

# Submission on the Review of the *Education for Persons with Special Educational Needs (‘EPSEN’) Act 2004*

Irish Human Rights and Equality Commission

March 2023



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

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## Abbreviations

<b>AIM</b>	Access and Inclusion Model
<b>AON</b>	Assessment of Need
<b>CAMHS</b>	Child and Adolescent Mental Health Services
<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities
<b>CSO</b>	Central Statistics Office
<b>DAC</b>	IHREC's Disability Advisory Committee
<b>DARE</b>	Disability Access Route to Education
<b>DEIS</b>	Delivering Equality of Opportunity in Schools
<b>DPO</b>	Disabled Persons Organisation
<b>ECCE</b>	Early Childhood Care and Education
<b>ECHR</b>	European Convention on Human Rights
<b>EPSEN</b>	Education for Persons with Special Educational Needs Act 2004
<b>ESC</b>	Economic, Social and Cultural rights
<b>ESRI</b>	Economic and Social Research Institute
<b>ETB</b>	Education and Training Board
<b>EU</b>	European Union
<b>FET</b>	Further Education and Training
<b>HSE</b>	Health Service Executive
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICT</b>	Information and Communications Technology

<b>IEP</b>	Individual Education Plan
<b>IPPN</b>	Irish Primary Principals Network
<b>ISL</b>	Irish Sign Language
<b>NCCA</b>	National Council for Curriculum and Assessment
<b>NCSE</b>	National Council for Special Education
<b>NDA</b>	National Disability Authority
<b>NEPS</b>	National Educational Psychological Service
<b>NSB</b>	National Statistics Board
<b>OPCAT</b>	Optional Protocol to the Convention against Torture
<b>SCA</b>	State Claims Agency
<b>SEN</b>	Special Educational Needs
<b>SENO</b>	Special Educational Needs Organiser
<b>SIM</b>	School Inclusion Model
<b>SNA</b>	Special Needs Assistant
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation

## Executive Summary

In the near twenty years since the enactment of the *Education for Persons with Special Educational Needs (‘EPSEN’) Act 2004*, which is intended to provide for the education of all students in an inclusive environment, significant parts of this legislation are not in force including assessments of a student’s educational needs and the development of individual education plans detailing the educational supports required by a student.<sup>1</sup> In this period, there has been major legislative and policy developments in the area of disability and inclusive education, including Ireland’s ratification of the Convention on the Rights of Persons with Disabilities. The Department of Education’s review of the EPSEN Act offers an opportunity to ensure that the legislation and policies concerning the provision of an inclusive education to all students complies with national and international human rights and equality standards, including the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

In this submission, the Commission identifies that the current legislation, policies and practices concerning the education of students with educational needs do not align with the vision of an inclusive education system as set out in international standards. The Commission calls for a clear time bound implementation plan for any legislative and policy changes required to transition to an inclusive education environment.

The submission highlights wider issues related to the education of disabled children and the provision of an inclusive education system which should be examined in this review including ensuring an inclusive educational community and inclusive school curriculum and addressing the expulsion, suspension, use of reduced timetables, and restraint and seclusion practices in educational settings. The submission calls for clear State action in these areas to address the barriers to students realising their right to an inclusive education.

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<sup>1</sup> Sections 3–13, 14(1)(b), 14(1)(d)–(f), 15–18, 38 and 39 of the EPSEN Act have not been commenced.



The Commission's submission sets out a range of key recommendations to inform the Department's review; including:

- Ensure the EPSEN Act's understanding of inclusive education is in line with international standards and international best practice;
- Reform the language of the Act to align with international standards and international best practice on the understanding of disability and inclusive education;
- Guarantee there is no legislative exception to all students, regardless of their educational need, accessing and benefiting from an inclusive education alongside their peers;
- Ensure a clear legislative basis for the provision of educational assessment, the development of individual education plans, the provision of resources on the basis of this plan and the availability of complaint and appeals mechanisms;
- Ensure that the educational supports required for students to support their transition to higher education and further education and training, and lifelong learning are reflected in legislation and policies.

## Recommendations

The Commission makes the following recommendations on the review of the *Education for Persons with Special Educational Needs Act 2004*:

### Human Rights and Equality Framework

1. The review of the *Education for Persons with Special Educational Needs Act 2004* should be underpinned by relevant human rights and equality standards.

### Public Sector Equality and Human Rights Duty

2. The State should amend section 2 of the Irish Human Rights and Equality Commission Act 2014 to extend the definition of a public body to include bodies in the educational sector that are wholly or partially in receipt of public funds, thereby ensuring that the Public Sector Duty is directly applicable to all schools / educational settings in the State.
3. The State should issue a formal communication, in the form of a circular, to public bodies under section 2 of the Irish Human Rights and Equality Commission Act 2014 to advance compliance with the Public Sector Duty, in line with the Commission's guidance. Once section 2 of the Irish Human Rights and Equality Commission Act 2014 is amended to extend the definition of a public body to include bodies in the educational sector that are wholly or partially in receipt of public funds, a circular should be issued to these public bodies. This communication should highlight the importance of ensuring inclusive consultation, including with a diversity of children, in the implementation of the Public Sector Duty.

### Consultation with disabled children and adults

4. The State should ensure the meaningful consultation with and direct involvement of disabled people, included disabled children, through their representative organisations, including those representing children, in the review of the *Education for Persons with Special Educational Needs Act 2004*; as well as in the development, implementation, monitoring, reporting, evaluation and reviewing of the legislation, policies, practices and decisions concerning inclusive education.
5. The *Education for Persons with Special Educational Needs Act 2004* should be amended to include the right to participation as a guiding principle for all decisions and actions made under the Act.

## Observations on the Education for Persons with Special Educational Needs Act 2004

6. The State should introduce an independent review provision into the *Education for Persons with Special Educational Needs Act 2004* for review two years after reforming legislation is enacted, and every five years thereafter, in order to ensure commencement of all provisions and that its implementation advances the rights of disabled students.
7. The State should initiate an independent review of the *Disability Act 2005* in tandem with the review of the *Education for Persons with Special Educational Needs Act 2004*.

#### Inclusive language within the EPSEN Act

8. The Department of Education should ensure that the review of the *Education for Persons with Special Educational Needs Act 2004* includes reform to the language of the Act and in particular removes the term 'special' to ensure compliance with the principles of the Convention on the Rights of Persons with Disabilities.
9. A wider examination of the legislation, policies and practices concerning education of disabled students should include the removal of any use of the term 'special' to describe the educational needs which students require to access an inclusive education system.

#### Definition of 'special educational needs' / 'disability'

10. The definition of disability in the *Education for Persons with Special Educational Needs Act 2004* should be brought into compliance with the human rights model which has evolved through the Convention on the Rights of Persons with Disabilities and which continues to be developed. This definition should be fully integrated and harmonised across all other relevant legislation, including the *Disability Act 2005*, the *Equality Acts*, the *Assisted Decision-Making (Capacity) Act 2015*, the *Assisted Decision-Making (Capacity) (Amendment) Act 2022* and the *Mental Health Act 2001*.
11. The development of a new definition should be based on close consultations with and the active involvement of disabled children, disabled adults and their representative organisations, and the resulting definition should ensure continued support for a broad inclusive interpretation of disability that enables all disability discrimination to be challenged.

#### Exceptions to the provision of inclusive education

12. Section 2 of the *Education for Persons with Special Educational Needs Act 2004* should be reformed to remove any exceptions to the right to inclusive education to ensure compliance with Article 24 of the Convention on the Rights of Persons with Disabilities.

## Inclusive Education

13. The review of the *Education for Persons with Special Educational Needs Act 2004* should include consideration of whether the Act and the State's understanding of 'inclusive education' is in compliance with Article 24 of the Convention on the Rights of Persons with Disabilities.
14. The State should develop a clear time bound implementation plan for legislative and policy changes to transition to an inclusive education environment.
15. A definition of 'inclusive education' should be included in a revised *Education for Persons with Special Educational Needs Act 2004* or in any proposed legislation concerning inclusive education aligned to Article 24 of the Convention on the Rights of Persons with Disabilities and in General Comment No. 4 on the right to inclusive education.
16. The State should invest in a ring-fenced resource to develop and maintain a national data infrastructure aligned to Article 31 of the Convention on the Rights of Persons with Disabilities that improves the comprehensiveness, quality, accessibility and availability of disaggregated equality data on students and workers across the education sector, in particular ensuring the collection and publication of data on the type/s of impairment, any intersecting equality ground, socio-economic status, geographic location; and barriers encountered and the educational support and, or reasonable accommodation provided.
17. All organisations engaged in the education of disabled students should publish data disaggregated by impairment and other equality groups, in an accessible and age-appropriate format, that can be readily communicated to students, and utilised by the public, civil society organisations and the research community.

## Assessments and Individual Education Plans

18. Any policies or practices related to the provision of educational assessments, the development of individual education plans, and the provision of education should have a clear statutory basis compliant with Article 24 of the Convention on the Rights of Persons with Disabilities and General Comment No. 4 specifying reviews, independent appeals mechanisms, and timeframes.
19. An individual education plan should clearly set out the educational supports required by a child to access and benefit from an inclusive education on the same basis as others compliant with Article 24 of the Convention on the Rights of Persons with Disabilities and General Comment No. 4.
20. The right of the child to express their views during the individual assessment, the preparation and review of the individual education plan, and in any appeal process

should be specifically provided for in a reformed *Education for Persons with Special Educational Needs Act 2004* or in any proposed legislation concerning inclusive education. Further, the State should ensure that disabled children can access an independent advocacy service to support them.

21. The right to access independent appeals and complaints mechanisms and the provision of legal remedies should be provided for in a revised *Education for Persons with Special Educational Needs Act 2004*.
22. The State should proceed with the ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities to ensure disabled students have access to the Committee on the Rights of Persons with Disabilities to vindicate their rights.

#### Future educational needs

23. The review of the *Education for Persons with Special Educational Needs Act 2004* should include particular consideration of the educational supports required for the transition to higher education and further education and training, and for lifelong learning and how these supports are to be reflected in an individual education plan.
24. The review should include consideration of the situation of 17 year olds who are in higher education, further education and training, and lifelong learning and whether the provisions of the *Education for Persons with Special Educational Needs Act 2004* continue to apply to them as they still meet the definition of a child under the legislation.

#### Transition from early childhood education

25. The review of the *Education for Persons with Special Educational Needs Act 2004* should include particular consideration of the educational supports required for the transition from early childhood education.
26. The State should ensure access to early childhood education, early development programmes and inclusive education for disabled children, including through adequate planning and the provision of rehabilitation programmes, assistive devices and reasonable accommodation.

#### National Council for Special Education

27. The *Education for Persons with Special Educational Needs Act 2004* should be revised to provide that the members appointed to the National Council for Special Education by the Minister shall comprise a majority of disabled people who have required educational needs support; and these members should reflect the diversity of disabled people and Irish society. Members should be required to have experience and/or expertise in the rights of disabled people and be committed to the principles

of Article 3 of the Convention on the Rights of Persons with Disabilities.

28. The *Education for Persons with Special Educational Needs Act 2004* should be revised to provide that the members appointed to the consultative forum by the National Council for Special Education shall comprise a majority of a disabled people who have required educational needs support; and these members should reflect the diversity of disabled people and Irish society. Members should be required to have experience and/or expertise in the rights of disabled people and be committed to the principles of Article 3 of the Convention on the Rights of Persons with Disabilities.

29. The *Education for Persons with Special Educational Needs Act 2004* should be revised to require the Minister and the National Council for Special Education to adhere to Article 4.3 of the Convention of the Rights of Persons with Disabilities and General Comment No. 7 on the participation of persons with disabilities in the appointment process for members of the National Council for Special Education and the consultative forum.

#### Impact of a non-inclusive education system

30. The State should address the administrative burdens faced by disabled students and their parents / caregivers having to apply for support at each stage of their education.

31. The State should resource a research programme to identify the conditions and investment necessary for disabled learners to succeed throughout the life course and at specific transition points from early childhood learning to primary school and including all further transition points in education and lifelong learning, including into employment.

32. Inclusive education policies should address the Cost of Disability in Ireland and the related socio-economic disadvantage experienced by disabled people.

33. The State should situate inclusive education policies in the context of other inclusive policies for disabled people, primarily social inclusion policies, and ensure adequate funding of third level education for all disabled people.

#### Additional factors which act as a barrier to an inclusive education system

##### State approach towards the provision of services and supports

34. The State should undertake a modelling study using best available, current data to quantify and then adequately resource the Assessment of Need process, under part 2 of the *Disability Act 2005*, to ensure that reports are completed within the statutory timeframes.

35. The data provided by the State Claims Agency should be disaggregated across claims to ensure the different pathways of each type of claim the Agency receives can be analysed; and that research be conducted into the experiences of children, families and caregivers who bring claims for delayed needs assessments.
36. The State should re-evaluate its approach to the provision of disability supports and services to ensure that mediation is the preferred method of dispute resolution and as far as practicable avoid entering into litigation.

#### Inclusive educational community

37. All members of an inclusive educational community should receive training on ableism, inclusive education and disabled student's educational needs.
38. Boards of management should have a least one dedicated representative for disabled students with educational needs. This board member should have access to the supports required to participate fully and effectively in the activities of the board.
39. The State and teaching colleges should address the low number of disabled teachers currently working in the education system. The State should set ambitious and measurable targets for significant initial and year-on-year increases in enrolment and graduation of disabled teachers, and provide career assistance to ensure employment, retention and progression. The targets should reflect the diversity of Irish society based on Census 2022 data.
40. Educational settings should ensure that there are dedicated spaces and, or initiatives for disabled children to interact with and support one another.
41. New educational settings should be built in accordance with universal design principles, to facilitate the needs of disabled students.
42. The current legislative provision on the right to reasonable accommodation in the provision of services and employment should be made fully compliant with the Convention on the Rights of Persons with Disability and obligations under European Union law as part of the ongoing review of the *Equality Acts*.

#### Inclusive curriculum, pedagogy and assessment

43. The national curriculum should be reviewed regarding pedagogy, content and assessment in light of Ireland's national and international human rights obligations on the right to inclusive education, with a focus on incorporating diversity and an understanding of the unique needs of all individual learners.

44. When designing, developing and reviewing national curricula, the National Council for Curriculum and Assessment and the National Council for Special Education must have regard to their Public Sector Duty obligations to include equality and human rights considerations.
45. The National Council for Special Education should publish its delayed Statement of Strategy 2022–2026 to demonstrate how it is exercising its statutory functions under the *Education for Persons with Special Educational Needs Act 2004* in line with Ireland’s international and human rights obligations.

### Irish Sign Language

46. Deaf persons and hard of hearing persons should be included in the development and implementation of *the Irish Sign Language Act 2017* and in all policies and decision-making processes that pertain to them and their education.
47. As a matter of priority, the State should undertake a comprehensive modelling exercise, which identifies the actions needed and funding required to ensure the timely provision of training, resources and supports to fully implement the *Irish Sign Language Act 2017*.

### Expulsions, suspensions and use of reduced timetables

48. The root causes underpinning the use of reduced timetables, notably the lack of learning supports, educational psychologists and specialised training for teachers, should be addressed, including through engagement with children and their families / caregivers. The State should develop concrete actions, with specific timeframes for delivery, to address the root causes of the use of reduced timetables.
49. Schools should be mandated and resourced to include disaggregated equality data, including on impairment grounds, when discharging their reporting duties on the use of reduced timetables to Tusla.
50. The Department of Education should publish an accessible, child-friendly version of the Guidelines for the Use of Reduced School Days in Schools to ensure that children are aware of their rights in relation to their education and the use of reduced timetables, and are able to better participate in decision-making processes affecting their lives.

### Use of restraint and seclusion practices

51. The Department of Education should publish without any further delay its guidelines on the use of seclusion and restraint practices.
52. The State should collect, use and publish quality, accessible data in a timely manner on the rates and character of seclusion and restraint of disabled students in



education settings; and commission and publish independent research into the use of such seclusion and restraint practices.

53. The State should undertake a review of the impacts of restrictive measures, including seclusion and restraint, on disabled students and the right to inclusive education. This review should be carried out by a human rights specialist with expertise in disability and children.
54. The State should ensure the provision of specialised training to teachers and other members of the educational community working with disabled students with educational needs to tackle the use of seclusion and restraint measures on disabled students in schools.
55. The Commission recommends that the State address the UN Committee on the Rights of the Children's Concluding Observation that the State: "Explicitly prohibit the use of restraint and seclusion in educational settings."

### Mental health services

56. The State should urgently address the mental health needs of children in Ireland, through full implementation of national policies to improve the capacity and quality of services, increased funding provision and by responding to emerging needs due to the impact of the pandemic.
57. The State should explicitly prohibit children from being admitted to an adult approved inpatient facility.
58. The State should establish an accessible and independent child specific mental health advocacy and information service.
59. Those working with children within mental health services, in particular children from structurally vulnerable groups, should receive adequate training, underpinned by the principles of both the Convention on the Rights of Persons with Disabilities and Convention on the Rights of the Child.

### Impact of the pandemic

60. The State should research the impact of the pandemic on disabled students and invest in a programme of mitigation measures that are designed with the active involvement of disabled students, their families / caregivers, and experts in inclusive education.
61. The State should conduct out sufficient future-proofing measures to ensure that it can respond pre-emptively to crises that can disproportionately affect disabled students.

62. The State should ensure the adequate provision of assistive devices and reasonable accommodation, where there is a need for such intervention.

## Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the 'IHREC Act'). We have a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations to the Government to strengthen, protect and uphold human rights and equality in the State.<sup>2</sup> We are the Independent Monitoring Mechanism for Ireland under the United Nations Convention on the Rights of Persons with Disabilities ('CRPD').<sup>3</sup> We have engaged with our statutory Disability Advisory Committee ('DAC') on this submission.<sup>4</sup> We will also be assigned the role of the National Preventive Mechanism co-ordinating body under the Optional Protocol to the Convention against Torture ('OPCAT'), pending ratification.<sup>5</sup>

In our *Strategy Statement 2022–2024*, the strategic priority on 'respect and recognition' sets out that we will promote the eradication of ableism, ageism, racism and sexism through public understanding and State action and promote CRPD compliant legislative reform.<sup>6</sup> We recognise that a society cannot be inclusive or fair without addressing the structural and institutional arrangements, practices, policies and cultural norms, which have the effect of excluding or discriminating against individuals or groups based on their identities.<sup>7</sup>

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<sup>2</sup> Section 10(2)(b) and (d) of the *Irish Human Rights and Equality Commission Act 2014*.

<sup>3</sup> Section 103 of the *Assisted Decision-Making (Capacity) (Amendment) Act 2022* amends section 10(2) of the *Irish Human Rights and Equality Act* to provide that one of our functions is to promote and monitor the implementation in the State of the CRPD.

<sup>4</sup> The Disability Advisory Committee was established in 2019, and is currently chaired by Commission member Dr Rosaleen McDonagh and Commission member Adam Harris is the Vice-Chair. The Terms of Reference of the Disability Advisory Committee are to: a) assist and advise the Commission on matters related to its function of keeping under review the adequacy and effectiveness of law and practice in the State relating to the protection of people with disabilities; b) advise the Commission on the fulfilment of its CRPD Article 33 independent monitoring role. See <https://www.ihrec.ie/crpd/>

<sup>5</sup> Under the *Inspection of Places of Detention Bill*, when enacted.

<sup>6</sup> Our strategic priority on 'respect and recognition' intersects with our four other strategic priorities: 'economic equality', 'justice', 'futureproofing' and 'public sector duty'; see IHREC, [Strategy Statement 2022–2024](#) (2022).

<sup>7</sup> IHREC, [Strategy Statement 2022–2024](#) (2022) p. 14.

The right to education is linked to the empowerment, participation and inclusion of disabled persons in society on an equal basis with others.<sup>8</sup> We welcome the opportunity to make a submission to the Department of Education ('the Department') on the *Education for Persons with Special Educational Needs (EPSEN) Act 2004* ('the Act'). However, we are concerned about the significant amount of time that has passed since the legislation was enacted and the announcement of a review; particularly as key parts of the Act have not been fully commenced including provisions, which would confer a statutory entitlement to an assessment of educational support needs and the development of individual educational plans on the basis of this assessment.<sup>9</sup> The failure to fully commence and implement the provisions within the Act, means there is an ongoing gap in the legislative framework with regard to the rights of disabled children and adults.<sup>10</sup>

While the State has sought to progress aspects of the Act on a non-statutory basis,<sup>11</sup> this approach is inadequate as these policy developments lack the necessary legislative underpinning and statutory protections. In the near twenty years since enactment, the non-commencement of sections of the Act has led to significant barriers for disabled students to an inclusive education.<sup>12</sup>

The State's normative practice of non-commencement of disability legislation or parts of disability legislation is concerning. As the Act's objective to provide for an inclusive approach to education is so closely linked to the State's obligations under international law, in particular the CRPD, there is a need for greater Oireachtas scrutiny of the practice and justifications for non-commencement and oversight of the impact of non-commencement

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<sup>8</sup> Andrea Broderick and Shivaun Quinlivan, 'The right to education: Article 24 of the CRPD' in Charles O'Mahony and Gerard Quinn (eds), *Disability Law and Policy: An analysis of the UN Convention* (Dublin 2017) p. 293.

<sup>9</sup> Sections 3–13, 14(1)(b), 14(1)(d)–(f), 15–18, 38 and 39 of the EPSEN Act have not been commenced.

<sup>10</sup> IHREC, [Comments on Ireland's 16th National Report on the implementation of the European Social Charter](#) (2019) p. 36.

<sup>11</sup> See discussion in Department of Education, [Consultation Paper on the Review of the Education for Persons with Special Educational Needs Act 2004](#) (2022) pp. 7–9.

<sup>12</sup> See comments by Donnelly J: "In an ideal world, children with disabilities would be able to have their health and educational needs assessed and be provided with the services to meet those needs in a timely manner. The Oireachtas legislated in 2004, through the Education for Persons with Special Needs Act, 2004 ("the EPSEN Act"), for such an ideal world in relation to educational needs assessment and education provision for children with disabilities. As we do not live in such an ideal world, some seventeen years later crucial parts of the EPSEN Act have not been commenced."; *C.M. (A Minor) Suing by his Mother and Next Friend SM v Health Service Executive* [2021] IECA 283, para. 1.

on the rights of disabled people. We consider that the State's failure in this regard provides the evidential basis for the need for the reform of the Act and early (two years from the enactment date of the reformed Act) and regular review (every five years thereafter) of this legislation in order to ensure that the State's failure to commence provisions is not perpetuated and that the rights of disabled students are realised.

The enactment of the Act pre-dates the adoption of the CRPD in 2006 and Ireland's subsequent ratification in 2018. Therefore, the rights and protections of disabled persons set out within the CRPD are not reflected in the Act; reform of the Act provides the opportunity for CRPD-compliant legislation. In line with the principles that underpin the CRPD, we call for an education system that values and embraces the CRPD vision of an inclusive model of education. The principles of the CRPD should be central to this review, not only in relation to an inclusive education system but also the meaning of disability, the rights of disabled students, non-discrimination and the effective participation of disabled children and adults in the review.

The review should also reflect the standards set out in the International Covenant on Economic, Social and Cultural Rights ('ICESCR', ratified 1989),<sup>13</sup> Convention on the Rights of the Child ('CRC', ratified 1992),<sup>14</sup> and the European Social Charter (Revised European Social Charter, ratified 2000) in regards to the rights of the child and the right to education. We note that all of these international standards were obligations on the State in 2004 and should have been addressed in the Act, its commencement and implementation; and throughout this submission we evidence how the State has failed to meet these obligations also.

While this submission makes recommendations to inform the Department's review of the Act, we believe this review should encompass wider issues in legislation, policies and practices which affect the provision of education to disabled students such as an inclusive

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<sup>13</sup> We note that Ireland has been provisionally scheduled for review by the Committee on Economic, Social and Cultural Rights in February–March 2024.

<sup>14</sup> We note that Ireland is being reviewed by the Committee on the Rights of the Child in January–February 2023.

educational community,<sup>15</sup> an inclusive curriculum, use of reduced timetables, use of seclusion and restraint in educational settings,<sup>16</sup> and the impact of the Covid-19 pandemic on the provision of education. The review should also include consideration of how a lack of an inclusive education system may impact on disabled children and adults' human rights such as progress to third level education, access to employment, and an adequate standard of living.<sup>17</sup>

In the absence of the commencement of relevant provisions of the Act, assessments of educational needs are currently provided for under Part 2 of the *Disability Act 2005*. We consider that it would be an opportune time for the Department of Children, Equality, Disability, Integration and Youth to review the *Disability Act 2005* in tandem with this review,<sup>18</sup> as the statutory entitlements to an assessment of needs and an assessment of educational needs are clearly linked.<sup>19</sup> Such a review would provide the opportunity to ensure that the assessment processes and the suite of supports and services provided comply with the principles of the CRPD, as both pieces of legislation predate the CRPD.

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<sup>15</sup> For the purposes of this submission, we understand an inclusive educational community to include students, parents / caregivers, principals, teachers, support staff, administrative staff, ancillary staff, sessional staff, contract staff, transport providers and escorts, boards of managements, health and disability support services, Government departments, disabled persons organisations and civil society organisations. This understanding is drawn from National Council for Special Education, [Inclusive Education Framework: A guide for schools on the inclusion of pupils with special educational needs](#) (2014) p. 22 and Government of Ireland, [Wellbeing Policy Statement and Framework for Practice 2018–2023](#) (Revised October 2019) p. 5.

<sup>16</sup> We recognise that students are being educated in places of actual detention – Oberstown Children Detention Campus – and in places of de-facto detention in education settings; Rachel Murray and Elina Steinerte, [Ireland and the Optional Protocol to the UN Convention Against Torture](#) (IHREC, 2017); Inclusion Ireland, [Shining a light on seclusion and restraint in schools in Ireland: The experience of children with disabilities and their families](#) (2018).

<sup>17</sup> See relevant human rights standards set out in CRPD including Article 24 – Education; Article 27 – Work and Employment; Article 28 – Adequate standard of living and social protection; Article 29 – Participation in political and public life; Article 30 – Participation in cultural life, recreation, leisure and sport.

<sup>18</sup> We note that the Joint Committee on Children, Equality, Disability, Integration and Youth have recently recommended that the EPSEN Act and Disability Act be reviewed in tandem; Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on Assessments of Need for Children](#) (February 2023) p. 53.

<sup>19</sup> See comments by Phelan J that “As apparent from their terms, the EPSEN Act 2004 and the 2005 [Disability] Act as promulgated were intended to operate in tandem.”; *C.T.M. (A Minor) Suing by his Mother and Next Friend v The Assessment Officer, The Health Service Executive*; *J.A. (A Minor) Suing by his Mother and Next Friend v The Health Service Executive* [2022] IEHC 131, para. 55. See also comments by Barr J that “in interpreting the 2005 [Disability] Act, one must have regard to the provisions of the 2004 [EPSEN] Act”; *CM (A Minor) (Suing by his Mother and Next Friend SM) v The Health Service Executive* [2020] IEHC 406, para. 98.

We have previously called for a review of the definition of disability in the *Disability Act 2005*, alongside the ongoing review of the *Equality Acts*,<sup>20</sup> to ensure coherence and consistency between the relevant statutory provisions, including the Act, and to bring the statutory definitions of disability into compliance with the human rights model of disability enshrined in CRPD.<sup>21</sup>

We consider that this review provides an opportunity for a wider examination of legislation, policies, and practices, which impact on the rights of disabled students and on their access to an inclusive education. This review should have regard to the ongoing legislative developments, which concern the rights of disabled students and the right to education including the *Mental Health (Amendment) Bill* – access to education for children with psychosocial disabilities –and the *Inspection of Places of Detention Bill* – access to education for children in places of detention and in de-facto detention. This should include disabled students who are accommodated outside of Ireland to receive specialist care and, or treatment.

This review should also consider how the Act and the goal of an inclusive education system interacts with and can be addressed within Government strategies (and successor strategies) including the National Disability Inclusion Strategy 2017–2022, the National Policy Framework for Children and Young People, and the Roadmap for Social Inclusion 2020–2025. In line with our strategic priority to acknowledge the intersectionality between diverse identities, we call for this review to consider how inclusive education can be addressed in Government national equality strategies.<sup>22</sup>

The review should be informed by the best available data including Census 2022,<sup>23</sup> longitudinal study data such as Growing Up in Ireland, and disaggregated administrative data. Integral to reform in the education system is the development of a robust national

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<sup>20</sup> *Equal Status Acts 2000-2018 and Employment Equality Acts 1998-2015*.

<sup>21</sup> IHREC, [Submission on the Review of the Equality Acts](#) (2021) pp. 22–24.

<sup>22</sup> Including the forthcoming National Action Plan Against Racism, new National Strategy for Women and Girls, new National Traveller and Roma Inclusion Strategy, new Migrant Integration Strategy, and the National LGBTI+ Inclusion Strategy.

<sup>23</sup> Census data on the prevalence of disability in Irish society, types of impairment, educational attainment and participation in the labour force should be considered in any proposed reforms. We note that there have been changes to questions 15 and 16, related to disability, in the 2022 Census form which may lead to an increase in the number of people reporting they have a disability in comparison to the data from Census 2016.

educational data infrastructure to facilitate planning and adequate monitoring of the education system and analyse the barriers that students face in accessing and benefiting from an inclusive education. Such an infrastructure should be compliant with the Public Sector Equality and Human Rights Duty,<sup>24</sup> take account of the National Statistics Board's Strategic Priorities for Official Statistics 2021–2026,<sup>25</sup> aligned to the forthcoming Equality Data Strategy, and informed by EU Equality Data Resources.<sup>26</sup>

We welcome the recent publication of Concluding Observations by the UN Committee on the Rights of the Child following Ireland's review under the CRC.<sup>27</sup> We are of the view that the Committee's recommendations will be invaluable to the Department in conducting this review and ensuring an inclusive education system in compliance with international standards.<sup>28</sup>

We welcome the opportunity to make a submission to this review on the EPSEN Act and the provision of educational supports to students, and are available to the Department to discuss the material presented.

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<sup>24</sup> Guidance should be taken from IHREC, [Implementing the Public Sector Equality and Human Rights Duty](#) (2019).

<sup>25</sup> The National Statistics Board have recommended that the 2022 census definition of disability be included in all survey data collection and disabled/non-disabled analysis of relevant statistics should be made available; see National Statistics Board, [Strategic Priorities for Official Statistics 2021–2026](#) (2021) p. 27.

<sup>26</sup> EU resources on best practice in equality data infrastructure include: European Commission, [European Handbook on Equality Data](#) (revised 2016); European Commission High Level Group on Non-Discrimination, Equality and Diversity – Subgroup on Equality Data, [Guidelines on improving the collection and use of equality data](#) (2018); European Commission High Level Group on Non-Discrimination, Equality and Diversity – Subgroup on Equality Data, [Guidance note on the collection and use of equality data on racial and ethnic origin](#) (2021); see also forthcoming Guidance note on the collection and use of Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) data (2023). See webpage: [European Commission - Equality data collection](#). The 2018 EU Equality Data Guidelines emphasise the legal basis for the collection of equality data, including special category data. The EU Equality Data Subgroup – which is chaired by the Fundamental Rights Agency – is a satellite group of the EU High Level Group on Non-Discrimination, Equality and Diversity. IHREC is represented on this group.

<sup>27</sup> Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023).

<sup>28</sup> In particular, we would draw the Department's attention to the Committee's recommendations to the State in relation to disabled children and education in paragraphs 29 and 37; Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023).



## Human rights and equality framework

The review of the Act engages a number of fundamental rights protected under the Constitution, and domestic and international human rights and equality law; including:

- The right to education,<sup>29</sup> including the right to an inclusive education;<sup>30</sup>
- Non-discrimination;<sup>31</sup>
- Right to participation;<sup>32</sup>
- Right of the child to express their views;<sup>33</sup>
- Collection and publication of accessible disaggregated data.<sup>34</sup>

Inclusive education is an essential socio-economic right and is intrinsically connected to the empowerment and social development of disabled people, impacting the realisation of other rights, such as the right to work,<sup>35</sup> and the right to live independently and participate within the community,<sup>36</sup> as well as the right to an adequate standard of living and social

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<sup>29</sup> Article 42 of the Constitution of Ireland places a positive duty on the State to provide free primary education to children to a minimum moral, intellectual and social standard; *Sinnott v. Minister for Education* [2001] 2 IR 645: at para. 1. See also CRPD Article 24; CRC Article 28; ICESCR Article 13; Article 2 of Protocol 1 to the European Convention of Human Rights ('ECHR'); Article 14 of the European Fundamental Charter of Human Rights Charter ('EU Charter').

<sup>30</sup> The right to inclusive education is expressly provided for under CRPD Article 24, which requires the State to provide inclusive education at all levels for disabled people and to ensure inclusive lifelong learning opportunities; see Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016).

<sup>31</sup> Article 40 of the Constitution; *Employment Acts 1998–2018* and the *Equal Status Acts 2000–2015*; CRPD Article 5; CRC Article 2(1); ICESCR Article 2; EU Charter Article 21; ECHR Article 14; ECHR Article 1 of Protocol no. 12.

<sup>32</sup> CRPD Articles 4.3 and 29 of the CRPD; CRC Article 12; Article 15 of the European Social Charter (Revised).

<sup>33</sup> CRPD Article 7; CRC Articles 3(1) and 12.

<sup>34</sup> CRPD Article 31 obliges State Parties to collect appropriate information, including statistical and research data, to enable to formulation and implementation of policies that protect the rights enshrined under the Convention.

<sup>35</sup> CRPD Article 27; Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 56.

<sup>36</sup> CRPD Article 19. In its authoritative guidance, the CRPD Committee has also underscored the link between CRPD Articles 24 and Article 19, and has held that inclusive education requires recognition of the right of disabled people to live within the community and enjoy inclusion and participation in the community; see Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) paras. 10(c) and 52.

protection,<sup>37</sup> including income through salary and pension.<sup>38</sup> We note that the Irish courts have limited the scope for judicial enforcement of economic, social and cultural ('ESC') rights, including the right to free primary education reflected in the Constitution, in the landmark case of *TD v Minister for Education*.<sup>39</sup> In light of this, we continue to call for the constitutional recognition of ESC rights, backed by appropriate supplementary statutory protections and policy measures.<sup>40</sup>

- 1. The Commission recommends that the review of the *Education for Persons with Special Educational Needs Act 2004* be underpinned by relevant human rights and equality standards.**

## Public Sector Equality and Human Rights Duty

In providing for an inclusive education in legislation and policies, we draw attention to the Public Sector Equality and Human Rights Duty ('Public Sector Duty') provided for in section 42 of the *Irish Human Rights and Equality Commission Act 2014*. Under this provision, all public bodies in Ireland have a statutory obligation to have regard to the need to eliminate discrimination, promote equality of opportunity and treatment, and protect the human rights of their staff, customers, service users and everyone affected by their policies and plans. The Public Sector Duty clearly places equality and human rights in the mainstream of how public bodies execute their functions.

