumstances, often to justify sanctions against children with disabilities.

Case Study: Clare v Minister for Education and Science [2004] IEHC 350

This is an example of the exception in section 7(4)(b) resulting in a finding that no discrimination occurred where sanctions are imposed to prevent a detrimental effect on other students. The Plaintiff was a boy with ADHR whose conduct was disruptive and sometimes violent. He received a number of detentions and was eventually expelled from secondary school. However, he received private tuition, which was provided and paid for by his secondary school. The plaintiff later attended a vocational school and his condition improved.

Smyth J found that the school had considered numerous options for the child, and had put substantial time and effort into trying to accommodate his return to the school. In the circumstances, he decided:

"De La Salle did not discriminate unfairly, unreasonably or at all (in the context of Section 7(1) (d) of the Act of 2000) in expelling Richard. The appeal mechanism of the 1998 Act was not in place at the time. Further, a period of three months notice of

intention to follow a probable course elapsed before the action into which the De La Salle were challenged: the school was entitled to balance the rights of Richard and the other students in his (intended) class - - such, on the basis that the facts in the correspondence are true, is not discrimination (Section 7 (4) (b) of the Act of 2000)."

Case Study: Mrs A v A Boys National School DEC-S2009-031, decision of the Equality Tribunal (now the WRC)

This case involved a child with autism spectrum disorder and attention deficit order, who was suspended from school after a series of incidents in which he had struck teachers, a special needs assistant and other pupils. The child's mother, Mrs A, claimed that her son B, was discriminated against by the respondent on the grounds of his disability in suspending him on two occasions arising from behaviour which she claimed was a consequence of his disability. She also claimed that the school's decision to suspend B amounted to a failure to provide reasonable accommodation to B. Mrs A and professionals working with the complainant had urged the school to develop a management plan to deal with the complainant's behaviour rather than applying the school's standard disciplinary sanction, as responding to inappropriate behaviour in a child with autism by punishment or sending the child out of the class was futile.

The respondent submitted that assessments had placed serious question marks over the suitability of B's placement in a mainstream school, but that despite its reservations it had made numerous accommodations for B, including an Individual Education Programme ('IEP'), resource teaching, liaising with specialists, purchasing specialist equipment, changing yards, etc. B had a behaviour management plan as part of his IEP, which made allowances for his day to day behaviour. However, the school claimed that as B progressed in the school his behaviour became a serious concern in that it was a danger for himself and others. Suspension had therefore been imposed as a measure of last resort. It claimed that B's behaviour was impacting negatively and seriously on the emotional, education and general welfare of the other children in the class and an increasing amount of the teacher's time was taken up dealing with his behavioural

difficulties and attempting to communicate with him. The school relied on the exceptions in sections 4(4) and 7(4)(b) of the ESA.

The Equality Officer accepted that B's behaviour may not have been wilful and that it was associated with his disability. However, he found that given the nature and increasing frequency of these incidents and the negative and potentially dangerous impact that they were having on B, his teachers and fellow students, the school had an obligation to put appropriate measures in place in order to address B's inappropriate behaviour. He found that B was as in fact treated more favourably than a student without a disability would have been treated, in similar circumstances, in terms of the manner in which the school's disciplinary procedure was applied. He was satisfied that the school, rather than invoking the disciplinary procedure prior to March 2005, had sought to deal with B's behavioural difficulties through alternative methods. He found that the exception in section 7(4)(b) of the ESA applied, meaning that the school had not discriminated.

He said (para. 5.8):

"Based on the evidence adduced in the present case, I am satisfied that the extreme nature of the difficulties presented by the complainant's behaviour, especially in terms of the incidences of striking his teachers/SNA/peers and the disproportionate amount of time that it was necessary for his class teacher to dedicate towards the management of this behaviour, were having a seriously detrimental effect on the capacity of the respondent to provide educational services to both the complainant and the other students in his class. In the circumstances, I am satisfied that the sanction of suspension was ultimately implemented by the respondent (in March, 2005 and June, 2005) as a last resort when all other alternatives as a means of dealing with the complainant's inappropriate behaviour had been explored and exhausted. I am satisfied that the respondent carried out a detailed investigation in relation to the incidents that prompted it to invoke the disciplinary procedure in these incidences and furthermore, I am satisfied that details of these incidents were communicated to the complainant's

mother on both occasions. Having regard to the provisions of Section 7(4)(b) of the Equal Status Acts, I am satisfied that the respondent did not subject the complainant to discrimination in the present case in terms of its decision to invoke the sanction of suspension in March and June, 2005. Accordingly, I find that the complainant has failed to establish a prima facie case of discrimination of the disability ground."

The Equality Officer also found that the school had put in place special measures and facilities to manage B's behaviours, and that the decision to suspend him did not amount to a failure to make reasonable accommodation in accordance with section 4 of the ESA.

He said (para. 5.12):

"Based on the evidence presented, I am satisfied that the respondent actively liaised and consulted with a wide range of professionals that had been engaged to provide assistance in managing the complainant's behavioural difficulties and special educational requirements. Furthermore, I am satisfied that the respondent did in fact put in place a wide range of special measures and initiatives (which have already been adverted to in para. 3.2), both as a consequence of its engagement with these professionals and through its own instigation, which were implemented in order to manage the complainant's behaviour and to cater for his special educational requirements as a person with a disability. In particular, I have taken note of the evidence of Ms. Y, the NEPS psychologist who provided assistance to the complainant, regarding the IEP's that were put in place for the complainant and the resultant initiatives that were implemented by the school in order to manage his behavioural difficulties and to cater for his special educational requirements. I have found the evidence of Ms. Y to be very compelling and in particular, I have noted her contention that she felt the respondent had attempted to facilitate the complainant as best it could given the fact it was operating as a mainstream school. Based on the evidence adduced, I am satisfied that the special measures and facilities (including the IEP's and behaviour management plan) that the respondent put in place in order to manage the complainant's behavioural difficulties were reasonable in the circumstances of this case and that these measures

were sufficient to discharge its obligations under section 4 of the Equal Status Acts to the complainant as a person with a disability. Having regard to the foregoing, I find that the respondent's decision to invoke the sanction of suspension on the complainant in March, 2005 and June, 2005 did not amount to a refusal or failure to provide reasonable accommodation to the complainant within the meaning of section 4 of the Equal Status Acts."

The 'harm to others' exception has also been used to justify the provision of separate of separate tuition for students with ADHD (see *Clare v Minister for Education and Science* [2004] IEHC 350).

If a person believes they have been subjected to unlawful discrimination, how and where can they seek redress?

If a person believes that their child has been discriminated against on the ground of disability, a complaint can be made to the Workplace Relations Commission ('WRC') under the ESA. Information in respect of the procedures in place at the WRC and what is involved in submitting a claim can be found here.

In addition to taking a complaint to the WRC under the ESA, a refusal to enrol, a suspension or an expulsion due to disability can be appealed under section 29 of the Education Act 1998. Section 29(1) provides that where a board of management of a school or its representative (a) permanently excludes a student from a school, (b) suspends a student from attendance at a school (c) refuses to enrol a student in a school, or makes another designated decision, the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may appeal that decision to the Secretary General of the Department of Education. The parent or the student, must first follow any appeal procedures provided by the school or patron and, having done so, may appeal the decision to the Secretary General of the Department of Education. The appeal is heard by a committee appointed by the Minister for Education.

The IHREC recommends that you seek legal advice before instituting a claim under the ESA or an appeal under section 29 of the Education Act 1998.

Contact details for the IHREC “Your Rights” Service

- Call us on 018583000 or Lo call 1 890 245545
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