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<sup>37</sup> CRPD Article 28.

<sup>38</sup> We have identified 'economic equality' amongst our five strategic priorities; see IHREC, [Strategy Statement 2022–2024](#) (2022) p. 11.

<sup>39</sup> *TD v Minister for Education* [2001] 4 IR 259; see also Gerard Hogan et al., *The Irish Constitution* (5th edn, Bloomsbury Professional 2018) para. 7.3.283. The Irish Constitution does not protect many enforceable ESC rights in its text. It features only two core rights: language rights of Irish speakers, protected by virtue of Article 8's provision of Irish as the national and first official language; and the right to free primary education in Article 42. Neither of these rights has been afforded very robust protection qua ESC rights. There is also one unenumerated/derived ESC right, of limited scope, in the right to earn a livelihood/seek employment. See IHREC, Policy Statement on the incorporation of Economic, Social and Cultural Rights into the Irish Constitution (forthcoming).

<sup>40</sup> See IHREC, Policy Statement on the incorporation of Economic, Social and Cultural Rights into the Irish Constitution (forthcoming). See also: IHREC, [Submission to the UN Committee on Economic, Social and Cultural Rights for the List of Issues on Ireland's Fourth Periodic Report](#) (2021) p. 10; IHREC, Submission to the Housing Commission on the public consultation on a Referendum on Housing in Ireland (September 2022) pp. 1–2.

However, we recognise that there may be difficulty in determining whether all education settings meet the definition of a ‘public body’. Section 2 of the IHREC Act provides that the meaning of ‘public body’ includes:

- an education and training board established under section 9 of the Education and Training Boards Act 2013;<sup>41</sup>
- a university or institute of technology;<sup>42</sup>
- any other person, body or organisation established by any Scheme administered by a Minister of the Government;<sup>43</sup>
- any other person, body, organisation or group financed wholly or partly out of moneys provided by the Oireachtas that stands prescribed for the time being (being a person, body, organisation or group that, in the opinion of the Minister, following consultation with the Commission, ought, in the public interest and having regard to the provisions and spirit of this Act, to be prescribed).<sup>44</sup>

The IHREC Act implies that the scope of ‘public body’, in the context of educational settings, only explicitly applies to Education and Training Board (‘ETB’) schools. It could be considered that educational settings, including primary and secondary schools, which are not ETB schools, do not meet the definition of a ‘public body’ and are therefore outside the scope of the Public Sector Duty. It may be possible for educational settings to be regarded as covered within the scope of ‘any other person, body or organisation established by any Scheme administered by a Minister of the Government’.<sup>45</sup> However, it is not clear whether educational settings have been established by a scheme rather than by the State. Accordingly, we think it would be preferable for section 2 to explicitly provide that the definition of public body includes bodies in the educational sector that are wholly or partly

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<sup>41</sup> Section 2(1)(e) of the IHREC Act 2014.

<sup>42</sup> Section 2(1)(d) of the IHREC Act 2014.

<sup>43</sup> Section 2(1)(f)(ii) of the IHREC Act 2014.

<sup>44</sup> Section 2(1)(h) of the IHREC Act 2014.

<sup>45</sup> For example, as national schools are provided pursuant to the State’s constitutional duty to provide free primary education pursuant to Article 42.4, which states that the State “shall provide for free primary education”. Therefore, given the State’s role in provision of education, it may possibly be suggested that some schools are included within the meaning of Section 2(f)(ii).

in receipt of public funds.<sup>46</sup> This would ensure that the Public Sector Duty is directly applicable to all educational settings in receipt of public funding in the State.

To fulfil the Public Sector Duty requirements to assess, address and report,<sup>47</sup> our guidance recommends that public bodies consult with service users, including a diversity of children, to identify issues and actions, and monitor progress.<sup>48</sup> We are of the view that compliance with the Public Sector Duty is fundamental to the education sector's ability to meet its obligations under international human rights norms, including CRPD and CRC.

- 2. The Commission recommends that the State amend section 2 of the *Irish Human Rights and Equality Commission Act 2014* to extend the definition of a public body to include bodies in the educational sector that are wholly or partially in receipt of public funds, thereby ensuring that the Public Sector Duty is directly applicable to all schools / educational settings in the State.**
- 3. The Commission recommends that the State should issue a formal communication, in the form of a circular, to public bodies under section 2 of the Irish Human Rights and Equality Commission Act 2014 to advance compliance with the Public Sector Duty, in line with the Commission's guidance. Once section 2 of the Irish Human Rights and Equality Commission Act 2014 is amended to extend the definition of a public body to include bodies in the educational sector that are in receipt of public funds, a circular should be issued to these public bodies. This communication**

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<sup>46</sup> We note Baker J's judgment in the High Court that an employee of a fee-paying school was to be regarded as a 'public servant' as the school receives State funding; even if the amount of direct State subvention received by the school is small, but it receives very substantial indirect funding through the payment of the salaries of its teaching staff. Baker J determined that "The language of the statute is clear and the ordinary and plain meaning of the expression "wholly or partly funded directly or indirectly" from Central Funds, does not require me to engage in any complex analysis of the clear intention of the Oireachtas to include indirect funding of the payment of salaries of staff as a means by which the first part of the test is satisfied." *Nic Bhrádaig -v- Employment Appeals Tribunal & ors* [2015] IEHC 305, paras. 24–25, 50. The implication of this judgement is that individual educational facilities which are in receipt of State funding may be designated as public bodies.

<sup>47</sup> The Public Sector Duty requires public bodies to undertake an assessment of the equality and human rights issues pertaining to their purpose and functions; to devise an action plan to address the issues raised in the assessment; and to report annually on progress and achievements.

<sup>48</sup> Further information and guidance on the Public Sector Duty can be found at: <http://www.ihrec.ie/our-work/publicsector-duty>

**should highlight the importance of ensuring inclusive consultation, including with a diversity of children, in the implementation of the Public Sector Duty.**

### Consultation with disabled children and adults

The review of the Act as well as any legislative and/or policy actions taken by the State in response to the review will be critically important for enshrining the right to an inclusive education in Irish law and practice. Accordingly, we are of the view that in order to ensure that the legislation and policies concerning an inclusive education system are adequate and appropriate there should be 'close consultation' with and 'active involvement' of disabled children and adults impacted by the legislation, policies, practices and decision making<sup>49</sup> throughout the review, the reform of the Act and implementation as well as subsequent monitoring, reporting, evaluation and review.<sup>50</sup>

The meaningful participation of disabled children and adults in processes involving them is beneficial to the decision-making processes due to their lived experience and their knowledge of the rights to be implemented.<sup>51</sup> Additionally, participation empowers disabled children and gives them recognition as rights holders who can play an active role in their communities and society.<sup>52</sup>

We note that States have an obligation to ensure the transparency of the consultation processes, the provision of appropriate and accessible information and early and continuous

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<sup>49</sup> For example regarding educational assessments, individual education plans, and provision of supports.

<sup>50</sup> Under CRPD Article 4.3, there is a general obligation for close consultation and active involvement of disabled people, which includes disabled children, through their representative organisations, in the development and implementation of legislation and policies to implement the Convention, and in other decision-making processes. The active involvement of civil society is also a core feature of the national implementation and monitoring mechanisms established under CRPD Article 33. See guidance in Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018).

<sup>51</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018) para. 9.

<sup>52</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018) para. 74.

involvement.<sup>53</sup> The consultation and participation processes must be inclusive, child-friendly, supportive,<sup>54</sup> transparent and respectful of the child's rights to freedom of expression and thought.<sup>55</sup> Further, they should meet obligations under CRPD Article 9 (Accessibility) to ensure the participation of all impairment groups including students who are non-verbal.

The right to participation is an essential component of the right to inclusive education. The United Nations Committee on the Rights of Persons with Disabilities ('CRPD Committee') has noted that disabled people and their families (when appropriate) must be recognised as partners and not merely as recipients of education.<sup>56</sup> All disabled people, including disabled children, should be able to effectively and fully participate in public life, without discrimination, on an equal basis with others.<sup>57</sup> The United Nations Committee on the Rights of the Child ('CRC Committee') has highlighted the inextricable link between Articles 12 (the right to participation) and Article 3(1) (the 'bests interests of the child'), noting that the two provisions have complementary roles: to realise the child's best interests and to prescribe

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<sup>53</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018) para. 43.

<sup>54</sup> Disabled children should be provide with "support in their decision-making, by, among other things, equipping them with, and enabling them to use, any mode of communication necessary to facilitate the expression of their views, including child-friendly information, and adequate support for self-advocacy, and ensure appropriate training for all professionals working with and for such children. States parties should also provide disability and age-appropriate assistance and procedures, and support."; Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018) para. 75.

<sup>55</sup> Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, [Joint Statement – The rights of children with disabilities](#) (2022) para. 6.

<sup>56</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 32.

<sup>57</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018) para. 16. The right to participation of children is specifically covered by CRC Article 12, which enshrines the right of the child to express his/her views on all matters affecting his/her life, and requires States to ensure due weight is given to these views in accordance with a child's age and maturity. See guidance on right to be heard in education and school; Committee on the Rights of the Child, [General Comment No. 12 \(2009\): The right of the child to be heard](#), CRC/C/GC/12 (20 July 2009) paras. 105–114

the standard methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests.<sup>58</sup>

The right to participation<sup>59</sup> should be a guiding principle to ensure the direct involvement of the voice of the child in the development, text and operation of the Act. Further, we call for particular attention to be paid to ensuring the State actively engages with Disabled Persons Organisations ('DPOs') on matters relating to disabled persons, and to actively support their further development and involvement by providing sustainable core funding, capacity building and training.<sup>60</sup> Such an approach enshrines the principle of 'nothing about us without us', central to the disability rights movement.

- 4. The Commission recommends the meaningful consultation with and direct involvement of disabled people, included disabled children, through their representative organisations, including those representing children, in the review of the *Education for Persons with Special Educational Needs Act 2004*; as well as in the development, implementation, monitoring, reporting, evaluation and reviewing of the legislation, policies, practices and decisions concerning inclusive education.**
- 5. The Commission recommends that the *Education for Persons with Special Educational Needs Act 2004* should be amended to include the right to participation as a guiding principle for all decisions and actions made under the Act.**

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<sup>58</sup> See Committee on the Rights of the Child, [General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)](#), CRC/C/GC/14 (29 May 2013) para. 43. Further, for participation to be effective and meaningful, it needs to be part of an ongoing process rather than an individual one-off event. See Committee on the Rights of the Child, [General Comment No. 12 \(2009\): The right of the child to be heard](#), CRC/C/GC/12 (20 July 2009) para. 133. Additionally, the process must comply with child rights standards. Including ensuring the process for a child to be heard is transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable. See [General Comment No. 12 \(2009\): The right of the child to be heard](#), CRC/C/GC/12 (20 July 2009) para. 134.

<sup>59</sup> The principle of participation requires the active and informed participation of individuals in the development, implementation, monitoring and reviewing of legislative, executive and administrative decisions that concern them. See United Nations Office of the High Commissioner for Human Rights, [Guidelines for States on the effective implementation of the right to participate in public affairs](#) (2018).

<sup>60</sup> IHREC, [Consultation on Terms of Reference and Work Programme for the Joint Oireachtas Committee on Disability Matters](#) (November 2020) p. 6.

## Observations on the Education for Persons with Special Educational Needs Act

The objective in the early 2000s to legislate through the EPSEN Act for a change from a system of segregated educational provision for disabled students towards a more inclusive model of education delivered in mainstream schools is a welcome approach<sup>61</sup> as disabled students are particularly disadvantaged in terms of participation in education.<sup>62</sup> Conferring a statutory entitlement to the provision of educational support for disabled students is critical to the protection of their rights and ensuring their effective inclusion in educational settings. However, the intention at the time of the passage of the Act through the Houses of the Oireachtas to “offer equal educational opportunities to all”<sup>63</sup> has not been realised. For approaching two decades, the State has failed to commence the significant parts of the Act and in so doing has failed generations of disabled children and adults and their families / caregivers. The review of the Act is taking place in this context of State inaction where the vision for an inclusive education system that is responsive to the needs of students and respects their rights remains unfulfilled.

Therefore, this review is a welcome opportunity to ensure that disabled students are provided with the educational supports they require to access and benefit from education on the same basis as every student. Notwithstanding this, it is regrettable that this is not an independent review but rather a Departmental review as there is a long history of failed and

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<sup>61</sup> We recognise that the passage of EPSEN Act in 2004 was part of a broader reform agenda at the time concerning the rights of disabled people including the National Disability Strategy 2004, sectoral plans prepared by six Government departments, multi-annual investment programme targeted at high priority disability support services, the *Disability Act 2005*, and the *Citizens Information Act 2007*. See webpage: [National Disability Authority – Previous Disability Strategies](#).

<sup>62</sup> Research in education settings shows that, compared to their peers, students with disabilities are more likely to face barriers in education, are more likely to report disliking school and are at risk of poorer academic outcomes. See Humphrey et al., ‘The role of school and individual differences in the academic attainment of learners with special educational needs and disabilities: a multi-level analysis’ (2012) *International Journal of Inclusive Education* 17 (9):909–931; McCoy et al., ‘Simply academic? Why children with special educational needs don’t like school’ (2012) *European Journal of Special Needs Education* 27 (1):81–97; Watson et al., *Educational and Employment Experiences of People with a Disability in Ireland: An Analysis of the National Disability Survey*, Research Series No.41 (2015, Dublin: ESRI); all research work cited in IHREC/ESRI, [Disability and Discrimination in Ireland: Evidence from the QNHS Equality Modules 2004, 2010, 2014](#) (2018) p. 12.

<sup>63</sup> See statement by the then Minister for Education and Science, Noel Dempsey TD, introducing the Education for Persons with Special Educational Needs Bill into the Dáil; [Education for Persons with Disabilities Bill 2003: Second Stage – Houses of the Oireachtas, Dáil Éireann debate – Thursday, 23 Oct 2003](#).



inadequate legislation and policy concerning disability. Disabled people need and deserve a strong legislative and policy basis to protect and vindicate rights. However, we recognise the emphasis the Department has placed on consultation for this review and we would stress the obligations to ensure the consultation is human rights compliant.<sup>64</sup>

Regrettably, this review of the Act is limited in nature, as key provisions in relation to an inclusive education including the right to an educational assessment and the development of individual educational plans have not been commenced. Consequently, contributors to this review are being asked to analyse and comment on provisions, which have never been in operation in Ireland. Further, a lack of research and adequate disaggregated equality data means we cannot fully assess the impact of non-commencement on disabled students across the impairment groups and equality grounds.

Any assessment of the value of fully commencing the Act will have to take account of whether the non-commenced provisions, which were agreed upon in 2004, may have been outpaced by legislative and policy developments, and also Ireland's ratification of CRPD. Therefore, the non-commenced provisions and the Act itself may not reflect best practice in providing for an inclusive education system for all students. We consider that central to this review is addressing how to bring the State's vision of an inclusive education system, as set out in legislation and policies, into compliance with CRPD and other national and international human rights and equality standards, particularly in relation to the rights of the child and the right to education.

This review is also an opportunity to consider wider aspects in the provision of an inclusive education model.<sup>65</sup> Further, it provides the opportunity to ensure that the right to access and benefit from an inclusive education can be realised through a non-adversarial system rather than the State's current litigious approach to disabled people seeking to vindicate their rights.

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<sup>64</sup> See section on 'Consultation with disabled children and adults'. See also CRPD Article 4.3 and Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018).

<sup>65</sup> This includes an inclusive curriculum, an inclusive educational community, and the inclusion of the voice of the child in all aspects of an inclusive education system

6. The Commission recommends that the State introduces an independent review provision into the *Education for Persons with Special Educational Needs Act 2004* for review two years after reforming legislation is enacted, and every five years thereafter, in order to ensure commencement of all provisions and that its implementation advances the rights of disabled students.
7. The Commission recommends that the State initiates an independent review of the *Disability Act 2005* in tandem with the review of the *Education for Persons with Special Educational Needs Act 2004*.

### Inclusive language within the EPSEN Act

We welcome that this review will consider the language used to describe special educational needs.<sup>66</sup> One of the key concerns that arise in the examination of the Act is the language of the Act and the inclusion of the term ‘special’ in the title of the Act and throughout the sections of the Act, including in the title of the National Council for Special Education. This term is also prevalent in the area of the provision of educational supports to students.<sup>67</sup> We note that this term does not find expression in CRPD Article 24 or in the CRPD Committee’s General Comment No. 4 on the right to inclusive education. This language is outdated and does not reflect a rights-based approach to disability and educational support. It does not embrace an inclusive approach to education and to supporting students.<sup>68</sup> The educational needs of disabled students are not ‘special’ rather they are the supports necessary for them to fully access and benefit from education.

8. The Commission recommends that the Department of Education should ensure that the review of the *Education for Persons with Special Educational Needs Act 2004* includes reform to the language of the Act and in particular removes the term ‘special’ to ensure compliance with the principles of the Convention on the Rights of Persons with Disabilities.

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<sup>66</sup> Department of Education, [Consultation Paper on the Review of the Education for Persons with Special Educational Needs Act 2004](#) (2022) p. 6.

<sup>67</sup> For example, Special Needs Assistants and Special Educational Needs Organisers.

<sup>68</sup> Sarah Arduin, Implementing Disability Rights in Education in Ireland: An Impossible Task? (2013) 36(1) Dublin University Law Journal 93–126, p. 108.

- 9. The Commission recommends that a wider examination of the legislation, policies and practices concerning education of disabled students includes removal of any use of the term ‘special’ to describe the educational needs which disabled students require to access an inclusive education system.**

### Definition of ‘special educational needs’ / ‘disability’

The Act defines ‘special educational needs’ as follows:

‘in relation to a person, a restriction in the capacity of the person to participate in and benefit from education on account of an enduring physical, sensory, mental health or learning disability or any other condition which results in a person learning differently from a person without that condition and cognate words shall be construed accordingly.’<sup>69</sup>

This definition is not aligned with the CRPD nor is it aligned with the social or human rights models of disability.<sup>70</sup> While CRPD does not provide a definition, it instead adopts a broad non-exhaustive categorisation of disabled persons<sup>71</sup> and affirms their human rights and fundamental freedoms. The definition in the Act is based on the medical model.<sup>72</sup> The CRPD Committee has been highly critical of medical definitions, which support a narrow concept of disability that disregard the social dimensions of disability.<sup>73</sup>

The social model of disability was developed in response to this criticism of the medical model; and this has in turn been built upon by the human rights model now endorsed by

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<sup>69</sup> Section 1 of the EPSSEN Act. Section 52 of the EPSSEN amends the definition of disability in section 2(1) of the *Education Act 1998* to provide that “‘disability’ means, in relation to a person, a restriction in the capacity of the person to participate in and benefit from education on account of an enduring physical, sensory, mental health or learning disability, or any other condition which results in a person learning differently from a person without that condition and cognate words shall be construed accordingly”.

<sup>70</sup> For more see: IHREC, [Submission on the Review of the Equality Acts](#) (2021) pp. 22–24.

<sup>71</sup> CRPD Article 1: “Persons with disabilities *include* [emphasis added] those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

<sup>72</sup> The medical model regards disability as an impairment that deviates from normal health status and needs to be treated, cured, fixed or rehabilitated. It frames the exclusion of disabled persons from society as an individual problem arising from the limited functionality associated with impairment, and fails to recognise the existence of barriers that hinder the full participation of disabled people in society on an equal basis with others. See OHCHR, [Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors. Professional training series No. 17](#) (2010) p. 15.

<sup>73</sup> See generally: International Disability Alliance, [Compilations of CRPD Committee Concluding Observations: Articles 1 to 4 – Purpose, Definitions, General Principles and General obligations](#) (2022).

the CRPD.<sup>74</sup> Unlike the social model, the human rights model provides moral principles and values, namely human dignity, as the foundation of disability policy. Too much focus on social barriers can have the effect of denying the personal experiences of physical or intellectual restrictions by placing disability as something entirely external to the person.<sup>75</sup> The human rights model addresses this by requiring the diversity of disabled people to be taken into account alongside the interaction between disabled people, their impairments and attitudinal and environmental barriers.<sup>76</sup>

We have previously recommended that the human rights model of disability should be fully integrated across all disability related legislation, including to ensure that the definition of disability is harmonised at a statutory level.<sup>77</sup> According to the CRPD Committee, effective legislation requires a definition of disability that includes those who have long-term physical, psychosocial, intellectual or sensory impairments, as well as past, present, future and presumed disabilities, and the associates of disabled people.<sup>78</sup> The Committee has been critical of a number of EU Member States for how disability is defined in their law; critiques

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<sup>74</sup> The social model focuses on society rather than the individual to differentiate between impairment and disability: while impairment relates to a condition of the body or the mind, disability is the result of the environment and society respond to or interact with that impairment to give rise to exclusion and discrimination; see Lisa Waddington and Andrea Broderick, [Combatting disability discrimination and realising equality](#) (European Commission, 2018) pp. 36–39.

<sup>75</sup> Theresia Degener, Definition of Disability (EU Network of Experts on Disability Discrimination, 2004).

<sup>76</sup> CRPD Preamble recital (e) “Recognizing the disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’ read together with Preamble recital (i) Recognizing further the diversity of persons with disabilities.

<sup>77</sup> IHREC, [Ireland and the Rights of the Child: Submission to the Committee on the Rights of the Child on Ireland’s combined fifth and sixth periodic reports](#) (2022) pp. 60–61. The Committee on the Rights of the Child have recommended that the State “Review relevant legislation, including the Equality Acts, Disability Act and Education for Persons with Special Education Needs Act, to bring them in line with a human rights-based approach to disability, particularly with regard to the definition of disability”: Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023) para. 29(a).

<sup>78</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 6 \(2018\) on equality and non-discrimination](#), CRPD/C/GC/6 (26 April 2018) paras. 17, 20, 23.

include reliance on the medical model<sup>79</sup> and/or charitable model<sup>80</sup>, vague concepts<sup>81</sup>, derogatory language<sup>82</sup> and a lack of harmony where multiple definitions exist.<sup>83</sup>

Other definitions of disability currently exist in Irish law in the *Disability Act 2005*<sup>84</sup> and the *Equality Acts*.<sup>85</sup> The *Disability Act* definition endorses the medical model. The definition in the *Equality Acts* uses highly medicalised language but its interpretation has been broad, expansive and effective in empowering disabled persons to pursue discrimination claims.<sup>86</sup> We note that the Act is currently under review and one of the commitments of the review is to examine the definition of disability.<sup>87</sup> We support the human rights model but are concerned that amending the legal definition of disability and harmonising it across

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<sup>79</sup> CRPD Committee, [Concluding Observations on France](#), CRPD/C/FRA/CO/1 (2021) para. 7(b); CRPD Committee, [Concluding Observations on Poland](#), CRPD/C/POL/CO/1 (2018) para. 5(b); CRPD Committee, [Concluding Observations on Bulgaria](#), CRPD/C/BGR/CO/1 (2018) para. 9; CRPD Committee, [Concluding Observations on Slovenia](#), CRPD/C/SVN/CO/1 (2018) para. 4(a); CRPD Committee, [Concluding Observations on Italy](#), CRPD/C/ITA/CO/1 (2016) para. 5; CRPD Committee, [Concluding Observations on Lithuania](#), CRPD/C/LTU/CO/1 (2016) para. 5; CRPD Committee, [Concluding Observations on Czech Republic](#), CRPD/C/CZE/CO/1 (2015) para. 7; CRPD Committee, [Concluding Observations on Austria](#), CRPD/C/AUT/CO/1 (2013) para. 8; CRPD Committee, [Concluding Observations on Hungary](#), CRPD/C/HUN/CO/1 (2012) para. 10.

<sup>80</sup> CRPD Committee, [Concluding Observations on Bulgaria](#), CRPD/C/BGR/CO/1 (2018) para. 9; CRPD Committee, [Concluding Observations on Slovenia](#), CRPD/C/SVN/CO/1 (2018) para. 4(a).

<sup>81</sup> CRPD Committee, [Concluding Observations on Poland](#), CRPD/C/POL/CO/1 (2018) para. 5(b).

<sup>82</sup> CRPD Committee, [Concluding Observations on Poland](#), CRPD/C/POL/CO/1 (2018) para. 5(b); CRPD Committee, [Concluding Observations on Slovenia](#), CRPD/C/SVN/CO/1 (2018) para. 4(a).

<sup>83</sup> CRPD Committee, [Concluding Observations on France](#), CRPD/C/FRA/CO/1 (2021) para. 7(b); CRPD Committee, [Concluding Observations on Slovenia](#), CRPD/C/SVN/CO/1 (2018) para. 4(a); CRPD Committee, [Concluding Observations on Italy](#), CRPD/C/ITA/CO/1 (2016) para. 5; CRPD Committee, [Concluding Observations on Lithuania](#), CRPD/C/LTU/CO/1 (2016) para. 5; CRPD Committee, [Concluding Observations on Austria](#), CRPD/C/AUT/CO/1 (2013) para. 8; CRPD Committee, [Concluding Observations on Hungary](#), CRPD/C/HUN/CO/1 (2012) para. 10.

<sup>84</sup> *Disability Act 2005*, Section 2(1) “a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.”

<sup>85</sup> *Employment Equality Act 1998*, Section 2 & *Equal Status Act 2000*, Section 2(1) a) The total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body, b) The presence in the body of organisms causing or likely to cause chronic disease or illness, c) The malfunction, malformation or disfigurement of a part of a person’s body, d) A condition or malfunction which results in a person learning differently from a person without the condition of malfunction, e) A condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour, and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

<sup>86</sup> For more detail see: IHREC, [Submission on the Review of the Equality Acts](#) (2021) pp. 22–24.

<sup>87</sup> Department of Children, Equality, Disability, Integration and Youth, [Consultation on the Review of the Equality Acts](#) (6 July 2021).

legislation could have unintended consequences for the *Equality Acts*, including a risk of regression of rights.<sup>88</sup>

It should be noted that adjacent definitions for psychosocial disabilities<sup>89</sup> exist in mental health<sup>90</sup> and capacity legislation.<sup>91</sup> We are of the view this can create problematic distinctions between mental health and disability. The above factors must be taken into consideration in the review and any efforts to amend the definition of disability should be harmonised across the Act, the *Disability Act*, the *Equality Acts*, mental health, capacity and other relevant legislation.

Other factors to consider in the development of a new definition are the circumstances of certain groups who do not self-identify as disabled, but are included within CRPD Article 1. Many members of the Deaf community do not consider themselves to be disabled but rather self-define as a linguistic and cultural minority, and this has been recognised by law in the *Irish Sign Language Act 2017*.<sup>92</sup> People with psychosocial disabilities have expressed discomfort with the disability label as they do not see the difference in their condition as a disability and/or have experienced the term ‘disability’ being used as a rationale for their subjection to unwanted treatment.<sup>93</sup>

**10. The Commission recommends that the definition of disability in the *Education for Persons with Special Educational Needs Act 2004* should be brought into compliance with the human rights model which has evolved through the Convention on the Rights of Persons with Disabilities and which continues to be**

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<sup>88</sup> Note that we are currently considering our position on this matter and it shall be addressed in a publication on the future of the Equality Acts, to be published in 2023.

<sup>89</sup> Office of the UN High Commissioner for Human Rights, [Mental health and human rights](#), A/HRC/ 34/32 (2017) para. 5; Distinguishes three categories of relevant person; persons using mental health services, persons with mental health conditions and persons with psychosocial disabilities and broadly defines these groups as “namely, persons who, regardless of self-identification or diagnosis of a mental health condition face restrictions in the exercise of their rights and barriers to participation on the basis of an actual or perceived impairment.”

<sup>90</sup> *Mental Health Act 2001*, Section 3.

<sup>91</sup> *Assisted Decision-Making (Capacity) Act 2015*, Section 3.

<sup>92</sup> Avril Mullane, John Bosco Conama & Robert Fourie, Human Rights and the Deaf Community in Ireland (2011) *Journal of Clinical Speech and Language Studies: Official Journal of the Irish Association of Speech and Language Therapists*, Volume 18, pp. 77–94.

<sup>93</sup> Jasna Russo & Debra Shulkes, ‘What we talk about when we talk about disability’ in Helen Spandler, Jill Anderson & Bob Sapey (eds.) *Madness, Distress and the Politics of Disablement* (Bristol University Press, 2015).

developed. This definition should be fully integrated and harmonised across all other relevant legislation, including the *Disability Act 2005*, the *Equality Acts*, the *Assisted Decision-Making (Capacity) Act 2015*, the *Assisted Decision-Making (Capacity) (Amendment) Act 2022* and the *Mental Health Act 2001*.

11. The Commission recommends that the development of a new definition should be based on close consultations with and the active involvement of disabled children, disabled adults and their representative organisations, and the resulting definition should ensure continued support for a broad inclusive interpretation of disability that enables all disability discrimination to be challenged.

### Exceptions to the provision of inclusive education

A key aspect of the Act is its emphasis on ensuring children are educated in an inclusive environment. This is most clearly set out in section 2, which has been commenced:

“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—

- (a) the best interests of the child as determined in accordance with any assessment carried out under this Act, or
- (b) the effective provision of education for children with whom the child is to be educated.”

Section 2 places an obligation on the State to ensure that disabled students with educational needs are educated in an inclusive environment. It has been noted that the Act “signalled a real shift in thinking from segregated provision” of education to a model where students were to be educated in an inclusive environment.<sup>94</sup> Since the introduction of the Act, the profile and characteristics of students attending mainstream schools has altered

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<sup>94</sup> Kenny et al., ‘Special education reforms in Ireland: changing systems, changing schools’ (2020) *International Journal of Inclusive Education* 1–20, p. 3.

dramatically with more and more students with a broad range of educational needs and disabilities attending school alongside their peers without such needs.<sup>95</sup>

While inclusive education is placed on a legislative basis in section 2, there are two exceptions to the provision of an inclusive education to a child set out in the legislation. This would appear to contradict the obligations under CRPD Article 24(1) for the State to “ensure an inclusive education system at all levels” with a view to realising the right to education without discrimination and on the basis of equal opportunity.<sup>96</sup> In realising this right to inclusive education, the State must ensure that disabled persons are not “excluded from the general education system on the basis of disability.”<sup>97</sup> Article 24 does not set out exceptions to the provision of inclusive education. The UN Human Rights Council have stated that “impairments must not be taken as a legitimate ground for denial or restriction of human rights that maximize academic and social development, consistent with the goal of full inclusion.”<sup>98</sup>

The two legislative exceptions would appear to provide for the exclusion of disabled students from the general education system on the basis of their disability. Further, it is unclear the consequences for a disabled child with educational needs if it is determined that it is inconsistent with the best of the interests of the child (section 2(a)) or the effective provision of education to their peers (section 2(b)) for that child to be educated in an inclusive environment. Does it mean that the child will be excluded from the education system entirely, segregated in a ‘special school’, or placed in a ‘special class’ within a mainstream school? We are of the view that none of these circumstances are compatible with Article 24.

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<sup>95</sup> Banks et al., A Study on the Prevalence of Special Educational Needs (2011, Trim: NCSE): cited in IHREC/ESRI, [Disability and Discrimination in Ireland: Evidence from the QNHS Equality Modules 2004, 2010, 2014](#) (2018) p. 62.

<sup>96</sup> Murphy et al., ‘Inclusive education and the law in Ireland’ (2022) International Journal of Law in Context 1–21, p. 8.

<sup>97</sup> CRPD Article 24(2)(a). States should ensure that disabled people can access quality and inclusive primary and secondary level education on an equal basis with others in their community.

<sup>98</sup> United Nations Human Rights Council, [Resolution 40/14: Rights of the child: empowering children with disabilities for the enjoyment of their human rights, including through inclusive education](#), A/HRC/RES/40/14 (8 April 2019) para. 2.



There is no consideration of how the ‘best interests’ of the child would be determined under section 2(a) and why it would not be in the ‘best interests’ of a child to be educated in an inclusive environment. The CRC Committee have set out that a child’s best interests is flexible and adaptable, and must be determined on a case-by-case basis.<sup>99</sup>

In regard to the exception under section 2(b), it is unclear who would determine that the education of a disabled student with educational needs with their peers would be inconsistent with the provision of education to other students. A wide level of discretion is granted to this person/group of people, which has a significant effect on the right of the student to access and benefit from an inclusive education system. Excluding a disabled student from learning with others based on their educational needs does not consider the benefits of an inclusive education system. Inclusive education should not be imagined as only benefiting the disabled student who has educational needs but rather it has broader educational and social benefits for their peers, teachers, school administrators, and wider society.<sup>100</sup> Inclusive education recognises the positive contribution disabled people can make to society and is a primary means by which to achieve inclusive societies.<sup>101</sup> The goal of inclusive education to ensure that students learn and socialise together addresses discriminatory and biased attitudes and teaches tolerance and an appreciation for diversity in education and society.<sup>102</sup>

We consider that the State needs to bring the legislative basis for inclusive education into compliance with CRPD, and ensure that there are no legislative exceptions to the provision of inclusive education. The CRPD Committee has declared that inclusion involves access to

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<sup>99</sup> Committee on the Rights of the Child, [General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)](#), CRC/C/GC/14 (29 May 2013) para. 32.

<sup>100</sup> UNSECO has noted that move towards an inclusive education system can be justified on a number of grounds: i) An educational justification: the requirement for schools to educate all children together means that they have to develop ways of teaching that respond to individual differences and that therefore benefit all children; ii) A social justification: inclusive schools are intended to change attitudes to difference by educating all children together, and form the basis for a just and non-discriminatory society; and iii) An economic justification: it is likely to be less costly to establish and maintain schools which educate all children together than to set up a complex system of different types of school specializing in particular groups of children; see UNESCO, [Towards inclusion in education: Status, trends and challenges – The UNESCO Salamanca Statement 25 years on](#) (2020) pp. 11–12.

<sup>101</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 10.

<sup>102</sup> United Nations General Assembly, [Right to education: report of the Special Rapporteur on the right to education](#), A/72/496 (2017) para. 27.

and progress in high-quality formal and informal education without discrimination, and seeks to enable communities, systems and structures to combat discrimination, including harmful stereotypes, recognise diversity, promote participation and overcome barriers to learning and participation for all by focusing on well-being and success of disabled students.<sup>103</sup>

The importance of educating disabled students in an inclusive education model has been emphasised by the CRC Committee,<sup>104</sup> the Committee on Economic, Social and Cultural Rights<sup>105</sup> and the European Committee of Social Rights<sup>106</sup>. This also reflects the obligations placed on the State by the European Commission<sup>107</sup> and the Council of Europe<sup>108</sup> to provide an inclusive education system for all. The European Commission have stated that education institutions and legislation must provide the conditions for an inclusive approach to the provision of education and that all levels of the education system must comply with CRPD.<sup>109</sup> We are of the view that legislative provisions concerning inclusive education need to reflect the principle that all students should be educated together,<sup>110</sup> regardless of differences in their educational needs and the diversity in their identity.<sup>111</sup> In this regard, a

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<sup>103</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 9.

<sup>104</sup> Committee on the Rights of the Child, [General Comment No. 9: The rights of children with disabilities](#), CRC/C/GC/9 (27 February 2007) paras. 66–67.

<sup>105</sup> Committee on Economic, Social and Cultural Rights, [General Comment No. 5: Persons with disabilities](#) (1994) para. 35.

<sup>106</sup> The European Committee of Social Rights found the Belgian Government in violation of the European Social Charter as it failed to effectively guarantee the right to the inclusive education of children with intellectual disabilities; [International Federation for Human Rights \(FIDH\) and Inclusion Europe v. Belgium](#), Complaint No. 141/2017 (2020).

<sup>107</sup> European Commission, [Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030](#) (2021) pp. 17–19.

<sup>108</sup> As a measure to promote equality and non-discrimination of all persons with disabilities: Council of Europe, [Disability Strategy 2017-2023 – Human Rights: A reality for all](#) (2017) p. 17.

<sup>109</sup> European Commission, [Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030](#) (2021) p. 18.

<sup>110</sup> United Nations Human Rights Council, [The right to education of persons with disabilities: Report of the Special Rapporteur on the right to education, Vernor Muñoz](#), A/HRC/4/29 (2007) para. 9.

<sup>111</sup> The review should acknowledge the intersectionality between disability and diverse identities and have regard to other national and international instruments which provide for equal access to education for all learners regardless of their backgrounds. For example, the EU Anti-Racism Action Plan 2020–2025 sets out that children from all racial or ethnic backgrounds must have equal access to education; see European Commission, [A Union of equality: EU anti-racism action plan 2020-2025](#) (2020) p. 11. Further, the EU action plan on Integration and Inclusion 2021–2027 recognises that disabled children need additional support to participate in education on an equal basis with others, see European Commission, [Action plan on Integration and Inclusion 2021-2027](#) (2020) p. 9.

reformed Act or new legislation concerning inclusive education should clearly set out that disabled students cannot be rejected from the general education system.<sup>112</sup>

**12. The Commission recommends that section 2 of the *Education for Persons with Special Educational Needs Act 2004* be reformed to remove any exceptions to the right to inclusive education to ensure compliance with Article 24 of the Convention on the Rights of Persons with Disabilities.**

## Inclusive education

We note that while section 2 provides for the education of disabled students with educational needs in an inclusive environment, the terms ‘inclusive education’ or ‘inclusive environment’ are not clarified or interpreted in the legislation. This is concerning as the meaning of inclusive education is often misunderstood. Inclusion is being misinterpreted as the right to a place in a mainstream school rather than the right of a student to adequate supports to benefit from a quality and effective education on an equal basis with others.<sup>113</sup> Inclusive education is aimed at ensuring that all learners, regardless of the personal characteristics or backgrounds, are able to learn together in a welcoming and supportive environment.<sup>114</sup> An inclusive education environment requires the provision of personalised supports rather than expecting students to adapt to the existing education system.<sup>115</sup>

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<sup>112</sup> “To ensure the non-discrimination perspective, laws and policies should explicitly comprise a “no-rejection clause”, forbidding the denial of admission into mainstream schools and guaranteeing continuity in education”; see United Nations Human Rights Council, [Empowering children with disabilities for the enjoyment of their human rights, including through inclusive education: Report of the United Nations High Commissioner for Human Rights](#), A/HRC/40/27 (2019) para. 43. See also United Nations Human Rights Council, [Thematic study on the right of persons with disabilities to education: Report of the Office of the United Nations High Commissioner for Human Rights](#), A/HRC/25/29 (2013) para. 56.

<sup>113</sup> Sarah Arduin, Implementing Disability Rights in Education in Ireland: An Impossible Task? (2013) 36(1) Dublin University Law Journal 93–126, p. 117.

<sup>114</sup> United Nations General Assembly, [Right to education: report of the Special Rapporteur on the right to education](#), A/72/496 (2017) para. 19.

<sup>115</sup> Andrea Broderick and Shivaun Quinlivan, ‘The right to education: Article 24 of the CRPD’ in Charles O’Mahony and Gerard Quinn (eds), *Disability Law and Policy: An analysis of the UN Convention* (Dublin 2017) p. 305.

There is no explicit definition of the ‘inclusive education’ in Article 24 but the CRPD Committee in General Comment No. 4 provides a definition of inclusion as:

- **Inclusion:** involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision to provide all students with an equitable and participatory learning experience and the environment that best corresponds to their requirements and preferences.<sup>116</sup>

It is important to note that the CRPD Committee is clear on the distinction between ‘inclusion’ and the terms ‘segregation’ and ‘integration’:

- **Segregation:** involves the education of disabled students being provided in separate environments, designed or used to respond to a particular impairment or to various impairments, in isolation from students without disabilities.
- **Integration:** involves disabled students being placed in existing mainstream educational institutions with the understanding that they can adjust to the standardised requirements of mainstream institutions.

A significant number of students in Ireland continue to be educated in special schools segregated from their peers<sup>117</sup> and such placements are rarely, if ever, reviewed.<sup>118</sup> In May 2022, we expressed concern that the proposed creation of ‘Special Educational Needs centres’ for students with autism and other disabilities was not mainstream, inclusive or rights compliant.<sup>119</sup> The use of special education systems, where students are segregated from the general education system, is based on the medical model of disability and is

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<sup>116</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 11.

<sup>117</sup> In 2021, 8,682 students were in special schools while 8,740 students were in special classes in mainstream primary schools and 3,178 students were in special classes in post-primary schools; Department of Education, [Education Indicators for Ireland](#) (2023) p. 21.

<sup>118</sup> National Council for Special Education, [Policy Advice on Special Schools and Classes: An Inclusive Education for an Inclusive Society? – Progress Report](#) (October 2019) p. 9.

<sup>119</sup> IHREC, [Proposed Special Education Needs Centres Not Mainstream, Not Inclusive and Not Rights Compliant](#) (press release, 26 May 2022).

therefore not in compliance with CRPD.<sup>120</sup> The CRPD Committee have stated that the right to non-discrimination includes the right not to be segregated.<sup>121</sup>

Inclusion is different from integration; the integration approach seeks to ensure that students are supported to fit into the existing system and comply with the existing standards.<sup>122</sup> We note that there has been an expansion in the use of ‘special classes’ in mainstream schools.<sup>123</sup> This has led to parallel system of provision.<sup>124</sup> Research has found that “although students in special classes are physically located in mainstream schools, the extent to which inclusion is taking place is questionable”.<sup>125</sup> A policy of integration can lead to exclusion of disabled students in schools.<sup>126</sup> Students in special classes in secondary schools can face particular problems such as stigmatisation and lowered expectations by their teachers.<sup>127</sup> There is an absence of evidence to show that special classes lead to better educational and social outcomes for students.<sup>128</sup> The CRPD Committee have stated that maintaining two system of educations – a mainstream education system and a

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<sup>120</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) paras. 18–19. See also Joyce Mortimer, ‘Inclusive education: Moving beyond ideology and restrictive theoretical perspectives’ in Charles O’Mahony and Gerard Quinn (eds), *Disability Law and Policy: An analysis of the UN Convention* (Dublin 2017) p. 315.

<sup>121</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 13.

<sup>122</sup> United Nations Human Rights Council, [Thematic study on the right of persons with disabilities to education: Report of the Office of the United Nations High Commissioner for Human Rights](#), A/HRC/25/29 (2013) para. 4.

<sup>123</sup> Banks et al., ‘An Irish Solution...? Questioning the Expansion of Special Classes in an Era of Inclusive Education’ (2017) 48(4) *The Economic and Social Review* 441– 461.

<sup>124</sup> Shevlin et al., ‘Inclusion at a Crossroads: Dismantling Ireland’s System of Special Education’ (2021) 11 *Education Sciences* 161, p. 165.

<sup>125</sup> Banks et al., ‘An Irish Solution...? Questioning the Expansion of Special Classes in an Era of Inclusive Education’ (2017) 48(4) *The Economic and Social Review* 441– 461, p. 458.

<sup>126</sup> United Nations Human Rights Council, [The right to education of persons with disabilities: Report of the Special Rapporteur on the right to education, Vernor Muñoz](#), A/HRC/4/29 (2007) para. 12.

<sup>127</sup> Shevlin et al., ‘Inclusion at a Crossroads: Dismantling Ireland’s System of Special Education’ (2021) 11 *Education Sciences* 161, p. 167.

<sup>128</sup> Shevlin et al., ‘Inclusion at a Crossroads: Dismantling Ireland’s System of Special Education’ (2021) 11 *Education Sciences* 161, p. 169. In examining the use of special classes and their relationship to CRPD, we note one of the findings from the Department’s inspection of mainstream schools in which ‘special classes’ for learners with autism spectrum disorder were allocated: “In the context of Ireland’s ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD), and the possible implications of Section 24 (Part 2) in particular, it would be worthwhile for policy makers to examine if the current configuration of special classes is the most effective model to fully include all learners in school life. Specifically, if full inclusion or ultimate enrolment into mainstream classes is to be viewed as the index of success, the current system of special classes appears to be having limited success for many learners who enrol in a special class.” See Department of Education and Skills, [Education Provision for Learners with Autism Spectrum Disorder in Special Classes Attached to Mainstream Schools in Ireland](#) (2020) p. 7.

special/segregated education – is not compatible with the obligation of States obligation to move as expeditiously and effectively as possible towards the full realization of Article 24.<sup>129</sup>

While we note that ‘special classes’ can be regarded as important by parents / caregivers due to the difficulties they face in getting school places for children;<sup>130</sup> this is in the context of the failure of the State to ensure an inclusive education system is implemented and adequately resourced. A high-quality inclusive education system requires the “education of all children on equal terms in the same general education system, adapting the educational system to the diverse educational requirements, abilities, potentials and preferences of each child.”<sup>131</sup>

We acknowledge that an inclusive education model, in full compliance with CRPD Article 24, will need time and resources<sup>132</sup> to be embedded in schools and the education system. Inclusion will have to be implemented in legislation and in policy, and be reflected in the culture and practices in schools.<sup>133</sup> The CRPD Committee have set out that the right to an inclusive education system can be progressively realised, but that States need to put in place a comprehensive and coordinated legislative and policy framework to transition to an inclusive education system along with a clear and adequate timeframe for

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<sup>129</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 40. See also Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, [Joint Statement – The rights of children with disabilities](#) (2022) para. 9.

<sup>130</sup> Shevlin et al., ‘Inclusion at a Crossroads: Dismantling Ireland’s System of Special Education’ (2021) 11 Education Sciences 161, p. 169.

<sup>131</sup> Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, [Joint Statement – The rights of children with disabilities](#) (2022) para. 9.

<sup>132</sup> We note that Ireland has been cited as an example of good practice in the allocation of adequate financial resources for supporting children with educational needs; United Nations Human Rights Council, [Empowering children with disabilities for the enjoyment of their human rights, including through inclusive education: Report of the United Nations High Commissioner for Human Rights](#), A/HRC/40/27 (2019) para. 47. As empirical evidence has “shown that maintaining segregated, separate and parallel education systems is more expensive and less sustainable than inclusive education models systems”; we consider that the transition to an inclusive education system does not require significant additional public spending but rather a shift in existing allocated resources to an inclusive model in line with CRPD Article 24. See United Nations Human Rights Council, [Empowering children with disabilities for the enjoyment of their human rights, including through inclusive education: Report of the United Nations High Commissioner for Human Rights](#), A/HRC/40/27 (2019) para. 47.

<sup>133</sup> United Nations General Assembly, [Right to education: report of the Special Rapporteur on the right to education](#), A/72/496 (2017) para. 113; European Agency for Special Needs and Inclusive Education, [Key Principles: Supporting policy development and implementation for inclusive education](#) (2021) p. 12.

implementation.<sup>134</sup> There is also a need for a transition plan,<sup>135</sup> to address the needs and rights of students, including the adequate resourcing of individualised support, as the system transitions to an inclusive model.<sup>136</sup> We note that in 2016, the CRC Committee called for the State to adopt a human rights-based approach to disability and establish a comprehensive strategy for the inclusion of disabled children in mainstream education.<sup>137</sup> The transition plan should acknowledge the diversity between disabled students, as disabled students will have varying needs due to their impairment/s which will need to be

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<sup>134</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) paras. 40, 63. See also Andrea Broderick and Shivaun Quinlivan, 'The right to education: Article 24 of the CRPD' in Charles O'Mahony and Gerard Quinn (eds), *Disability Law and Policy: An analysis of the UN Convention* (Dublin 2017) pp. 309–310.

<sup>135</sup> United Nations Human Rights Council, [The right to education of persons with disabilities: Report of the Special Rapporteur on the right to education, Vernor Muñoz](#), A/HRC/4/29 (2007) para. 30. See also Andrea Broderick and Shivaun Quinlivan, 'The right to education: Article 24 of the CRPD' in Charles O'Mahony and Gerard Quinn (eds), *Disability Law and Policy: An analysis of the UN Convention* (Dublin 2017) pp. 308–309; European Agency for Special Needs and Inclusive Education, [Key Principles: Supporting policy development and implementation for inclusive education](#) (2021) p. 13.

<sup>136</sup> This transition plan should specifically reference those segregated in 'special schools' and the actions required to transition over time to supporting these students in mainstream settings. We note that no EU Member State has a fully inclusive system where 100% of students attend mainstream schools and are educated alongside their peers for 100% of the time; however, the education systems in EU Member States are moving towards an inclusive education model by providing the educational supports required for students in mainstream settings; European Agency for Special Needs and Inclusive Education, [Inclusive education for learners with disabilities: Study for the European Parliament's Committee on Petitions](#) (European Parliament, 2017) p. 21. Guidance on the steps necessary to change from the current model of educational provision to an inclusive educational system can be taken from the European Agency for Special Needs and Inclusive Education's Changing the Role of Specialist Provision project: see <https://www.european-agency.org/resources/publications/CROSP-final-summary-report>. We consider that the transition plan should specifically provide for the public reporting of accessible and timely data disaggregated by impairment group and equality grounds on students in 'special schools' to monitor their use and ensure transparency in the use of these settings as the education system transition to an inclusive education model. The transition plan should also reference the situation of disabled students educated in other settings including places of detention, health and social care services and those students living outside the State. We note that the Committee on the Rights of the Child has stressed that pending the process of de-institutionalisation, all persons in institutional care settings should be given access to inclusive education with immediate effect by linking them with inclusive academic institutions in the community; Committee on the Rights of the Child, [General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)](#), CRC/C/GC/14 (29 May 2013) para. 66. Additionally, disabled people leaving institutions, including children, should have access to inclusive education without discrimination, including opportunities to participate in lifelong learning to promote their social and economic empowerment and to prevent segregation and institutionalisation. See Committee on the Rights of Persons with Disabilities, [Guidelines on deinstitutionalization, including in emergencies](#) (2022) para. 106; See also Committee on the Rights of Persons with Disabilities, [General comment No. 5 \(2017\) on living independently and being included in the community](#), CRPD/C/GC/5 (27 October 2017) para. 88.

<sup>137</sup> Committee on the Rights of the Child, [Concluding observations on the combined third and fourth periodic reports of Ireland](#), CRC/C/IRL/CO/3-4 (1 March 2016) paras. 47–48.



taken account of and responded to in the delivery of individualised support.<sup>138</sup> The transition plan should address intersectionality,<sup>139</sup> as disabled students can experience intersectional discrimination on the basis of their gender, socio-economic status, nationality, race, ethnicity, membership of the Traveller and Roma community, and living in rural areas.<sup>140</sup> The transition plan should also recognise the need for a trauma-informed approach to inclusive education as disabled students might be experiencing traumas such as arriving in Ireland in response to the war in Ukraine or crises in other States; and, or be unaccompanied or separated, and be living in settings such as Direct Provision centres and emergency accommodation. In line with the principles of non-discrimination, measures to address diversity and intersectionality should focus on removing all barriers to an inclusive education.

We consider there is a need for a clear definition of inclusive education in legislation so that the term is widely understood and people know what the elements of an inclusive education system are.<sup>141</sup> The definition of inclusive education should specifically reference intersectionality to illustrate the different social and environmental factors that can affect a student's access to and benefit of education.<sup>142</sup> States should ensure that effective individualised support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.<sup>143</sup> The CRPD Committee have

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<sup>138</sup> Students with educational needs have "diverse abilities, characteristics, learning needs and styles"; National Council for Special Education, [Inclusive Education Framework: A guide for schools on the inclusion of pupils with special educational needs](#) (2014) p. 17.

<sup>139</sup> We note that intersectionality is being addressed in the review of the Equality Acts. See our position on intersectionality in IHREC, [Submission on the Review of the Equality Acts](#) (2021) pp. 27–31.

<sup>140</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 13; United Nations General Assembly, [Right to education: report of the Special Rapporteur on the right to education](#), A/72/496 (2017); European Agency for Special Needs and Inclusive Education, [Legislative Definitions around Learners' Needs: A snapshot of European country approaches](#) (2022) p. 14.

<sup>141</sup> Guidance on the meaning of inclusive education and the supports required by people can be drawn from Article 24 and CRPD Committee General Comment No. 4. Article 24 places obligations on States to provide disabled people with reasonable accommodation for their requirements and to receive the support they require, within the general education system, to facilitate their effective education. See CRPD Article 24(2)(c)–(d). See also United Nations Human Rights Council, [Thematic study on the right of persons with disabilities to education: Report of the Office of the United Nations High Commissioner for Human Rights](#), A/HRC/25/29 (2013) para. 56; European Agency for Special Needs and Inclusive Education, [Key Principles: Supporting policy development and implementation for inclusive education](#) (2021) p. 12.

<sup>142</sup> European Agency for Special Needs and Inclusive Education, [Legislative Definitions around Learners' Needs: A snapshot of European country approaches](#) (2022) p. 50.

<sup>143</sup> CRPD Article 24(2)(e).



set out that an inclusive education system comprises four interrelated features: Availability; Accessibility; Acceptability; and Adaptability.<sup>144</sup> There should be sufficient educational places for disabled students at all levels throughout the community and the entire education system must be accessible.<sup>145</sup> The CRPD Committee call for particular attention to be given to making appropriate supports to those with autism spectrum disorder, those with communication impairments and those with sensory disabilities.<sup>146</sup>

In implementing inclusive practices in educational settings, there is a need for fundamental change in educational provision and its resourcing.<sup>147</sup> There is a need for adequate funding for reasonable accommodations (physical, technological, structural, psycho-social, sensory) to ensure that the learning environment is accessible for all students with disabilities.<sup>148</sup> Other priority areas for funding include the pre-service and in-service training for teachers and school administrators<sup>149</sup> and initial and continuous training for all members of the educational community<sup>150</sup>; and the development of accessible curricula across all subjects.<sup>151</sup>

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<sup>144</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) paras. 20–27. Drawing from the recommendation of the UN Committee on the Economic, Social and Cultural Rights; Committee on the Economic, Social and Cultural Rights, [General Comment No. 13: The right to education](#), E/C.12/1999/10 (1999)

<sup>145</sup> This includes buildings, water and sanitation facilities, school cafeterias, recreational spaces, school transportation, information and communications tools (comprising ambient or frequency modulation assistive systems), the curriculum, educational materials, teaching methods, assessments and language and support services. Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 22.

<sup>146</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 35.

<sup>147</sup> Murphy et al., 'Inclusive education and the law in Ireland' (2022) *International Journal of Law in Context* 1–21, p. 4.

<sup>148</sup> United Nations Committee on the Economic, Social and Cultural Rights, [General comment No. 5: Persons with disabilities](#) (1994) para. 35; Nations Human Rights Council, [The right to education of persons with disabilities: Report of the Special Rapporteur on the right to education, Vernor Muñoz](#), A/HRC/4/29 (2007) para. 34.

<sup>149</sup> United Nations Committee on the Economic, Social and Cultural Rights, [General comment No. 5: Persons with disabilities](#) (1994) para. 35; Nations Human Rights Council, [The right to education of persons with disabilities: Report of the Special Rapporteur on the right to education, Vernor Muñoz](#), A/HRC/4/29 (2007) para. 34; European Agency for Special Needs and Inclusive Education, [Key Principles: Supporting policy development and implementation for inclusive education](#) (2021) pp. 17–18.

<sup>150</sup> This includes principals, teachers, support staff, administrative staff, ancillary staff, sessional staff, and contract staff.

<sup>151</sup> IHREC, [Ireland and the Council of Europe Convention on preventing and combating violence against women and domestic violence](#) (2023) p. 47.

In monitoring the implementation of an inclusive education model, we call for improvements in the collection and publication of disaggregated equality data related to education in line with CRPD Article 31.<sup>152</sup> At present, there is lack of comprehensive and disaggregated data by impairment and by groups protected under equality legislation.<sup>153</sup>

**13. The Commission recommends that the review of the *Education for Persons with Special Educational Needs Act 2004* should include consideration of whether the Act and the State’s understanding of ‘inclusive education’ is in compliance with Article 24 of the Convention on the Rights of Persons with Disabilities.**

**14. The Commission recommends that the State develop a clear time bound implementation plan for legislative and policy changes to transition to an inclusive education environment.**

**15. The Commission recommends that a definition of ‘inclusive education’ should be included in a revised *Education for Persons with Special Educational Needs Act 2004* or in any proposed legislation concerning inclusive education aligned to Article 24 of the Convention on the Rights of Persons with Disabilities and in General Comment No. 4 on the right to inclusive education.**

**16. The Commission recommends that the State invests in a ring-fenced resource to develop and maintain a national data infrastructure aligned to Article 31 of the Convention on the Rights of Persons with Disabilities that improves the**

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<sup>152</sup> CRPD Article 31 on statistics and data collection includes a requirement on States Parties to undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to CRPD. Guidance on Article 31 can be drawn from: United Nations Office of the High Commissioner for Human Rights, [Article 31: List of illustrative indicators on statistics and data collection](#) (2020). The UN Special Rapporteur on the right to education has recommended that States collect and publish disaggregated data in order to ensure they are meeting their obligations to provide inclusive and equitable education; see United Nations General Assembly, [Right to education: report of the Special Rapporteur on the right to education](#), A/72/496 (2017) para. 109. The CRPD Committee have noted that a lack of disaggregated data and research may act as a barrier to inclusive education; see Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) paras. 4(d), 6.

<sup>153</sup> IHREC, [Submission by the Irish Human Rights and Equality Commission to the Oireachtas Special Committee on COVID-19 Response: the impact of Covid-19 on persons with disabilities](#) (June 2020) p. 10. See also the our recommendation for urgent action by the State to develop and roll out disaggregated data collection in its submission on the review of the *Equality Acts* in December 2021. IHREC, [Submission on the Review of the Equality Acts](#) (2021) p. 67.

comprehensiveness, quality, accessibility and availability of disaggregated equality data on students and workers across the education sector, in particular ensuring the collection and publication of data on the type/s of impairment, any intersecting equality ground, socio-economic status, geographic location; and barriers encountered and the educational support and, or reasonable accommodation provided.

- 17. The Commission recommends that all organisations engaged in the education of disabled students should publish data disaggregated by impairment and other equality groups, in an accessible and age-appropriate format, that can be readily communicated to students, and utilised by the public, civil society organisations and the research community.**

## Assessments and individual education plans

Sections 3–13 of the Act provide a statutory entitlement to an education assessment of a student’s needs, the creation of an Individual Education Plan (‘IEP’) on the basis of the assessment, the provision of educational supports set out in the IEP, a review of the IEP and an independent appeals process for the assessment and the IEP. However, these provisions have never been commenced.

## Assessment of Need

In the absence of the commencement of these provisions, disabled students who require an assessment of their educational needs are instead being assessed under the *Disability Act 2005*. The Assessment of Need (‘AON’) process is different from what is provided under the Act, as the AON is an assessment of the needs for educational services rather than an assessment of the educational needs of the disabled child.<sup>154</sup> The AON process is a diagnosis led model, rather a needs led model.<sup>155</sup> The requirement to receive a diagnosis to access

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<sup>154</sup> Ombudsman for Children’s Office, [Unmet Needs: A report by the Ombudsman for Children’s Office on the challenges faced by children in Ireland who require an assessment of their needs](#) (2020) p. 7. Section 4(6) of the EPSEN Act provides that “An assessment for the purposes of this section shall include an evaluation and statement of the nature and extent of the child’s disability (including in respect of matters that affect the child overall as an individual) and an evaluation and statement of the services which the child will need so as to be able to participate in and benefit from education and, generally, to develop his or her potential.”

<sup>155</sup> Ombudsman for Children’s Office, [Unmet Needs: A report by the Ombudsman for Children’s Office on the challenges faced by children in Ireland who require an assessment of their needs](#) (2020) p. 27.

supports reinforces social advantage and disadvantage as parents / caregivers who could afford private assessments received timelier access to supports.<sup>156</sup> The level of support provided on the foot of an AON is based on disability, despite students with the same disability potentially having different educational needs.<sup>157</sup>

After a Court of Appeal ruling in 2021,<sup>158</sup> the National Council for Special Education ('NCSE') is legally required to nominate an appropriate person with expertise to carry out an assessment of education needs on behalf of the HSE under the AON process.<sup>159</sup> In guidance provided to schools, the NCSE has advised that a report of education needs should be completed by a school principal, or a teacher, who is familiar with the student.<sup>160</sup> We consider that this review should examine how this new process of completing an assessment of educational needs as part of the AON process under the Disability Act operates in practice and how it interacts with the provisions<sup>161</sup> under the Act providing for an assessment of educational needs.<sup>162</sup>

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<sup>156</sup> National Council for Special Education, [Delivery for Students with Special Educational Needs: A proposed new model for allocating teaching resources for students with special educational needs](#) (2014) p. 3. See also Kenny et al., 'Special education reforms in Ireland: changing systems, changing schools' (2020) International Journal of Inclusive Education 1–20, p. 4; Ombudsman for Children's Office, [Plan for Places – Forward Planning for the Provision of Schools Places for Children with Special Educational Needs: A Children's Rights Issue](#) (2022) p. 31.

<sup>157</sup> National Council for Special Education, [Delivery for Students with Special Educational Needs: A proposed new model for allocating teaching resources for students with special educational needs](#) (2014) p. 3.

<sup>158</sup> Donnelly J held that the provisions of section 8(3) of the Disability Act applied to a child as well as an adult. Section 8(3) provides that "Where an assessment officer is of opinion that there may be a need for an education service to be provided to an applicant, he or she shall, as soon as may be, request the Council in writing to nominate a person with appropriate expertise to assist in the carrying out of the assessment under this section in relation to the applicant and the Council shall comply with the request." Donnelly J noted that the child would not be entitled to a service statement on the basis of the assessment of education needs as the Disability Act provisions (section 11) regarding service statements only apply to adults and the relevant provisions (sections 3 and 4) of the EPSEN Act concerning students in school and children have not been commenced. See *C.M. (A Minor) Suing by his Mother and Next Friend SM v Health Service Executive* [2021] IECA 283.

<sup>159</sup> Department of Education, [Report of Education Needs for the purpose of Assessment of Need \(Disability Act 2005\)](#) (published 20 October 2022, last updated 2 February 2023); Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on Assessments of Need for Children](#) (February 2023) pp. 47–49.

<sup>160</sup> We note that this new process of completing an assessment of education needs as part of the AON process is being trialled in 80 schools. Department of Education, [Report of Education Needs for the purpose of Assessment of Need \(Disability Act 2005\)](#) (published 20 October 2022, last updated 2 February 2023).

<sup>161</sup> Sections 3 and 4 of the EPSEN Act.

<sup>162</sup> We note the comments of Donnelly J in this regard: "there is nothing in s. 8(3) that directly affects the educational assessments carried out under the EPSEN Act. Any person nominated by the Council under s. 8(3) to carry out the assessment would have access to the assessment (if any) already carried out under the EPSEN Act. On the other hand, if a s. 8(3) assessment has already been carried out, as we shall see, the provisions of s. 5(6) of the EPSEN Act requires those carrying out an assessment under s. 4 of the EPSEN Act to have regard

## Policy initiatives

There have been policy initiatives since 2004 to transition to inclusive education. Since 2007, the Continuum of Support Framework is being implemented to assist schools in identifying and planning for the needs of all students which provides for the drawing up of individualised support plans.<sup>163</sup>

We note that the Department has stated that model for the provision of educational needs has moved on from a diagnosis-led model to one that is driven by the needs of the child.<sup>164</sup> In mainstream primary and secondary schools where an assessment is needed for resource allocation a new model was introduced in 2017 of ‘frontloading’ of resources to schools based on a school’s need.<sup>165</sup> This new system has been regarded as ‘incompatible’ with the vision of inclusive education and ‘counter-intuitive’ as the system is not based on the needs of the student.<sup>166</sup> It has been contended that: “it is necessary to identify the individual needs of students in order to ensure that the resources provided to the school are, in fact, sufficient in meeting their needs.”<sup>167</sup> Further, the ‘frontloading’ model gives considerable

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to any relevant assessment already carried out. It seems to me that the s. 8(3) assessment and the s. 3 and s. 4 assessment processes run parallel to each other. An assessment under s. 8(3) of a child's educational needs does not undermine the assessment pathways under s. 3 or s. 4 of the EPSEN Act. It is merely a different route to achieving the same objective. They are separate pathways”: *C.M. (A Minor) Suing by his Mother and Next Friend SM v Health Service Executive* [2021] IECA 283, para. 73.

<sup>163</sup> See guidance provided to teachers; Department of Education, [Special Educational Needs: A Continuum of Support – Guidelines for Teachers](#) (2007).

<sup>164</sup> See comments by Martina Mannion, Assistant Secretary at the Department of Education; Houses of the Oireachtas, [Joint Committee on Education, Further and Higher Education, Research, Innovation and Science debate – Special Needs Education: Discussion](#) (13 April 2021).

<sup>165</sup> This new model introduced in 2017, is based on the guidance of the NCSE; see National Council for Special Education, [Delivery for Students with Special Educational Needs: A proposed new model for allocating teaching resources for students with special educational needs](#) (2014). Under this model, schools have greater levels of autonomy in allocating and managing resources. The model provides that resources, including the allocation of Special Education Teachers, are dependent on the profile of the school including the number of students with complex needs; the results of standardised test results for literacy and numeracy; and the social context of the school (educational disadvantage, primary school location and gender); see Department of Education, [Guidelines for Primary Schools: Supporting Pupils with Special Educational Needs in Mainstream Schools](#) (2017); Department of Education, [Circular No 007/2019: Circular to the Management Authorities of all Mainstream Primary Schools – Special Education Teaching Allocation](#) (2019); Department of Education, [Circular No 008/2019: Circular to the Management Authorities of all Post Primary Schools: Secondary, Community and Comprehensive Schools and the Chief Executive Officers of the Education and Training Boards – Special Education Teaching Allocation](#) (2019). See also Kenny et al., ‘Special education reforms in Ireland: changing systems, changing schools’ (2020) *International Journal of Inclusive Education* 1–20, pp. 1, 4; Murphy et al., ‘Inclusive education and the law in Ireland’ (2022) *International Journal of Law in Context* 1–21, p. 11.

<sup>166</sup> Murphy et al., ‘Inclusive education and the law in Ireland’ (2022) *International Journal of Law in Context* 1–21, p. 11.

<sup>167</sup> Murphy et al., ‘Inclusive education and the law in Ireland’ (2022) *International Journal of Law in Context* 1–21, p. 11.

discretion to the principal in allocating resources.<sup>168</sup> We note also that a pilot for a new School Inclusion Model ('SIM') has been introduced since 2019,<sup>169</sup> but the rollout was delayed due to the Covid-19 pandemic.<sup>170</sup> It is important to independently evaluate how successful these policies are in addressing the barriers disabled students experience in accessing education,<sup>171</sup> their impact on the right of students to an inclusive education, and the variation in how they are applied between schools.<sup>172</sup>

Notwithstanding their value in advancing inclusive education, these policy developments do not have a statutory basis. With the non-commencement of the Act, there is still no statutory right to an assessment of educational needs, the development of an education plan, or recourse to an independent appeals mechanism<sup>173</sup>. Therefore, they can be easily

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<sup>168</sup> We note the concerns raised by the Irish Primary Principals Network ('IPPN') on the frontloading allocation model: "The two positives of the new model are also negatives. No need for a diagnosis is positive but raises a number of concerns around resources and decision-making. Front-loading is also a positive but also raises the issue of identifying the needs of a school accurately. Given that many children will not be given diagnoses as they will no longer need them, how will the DES identify the children with "complex needs"?"; IPPN, [2020/2021 SNA Allocation Update](#).

<sup>169</sup> Based on NCSE policy advice; see National Council for Special Education, [Comprehensive Review of the Special Needs Assistant Scheme: A New School Inclusion Model to Deliver the Right Supports at the Right Time to Students with Additional Care Needs](#) (2018). The piloted model provides a frontloading of Special Needs Assistants ('SNAs'); training of SNAs; expansion of the National Educational Psychological Service ('NEPS') to provide increased supports to schools; provision of in-school therapy service, including speech and language therapy, occupational therapy; creation of a regional support team comprising speech and language therapists, occupational therapists and behaviour support practitioners; and a new national nursing service for students with complex medical needs in schools.; see Department of Education, [Minister McHugh announces trial of a new School Inclusion Model to provide the right supports at the right time to students with additional needs](#) (press release, 27 March 2019). It will be evaluated by the Economic and Social Research Institute; see <https://www.esri.ie/current-research/evaluation-of-the-school-inclusion-model>.

<sup>170</sup> National Disability Authority, [NDA Independent Assessment of Implementation of the National Disability Inclusion Strategy for 2021](#) (2022) p. 25.

<sup>171</sup> See discussion of challenges in responding to the needs of children; Ombudsman for Children's Office, [Unmet Needs: A report by the Ombudsman for Children's Office on the challenges faced by children in Ireland who require an assessment of their needs](#) (2020); AsIAM, [Reforming the Education for Persons with Special Educational Needs Act 2004 - A Green Paper from AsIAM](#) (2021); Ombudsman for Children's Office, [Plan for Places – Forward Planning for the Provision of Schools Places for Children with Special Educational Needs: A Children's Rights Issue](#) (2022).

<sup>172</sup> Keny et al., 'Special education reforms in Ireland: changing systems, changing schools' (2020) International Journal of Inclusive Education 1–20, p. 9.

<sup>173</sup> There is no statutory basis for parents to independently appeal or review their allocation of resources if they disagree about the support allocated to their child. See Catriona Moloney et al, [Mind the Gap: Barriers to the realisation of the rights of children with disabilities in Ireland](#) (Ombudsman for Children's Office 2021) p. 43. As the Special Education Appeals Board has not been established, families are required to go through the courts system to vindicate the rights of the child. See Children's Rights Alliance, [Report Card 2022](#) (2022) p. 81.

altered due to funding constraints and changing Government policies. Further, their development and review are not subject to adequate Oireachtas oversight.

### Individual Education Plan

We consider that there needs to be a clear legislative basis for an individual assessment,<sup>174</sup> development of an individual education plan<sup>175</sup> and the availability of a review and appeals mechanism to vindicate the rights of the child. This follows the recommendation of the CRPD Committee for a consistent framework for the early identification, assessment and support required to enable disabled people to flourish in inclusive learning environments.<sup>176</sup>

The CRPD Committee have stated that an individualised education plan should:

- Identify the reasonable accommodations and specific support required by individual students, including a qualified learning support assistant, either on a shared or on a one-to-one basis, depending on the requirements of the student; and the provision of assistive compensatory aids, specific learning materials in alternative/accessible formats, modes and means of communication, communication aids and assistive and information technology.
- Address the transitions experienced by learners who move from segregated to mainstream settings and between levels of education.<sup>177</sup>

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<sup>174</sup> Individual assessments and interventions are critical for students in ensuring they access an inclusive and quality education. See United Nations Human Rights Council, [Thematic study on the right of persons with disabilities to education: Report of the Office of the United Nations High Commissioner for Human Rights](#), A/HRC/25/29 (2013) para. 46. See also Murphy et al., 'Inclusive education and the law in Ireland' (2022) *International Journal of Law in Context* 1–21, p. 11.

<sup>175</sup> Individual education plans are seen as key for students in realising their educational rights, including their right to learn on an equal basis with others. See Sarah Arduin, *Implementing Disability Rights in Education in Ireland: An Impossible Task?* (2013) 36(1) *Dublin University Law Journal* 93–126, p. 108.

<sup>176</sup> This follows the recommendation of the CRPD Committee for a consistent framework for the early identification, assessment and support required to enable disabled people to flourish in inclusive learning environments. See Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 63(j).

<sup>177</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 33.



## Voice of the child

A core aspect of an individual education plan is the involvement of the student, their parents and professionals.<sup>178</sup> However, the voice of the student is missing from key parts of the legislation.<sup>179</sup> We note the requirement under section 8(4) that when a Special Educational Needs Organiser ('SENO') is preparing an education plan, at the direction of the NCSE, they shall convene a group of people to advise on the plan and this group “**may** [emphasis added] include ... the child where this is considered appropriate by the special educational needs organiser having regard to the age of the child and the nature and extent of the child's special educational needs.” While legislative provision is made for including the voice of the child, the involvement of the child in the development of their own education plan is at the discretion of the SENO rather than an express right to participate and have their voice heard.

There is also no express provision providing that disabled students can express their views in the educational assessment, and there is no provision for the participation of students in the review or appeals processes.<sup>180</sup> Instead, the legislation provides in a number of places for the rights of the parent to be consulted on the assessment and education plan, including the review of the education plan, and for the parents to appeal an assessment, to appeal the failure or refusal of the NCSE to make a designation of a school, and to appeal an education plan to an independent appeals board. The CRPD Committee are clear that an inclusive education is the right of the child; and that parental or caregiver responsibilities in this regard are subordinate to the rights of the child.<sup>181</sup> It has been contended that this exclusion of the child is “inconsistent with the spirit” of Article 42A.<sup>182</sup> Children have the

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<sup>178</sup> United Nations Human Rights Council, [Thematic study on the right of persons with disabilities to education: Report of the Office of the United Nations High Commissioner for Human Rights](#), A/HRC/25/29 (2013) para. 47.

<sup>179</sup> There is no requirement, in section 3, for the principal of the school to consult with the student when preparing an IEP. Instead, section 3(9) provides that the principal, in preparing an education plan, shall consult with the parents of the child, the special educational needs organiser with responsibility for the school concerned and such other persons as the principal considers appropriate.

<sup>180</sup> Conor O'Mahony, 'Education, Play and Leisure' in Children's Rights Alliance and Law Centre for Children and Young People (eds), [Making rights real for children: A children's rights audit of Irish law](#) (Dublin 2015) p. 142; Catriona Moloney et al, [Mind the Gap: Barriers to the realisation of the rights of children with disabilities in Ireland](#) (Ombudsman for Children's Office 2021) p. 41.

<sup>181</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 10(a).

<sup>182</sup> It is noted that the provisions in Article 42A do not apply to administrative proceedings such as the Special Education Appeals Board; see Conor O'Mahony, 'Education, Play and Leisure' in Children's Rights Alliance and



right to express their views in administrative proceedings concerning them, and their views should be given due weight in accordance with their age and maturity.<sup>183</sup> Disabled children should be provided with disability and age-appropriate assistance,<sup>184</sup> including access to an independent advocacy service to support them,<sup>185</sup> to realise their right to express their views freely on all matters that concern them on all equal basis with other children.<sup>186</sup> The CRPD Committee is clear that children have a right to participate in the development of their own individualised education plans and in the regular monitoring and evaluation of the plan.<sup>187</sup>

### Complaints mechanisms and legal remedies

In circumstances where a student's right to an inclusive education is violated, the CRPD Committee provide that States must introduce independent, effective, accessible, transparent, safe and enforceable complaints mechanisms and legal remedies.<sup>188</sup> In particular, students must have access to recourse mechanisms if the support set out in their education plan is inadequate or unavailable.<sup>189</sup> We are of the view that there needs to be a statutory recourse available to students if an assessment does not occur or if an education plan is not put in place or adequately implemented. Students must have access to robust and accessible domestic systems of redress and remedies. Further, we are of the view that

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Law Centre for Children and Young People (eds), [Making rights real for children: A children's rights audit of Irish law](#) (Dublin 2015) p. 142.

<sup>183</sup> CRC Article 12. The Committee on the Rights of the Child have recommended that the State "ensure the right of children with disabilities to be heard in all decisions that affect them": Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023) para. 29(d).

<sup>184</sup> "States parties should ensure that children with disabilities are equipped with, and enabled to use, any mode of communication, including sign language, Braille, Easy Read, alternative and augmentative modes of communication necessary to facilitate the expression of their views"; see Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, [Joint Statement – The rights of children with disabilities](#) (2022) para. 5.

<sup>185</sup> We note that there is no advocacy service for disabled children in Ireland, which means there is a policy gap in ensuring that the voice of the child is heard in proceedings concerning them; see Catriona Moloney et al, [Mind the Gap: Barriers to the realisation of the rights of children with disabilities in Ireland](#) (Ombudsman for Children's Office 2021) p. 33.

<sup>186</sup> CRPD Article 7(3).

<sup>187</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) paras. 33, 47.

<sup>188</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 65.

<sup>189</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 33.

the State must ratify the CRPD Optional Protocol to ensure that disabled students have access to the CRPD Committee to vindicate their rights.<sup>190</sup>

## Timeframes

We consider that there should be clear specific timeframes in the legislation in regard to the sequencing of the different elements involved in the individual assessment, developing the individual education plan, the provision of supports, the review of the plan, and any appeals. This is to ensure clarity for the child in knowing and understanding their rights under this legislation. Further, we are of the view that adequate initial and ongoing training should be provided to those involved in the educational assessment and those involved in preparing the individual education plan to ensure the rights of the child are respected throughout these processes.

**18. The Commission recommends that any policies or practices related to the provision of educational assessments, the development of individual education plans, and the provision of education should have a clear statutory basis compliant with Article 24 of the Convention on the Rights of Persons with Disabilities and General Comment No. 4 specifying reviews, independent appeals mechanisms, and timeframes.**

**19. The Commission recommends that an individual education plan should clearly set out the educational supports required by a child to access and benefit from an inclusive education on the same basis as others compliant with Article 24 of the Convention on the Rights of Persons with Disabilities and General Comment No. 4.**

**20. The Commission recommends that the right of the child to express their views during the individual assessment, the preparation and review of the individual education plan, and in any appeal process should be specifically provided for in a reformed *Education for Persons with Special Educational Needs Act 2004* or in any**

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<sup>190</sup> Ireland is one of only three EU Member States not to have either signed or ratified the Optional Protocol, along with Poland and the Netherlands. The Optional Protocol gives the CRPD Committee the authority to receive and consider communications from individuals or groups alleging violations of any of the convention's provisions. The Optional Protocol also enables the committee to undertake inquiries with States Parties where there is information or evidence indicating grave or systematic violations of the convention.

**proposed legislation concerning inclusive education. Further, the State should ensure that disabled children can access an independent advocacy service to support them.**

**21. The Commission recommends that the right to access independent appeals and complaints mechanisms and the provision of legal remedies should be provided for in a revised *Education for Persons with Special Educational Needs Act 2004*.**

**22. The Commission recommends the State proceed with the ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities to ensure disabled students have access to the Committee on the Rights of Persons with Disabilities to vindicate their rights.**

### Future educational needs

Section 15 of the Act, which has not been commenced, provides that in preparing or reviewing an individual education plan the principal or the SENO shall, from the child's attaining such age as the principal or organiser considers appropriate, take account of the provision which will be required to assist the child to continue their education or training when they become an adult. It is welcome that the Act addresses the necessity of educational supports in the transition to tertiary level or to further education and training ('FET').

However, it is important to recognise the different context in education for disabled people since the enactment of the Act in 2004, with the increase in the educational attainment levels of disabled students.<sup>191</sup> There is also an increasing number of disabled students accessing higher education institutions, in 2020/2021 6.6% of the total student population were registered with disability support services in their institution.<sup>192</sup> These statistics highlight the vital importance of putting in place adequate and effective educational

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<sup>191</sup> In the 2016 Census, 13.6% of disabled people had further education and training as their highest level of education attainment in comparison with 12.0% in the 2011 Census. In 2016, 13.1% had tertiary education as their highest level of education attainment in comparison with 10.8% in the 2011 Census. See Census figures cited in National Disability Authority, [Mid-term Review of Progress: The National Disability Inclusion Strategy and Indicators](#) (2020) p. 33.

<sup>192</sup> This compares with figures of 6.3% (2019/20) 6.2% (2018/19 and 2017/18) and 5.7% (2016/17); see Ahead, [Students with Disabilities Engaged with Support Services in Higher Education in Ireland 2020/21](#) (2022).

supports at primary and secondary level aimed at ensuring that disabled people are able to access tertiary education, FET, and lifelong learning without discrimination and on an equal basis with others.<sup>193</sup> States must identify and remove attitudinal, physical, linguistic, communication, sensory, psycho-social, financial, legal and other barriers to education at these levels.<sup>194</sup>

While it is beneficial for this legislation to address the transition to tertiary or higher education, as this provision has never been commenced it is difficult to assess how this provision would work in practice in terms of tailoring an individual education plan to address the educational supports needed to progress to further education. We are of the view that if a fully inclusive education model, in compliance with CRPD Article 24, is introduced at all levels of the education system the barriers faced by disabled students in transitioning to tertiary or FET should be minimised. Legislation and policies concerning inclusive education should be clear on the educational supports required for lifelong learning and should address the transition to further education. The European Agency for Special Needs and Inclusive Education have called for States to develop a transition strategy to “support all learners at times of transition between phases of education – and particularly as they move into adult life – through vocational education and training, further and higher education, independent living and employment”.<sup>195</sup>

Furthermore, legislation should address the situation of 17 year olds, who are regarded as a child under section 1 of the Act, who are in higher education or FET. It should be clear in the legislation whether the provisions in the Act apply to this cohort of students, and if not what educational supports are available to these disabled children.

**23. The Commission recommends that the review of the *Education for Persons with Special Educational Needs Act 2004* include particular consideration of the educational supports required for the transition to higher education and further**

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<sup>193</sup> As provided for under Article 24(5). See also Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 38.

<sup>194</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 38.

<sup>195</sup> European Agency for Special Needs and Inclusive Education, [Key Principles: Supporting policy development and implementation for inclusive education](#) (2021) pp. 21–22.

education and training, and for lifelong learning and how these supports are to be reflected in an individual education plan.

**24. The Commission recommends that that the review include consideration of the situation of 17 year olds who are in higher education, further education and training, and lifelong learning and whether the provisions of the *Education for Persons with Special Educational Needs Act 2004* continue to apply to them as they still meet the definition of a child under the legislation.**

### Transition from early childhood education

We are of the view that it is not clear in the Act whether the provisions apply to those in early childhood education.<sup>196</sup> Further, it is not clear from the provisions of the Act the supports and structures required to be in place for disabled students as they transition from early childhood education to primary school.<sup>197</sup> We consider that it is essential that policy and/or legislation should address this transition to ensure there is no regression in the provision of educational support to disabled students. The movement of a disabled child from early childhood education to primary school should be considered in any transition plan to an inclusive education model.

We are also of the view that there are issues associated with the current provision of early childhood education which should be addressed.<sup>198</sup> We note that the Access and Inclusion Model ('AIM') model was introduced in 2016, in order to ensure that disabled children can access and meaningfully participate in the Early Childhood Care and Education ('ECCE') programme.<sup>199</sup> However, it has been found that receiving the approved levels of support

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<sup>196</sup> The CRPD Committee have set out that an inclusive education system must be realised at all levels included preschool: Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 8.

<sup>197</sup> The CRPD Committee note that individualised education plan must address the transition between levels of education: [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 33..

<sup>198</sup> IHREC, [Ireland and the Rights of the Child: Submission to the Committee on the Rights of the Child on Ireland's combined fifth and sixth periodic reports](#) (2022) p. 64.

<sup>199</sup> See <https://aim.gov.ie/>. See generally, ESRI, [Measuring Childhood Disability and AIM Programme Provision in Ireland](#) (2021).

from AIM can be a difficult and lengthy process and may delay early intervention for disabled children with specific educational needs.<sup>200</sup>

**25. The Commission recommends that the review of the *Education for Persons with Special Educational Needs Act 2004* include particular consideration of the educational supports required for the transition from early childhood education.**

**26. The Commission recommends that the State ensure access to early childhood education, early development programmes and inclusive education for disabled children, including through adequate planning and the provision of rehabilitation programmes, assistive devices and reasonable accommodation.**

## National Council for Special Education

The substantive provisions of the Act, which have been commenced relate to the establishment of the NCSE. The Council is provided with significant powers in relation to the non-commenced provisions relating to educational assessments and individual education plans.

We note that under section 21 on the membership of the NSCE, there is provision for the Minister to appoint to the Council a person or persons with educational needs, their parents and representatives.<sup>201</sup> However, the Minister shall only have regard to the desirability of appointing such people; there is no specific requirement to appoint such a person or persons. Due to importance of the role of the NCSE in implementing the vision of inclusive education, we are of the view that the Minister should be required to ensure that the majority of members they appoint to the Council are disabled people who have required educational needs support.<sup>202</sup> The membership should reflect the diversity of disabled

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<sup>200</sup> Problems such as infrequent visits from AIM Early Years Specialists, refusal of supports, insufficient resources and a lack of training for practitioners have been identified: see Jessica Roberts & Patsy Callaghan, [Inclusion is the ideal, but what is the reality? Early years practitioner's perceptions of the access and inclusion model in preschools in Ireland](#) (2021) 29 European Early Childhood Education Research Journal 780–794.

<sup>201</sup> Section 21(6).

<sup>202</sup> We note that the *Assisted Decision-Making (Capacity) (Amendment) Act 2022* provides in relation to appointments to our DAC that at least two-thirds of the number of persons appointed shall have, or have had, a disability within the meaning of section 2(1) of the *Disability Act 2005*.

people and Irish society<sup>203</sup> and members should have experience and/or expertise in the rights of disabled people including a commitment to the principles of CRPD set out in Article 3.<sup>204</sup>

We note there is a similar provision under section 22 in relation to the Council appointing members to consultative forum, and we reiterate our view that the membership of the consultative forum should comprise a majority of disabled people who have required educational needs support and represent the diversity of disability and Irish society.<sup>205</sup>

In both of these sections, there are requirements for consultation before the Minister or the Council appoints members. We consider that the requirements of CRPD Article 4.3 and General Comment No. 4 should be reflected in the legislative reform to ensure the Minister and the Council consults with and actively involves disabled people, including disabled children, through their representative organisations in decision-making processes that concern them.<sup>206</sup>

**27. The Commission recommends that the *Education for Persons with Special Educational Needs Act 2004* be revised to provide that the members appointed to the National Council for Special Education by the Minister shall comprise a majority of disabled people who have required educational needs support; and these members should reflect the diversity of disabled people and Irish society. Members should be required to have experience and/or expertise in the rights of**

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<sup>203</sup> Members should reflect the diversity of disabled people – including those who have long-term physical, mental, intellectual or sensory impairments – and ensure equality of representation between women and men. Data on the diversity of Irish society is provided by the Census.

<sup>204</sup> CRPD Article 3 set outs that the principles of the CRPD are: a. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; b. Non-discrimination; c. Full and effective participation and inclusion in society; d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; e. Equality of opportunity; f. Accessibility; g. Equality between men and women; h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

<sup>205</sup> Section 22(6).

<sup>206</sup> CRPD Article 4.3. See also Committee on the Rights of Persons with Disabilities, [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention](#), CRPD/C/GC/7 (9 November 2018).

disabled people and be committed to the principles of Article 3 of the Convention on the Rights of Persons with Disabilities.

28. The Commission recommends that the *Education for Persons with Special Educational Needs Act 2004* be revised to provide that the members appointed to the consultative forum by the National Council for Special Education shall comprise a majority of a disabled people who have required educational needs support; and these members should reflect the diversity of disabled people and Irish society. Members should be required to have experience and/or expertise in the rights of disabled people and be committed to the principles of Article 3 of the Convention on the Rights of Persons with Disabilities.

29. The Commission recommends that the *Education for Persons with Special Educational Needs Act 2004* be revised to require the Minister and the National Council for Special Education to adhere to Article 4.3 of the Convention of the Rights of Persons with Disabilities and General Comment No. 7 on the participation of persons with disabilities in the appointment process for members of the National Council for Special Education and the consultative forum.



## Impact of a non-inclusive education system

CRPD, in its preamble, highlights that the majority of disabled people live in conditions of poverty and Article 28(2) obligates States to ensure access for disabled people to poverty reduction programmes. We have previously noted the levels of poverty experienced by disabled people and called for policies in the areas of education and others as a means of tackling poverty levels.<sup>207</sup> In accessing public services, including education, there are large gaps between people with and without disabilities.<sup>208</sup> As noted by the European Commission “education creates the foundations for combating poverty and for creating fully inclusive societies.”<sup>209</sup> Given the inadequacy of education for disabled people, as demonstrated through lower levels of educational attainment<sup>210</sup> we have previously called for a model of inclusive education in line with CRPD Article 24,<sup>211</sup> which includes an obligation to provide lifelong learning.<sup>212</sup>

### Early school leavers

It has been found nationally and internationally that children with ‘special educational needs’ in childhood have higher rates of early school leaving.<sup>213</sup> The 2016 census showed that the levels of education for disabled people is substantially lower than for the total population and a more recent household survey conducted by the Economic and Social Research Institute (‘ESRI’) for the National Disability Authority (‘NDA’) has found that the number of disabled people with no qualifications beyond primary level could be close to

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<sup>207</sup> IHREC, [Disability and Discrimination in Ireland: Evidence from the ONHS Equality Modules 2004, 2010, 2014](#) (2018) p. 59.

<sup>208</sup> IHREC, [Disability and Discrimination in Ireland: Evidence from the ONHS Equality Modules 2004, 2010, 2014](#) (2018) p. 38.

<sup>209</sup> European Commission, [Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030](#) (2021) pp. 17–18.

<sup>210</sup> IHREC, [Disability and Discrimination in Ireland: Evidence from the ONHS Equality Modules 2004, 2010, 2014](#) (2018) p. 24.

<sup>211</sup> IHREC, [Ireland and the Rights of the Child: Submission to the Committee on the Rights of the Child on Ireland’s combined fifth and sixth periodic reports](#) (2022) p. 64.

<sup>212</sup> CRPD Article 24(5).

<sup>213</sup> Eamonn Carroll, Selina McCoy and Georgiana Mihut, [Exploring cumulative disadvantage in early school leaving and planned post-school pathways among those identified with special educational needs in Irish primary schools](#) (2022) Br Educ Res J. 1–18, p. 12.

50%.<sup>214</sup> Additionally, disabled people are less likely to complete third level education.<sup>215</sup> These lower rates are linked to a number of factors which include a higher likelihood of experiencing conflict in their interactions with primary care givers, having negative interactions with teachers, coming from more economically vulnerable households and attending schools with higher rates of socio-economic disadvantage.<sup>216</sup> Further, the waiting list for assessment for supports in schools for disabled children can stretch into years and has resulted in a system where families who have the resources to pay for private assessments do so, exacerbating inequality for disabled people.<sup>217</sup>

Disabled people are not always offered effective bridges to the next stage of education, further training or the labour market. A recent study on transitions for students with intellectual disabilities from post primary found that there is a lack of appropriate guidance for these students from mainstream schools and a lack of clarity on which school staff has responsibility for supporting transitions.<sup>218</sup> Further, it has been noted that having to reapply for supports at each stage of education is a huge additional burden.<sup>219</sup>

## Progress to third level

Since 2004, the education gap for at least a post-secondary education between disabled people and those without a disability has increased.<sup>220</sup> By 2019, only 39% of disabled people

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<sup>214</sup> 13.7% of disabled people aged 15-50 have completed no higher than primary level education. CSO, [Census of Population 2016 – Profile 9 Health, Disability and Carers](#). ESRI figures may be higher as they include people over 65 and educational attainment levels are much lower among older people. Brenda Gannon and Brian Nolan, [Disability and Social Inclusion in Ireland](#) (ESRI, 2019) p. 25.

<sup>215</sup> Only 37% of disabled people are third level educated compared with 53.4% of the total population. CSO, [Census of Population 2016 – Profile 9 Health, Disability and Carers](#). The ESRI estimates that only 10% of disabled people are third level educated.

<sup>216</sup> Eamonn Carroll, Selina McCoy and Georgiana Mihut, [Exploring cumulative disadvantage in early school leaving and planned post-school pathways among those identified with special educational needs in Irish primary schools](#) (2022) Br Educ Res J. 1–18, p. 12.

<sup>217</sup> Eamonn Carroll, Keyu Ye and Selina McCoy, [Educationally maintained inequality? The role of risk factors and resilience at 9, 13 and 17 in disabled young people’s post-school pathways at 20](#) (2022) Irish Educational Studies, p. 2.

<sup>218</sup> Des Aston, Joanne Banks and Michael Shevlin, [Post-School Transitions for Students with Intellectual Disabilities in the Republic of Ireland, Dublin](#) (2021) p. 9.

<sup>219</sup> Vivian Rath and Patricia McCarthy, [Ableism in Academia in Ireland: Experiences of Disabled Academics and Recommendations for the Future](#) (2021) p. 12.

<sup>220</sup> ESRI, [Identification of Skills Gaps among Persons with Disabilities and their Employment Prospects](#) (2021) p. 13.

had a post-secondary level of education compared to 57% of those without disabilities.<sup>221</sup> While there is an overall increase in undergraduate students in higher education registering with disability support services, the numbers of postgraduates registering remains very low<sup>222</sup>, with the numbers who progress to work in academia expected to be even lower.<sup>223</sup> Since the academic year 2011/2012 there has been a 52% increase in the number of disabled students per disability support service staff member.<sup>224</sup> Further, although there has been a policy emphasis on increasing the number of disabled students, there is little evident policy provision for their wider social engagement<sup>225</sup> in higher education.<sup>226</sup>

Whether disabled people enter into higher education has been found to be linked to their socio-economic status. An analysis of the Disability Access Route to Education ('DARE') scheme showed that those applying from schools other than schools on the Delivering Equality of Opportunity in Schools ('DEIS') programme (the majority of which are fee-paying) remain "somewhat more likely to be deemed eligible for DARE".<sup>227</sup> Higher education graduates continue to experience better outcomes across a range of areas and therefore continued differential access to courses by disability and socio-economic status will maintain inequality.<sup>228</sup>

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<sup>221</sup> ESRI, [Identification of Skills Gaps among Persons with Disabilities and their Employment Prospects](#) (2021) p. 13.

<sup>222</sup> Please note these figures relate to 25 higher education institutions; see Ahead, [Students with Disabilities Engaged with Support Services in Higher Education in Ireland 2020/21](#) (2022) p. 12.

<sup>223</sup> Vivian Rath and Patricia McCarthy, *Ableism in Academia in Ireland: Experiences of Disabled Academics and Recommendations for the Future* (2021) p. 6.

<sup>224</sup> Ahead, [Students with Disabilities Engaged with Support Services in Higher Education in Ireland 2020/21](#) (2022) p. 63..

<sup>225</sup> Wider social engagement involves engaging in social networks both inside and outside of class, allowing students to develop social and cultural capital, as well as fostering a sense of belonging, all of which are important to the pursuit of employment. See Vivian Rath, [The Social Engagement Experiences of Disabled Students in Higher Education in Ireland](#) (2021) p. ii.

<sup>226</sup> Eamonn Carroll, Keyu Ye and Selina McCoy, [Educationally maintained inequality? The role of risk factors and resilience at 9, 13 and 17 in disabled young people's post-school pathways at 20](#) (2022) Irish Educational Studies, p. 5.

<sup>227</sup> DARE is a third level alternative scheme for school-leavers and DEIS is a programme of support for schools deemed to be in disadvantaged areas. Eamonn Carroll, Keyu Ye and Selina McCoy, [Educationally maintained inequality? The role of risk factors and resilience at 9, 13 and 17 in disabled young people's post-school pathways at 20](#) (2022) Irish Educational Studies, p. 4.

<sup>228</sup> It is of note that the upcoming Review of the Equality Acts will introduce a socio-economic ground for discrimination. Eamonn Carroll, Keyu Ye and Selina McCoy, [Educationally maintained inequality? The role of risk factors and resilience at 9, 13 and 17 in disabled young people's post-school pathways at 20](#) (2022) Irish Educational Studies, p. 16.

## Low employment rates

The employment rates for disabled people are significantly lower than for the total population<sup>229</sup> and there may be a link between low labour market participation for disabled people and negative school experiences.<sup>230</sup> Higher education attainment levels are linked with higher employment rates.<sup>231</sup> However, Ireland's ranks poorly across the EU28 with the fourth lowest percentage of working people with a disability.<sup>232</sup> While the State's 'Comprehensive Employment Strategy for People with Disabilities'<sup>233</sup> aims to increase the number of disabled people who are employed it is important to note that this employment needs to be decent work.<sup>234</sup> The State has an obligation not only to ensure access to employment for disadvantaged groups but also to ensure just and favourable conditions of work, which include fair wages with equal pay for equal work.<sup>235</sup> Research has shown that disabled people have significantly poorer outcomes on many indicators of decent work, including discrimination in the workplace and higher rates of work-related illnesses.<sup>236</sup>

It is clear that education, at all stages, for disabled people is closely linked to the employment of disabled people and to their general life chances. Therefore, this review should be informed by how the education system can improve not only the number of disabled people who are employed but disabled people's access to decent work.

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<sup>229</sup> 51.1% of disabled men and 42.2% of disabled women aged 15-64 were in employment, compared with 78% and 65.9% respectively for the total population. CSO, [Census of Population 2016 – Profile 9 Health, Disability and Carers](#).

<sup>230</sup> IHREC, [Disability and Discrimination in Ireland: Evidence from the ONHS Equality Modules 2004, 2010, 2014](#) (2018) p. 59.

<sup>231</sup> The CSO estimates that in Ireland persons aged 25–64 with a third level qualification have an employment rate of 85% compared with a 32% employment rate for those without. CSO, [Educational Attainment Thematic Report 2021](#).

<sup>232</sup> Only 36% of working people in Ireland are disabled; ESRI, [Identification of Skills Gaps among Persons with Disabilities and their Employment Prospects](#) (2021) p.74.

<sup>233</sup> See generally Government of Ireland, [Comprehensive Employment Strategy for People with Disabilities 2015-2024](#).

<sup>234</sup> Decent work refers to jobs which confer equality of opportunity, income security, safety, security and voice to workers.

<sup>235</sup> ICESCR Articles 2 and 7.

<sup>236</sup> IHREC/ESRI, [Monitoring Decent Work in Ireland](#) (2021) pp.114, 117.

## Deprivation rates

The link between education levels and poverty is clear. The CSO have noted that education level is one of the most important individual factors in reducing risk of poverty.<sup>237</sup>

Households with a member who is a disabled person have nearly €8,000 less annual equalised income,<sup>238</sup> with the overall Cost of Disability in Ireland estimated to range from €9,482 to €11,734.<sup>239</sup> Those who are unable to work due to long-standing health problems are most at risk of poverty.<sup>240</sup> Evidence clearly shows that the rate of individuals both in consistent poverty and at risk of poverty is considerably higher for disabled people.<sup>241</sup> Given the economic inequality experienced by disabled people in Ireland, this review must consider the Cost of Disability in Ireland to ensure that disabled students access the same educational opportunities as their non-disabled peers.

**30. The Commission recommends the State address the administrative burdens faced by disabled students and their parents / caregivers having to apply for support at each stage of their education.**

**31. The Commission recommends that the State resources a research programme to identify the conditions and investment necessary for disabled learners to succeed throughout the life course and at specific transition points from early childhood learning to primary school and including all further transition points in education and lifelong learning, including into employment.**

**32. The Commission recommends that inclusive education policies address the Cost of Disability in Ireland and the related socio-economic disadvantage experienced by disabled people.**

**33. The Commission recommends that the State situate inclusive education policies in the context of other inclusive policies for disabled people, primarily social inclusion**

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<sup>237</sup> CSO, [SILC Module on the Intergenerational Transmission of Disadvantage 2019](#).

<sup>238</sup> Indecon, [The Cost of Disability in Ireland](#) (2021) p. 34.

<sup>239</sup> Indecon, [The Cost of Disability in Ireland](#) (2021) p. xvii. Households which include a disabled person report a higher financial burden for housing costs, debt repayment and medicine and report a higher level of at risk of poverty. See Indecon, [The Cost of Disability in Ireland](#) (2021) p. 44.

<sup>240</sup> CSO, [Poverty Insights – Income Reference Periods 2018 to 2020](#).

<sup>241</sup> Indecon, [The Cost of Disability in Ireland](#) (2021) pp. 46, 48.

**policies, and ensure adequate funding of third level education for all disabled people.**

## Additional factors which act as a barrier to an inclusive education system

### State approach towards the provision of services and supports

It is regrettable that there is a continuing need to vindicate human rights in the context of basic education, through the courts, with all the stress, life impact and costs involved. As noted above, the failure to commence the relevant sections of the Act has forced children and families to rely on the AON process under the *Disability Act 2005*. The AON process has been subject to criticism due to delays in the assessment process<sup>242</sup> and compatibility with human right standards.<sup>243</sup> We note the recent High Court judgment which found the HSE's 'preliminary team assessment' stage of the AON process does not comply with the *Disability Act 2005* as the assessment fails to provide a comprehensive diagnostic assessment of the nature and extent of the disability.<sup>244</sup> Further, as *amicus curiae* in the *OB* case in the Court of Appeal, we submitted that the manner in which the HSE carries out the AON is incomplete, as it determines that a person has a disability, but does not provide a diagnosis of the disability leading to difficulties accessing health and education services.<sup>245</sup>

The majority of AONs are not being completed within statutory timeframe of six months;<sup>246</sup> we note that figures from June 2022 show that only 29% of AONs, completed in 2022, were

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<sup>242</sup> Phelan J stated in the High Court that it is "uncontroverted that there has been widescale non-compliance with statutory time-limits across many regions of the country."; *C.T.M. (A Minor) Suing by his Mother and Next Friend v The Assessment Officer, The Health Service Executive*; *J.A. (A Minor) Suing by his Mother and Next Friend v The Health Service Executive* [2022] IEHC 131, para. 3.

<sup>243</sup> Ombudsman for Children's Office, [Unmet Needs: A report by the Ombudsman for Children's Office on the challenges faced by children in Ireland who require an assessment of their needs](#) (2020). See also the recent report: Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on Assessments of Need for Children](#) (February 2023).

<sup>244</sup> *C.T.M. (A Minor) Suing by his Mother and Next Friend v The Assessment Officer, The Health Service Executive*; *J.A. (A Minor) Suing by his Mother and Next Friend v The Health Service Executive* [2022] IEHC 131.

<sup>245</sup> IHREC, [Amicus Curiae Submission](#) (2022) and IHREC, [HSE's interpretation of Disability Act undermines rather than upholds disability rights](#) (press release, 15 January 2022)

<sup>246</sup> The *Disability Act 2005* and associated regulations –Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263/2007) – provide that the AON should be commenced within three months of an application and completed within a further three months. Accordingly, an AON should be completed within six months. We note comments by the Phelan J in the High Court that "the disconnection between operational realities and "the gold standard" identified in the legislation [Disability Act 2005] complained of in these proceedings is not a novel issue. Difficulties in delivering an AON in accordance with the provisions of the 2005 Act within existing operational constraints recur through the case-law."; *T.M. (A Minor) Suing by his Mother and Next Friend v The Assessment Officer, The Health Service Executive*; *J.A. (A Minor) Suing by his Mother and Next Friend v The Health Service Executive* [2022] IEHC 131, para. 63.

completed within six months.<sup>247</sup> The average duration of the assessment process per report completed is approximately 16 months.<sup>248</sup> A substantial number of AONs remain overdue for completion, with a significant number overdue for longer than three months.<sup>249</sup> A statutory remedy is available to families / caregivers,<sup>250</sup> including applying to the Circuit Court for an enforcement order to direct the HSE or education service provider<sup>251</sup> to comply with their statutory obligations concerning AONs.<sup>252</sup>

A number of children and families / caregivers have also resorted to taking Judicial Review proceedings concerning the AON process and the *Disability Act 2005*.<sup>253</sup> The failure to conduct AONs without statutory timeframes or to access an AON means that families /

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<sup>247</sup> HSE, [Management Data Report](#) (June 2022) p. 132. In 2021, only 15% of AON were completed within the statutory timeframe; HSE, [Report to the Minister of State for Disability at the Department of Health: As provided for under Section 13 of the Disability Act 2005 in respect of data collected in 2021](#) (2022) p. 8.

<sup>248</sup> HSE, [Report to the Minister of State for Disability at the Department of Health: As provided for under Section 13 of the Disability Act 2005 in respect of data collected in 2021](#) (2022) p. 8.

<sup>249</sup> At the end of Q2 2022, there were 2,531 applications overdue for completion with 1,449 of those applications overdue for longer than three months; HSE, [Response to Deputy Pauline Tully's Parliamentary Question](#) (22 July 2022). By Q3 2022, the number of applications overdue for completion was 3,494, with no data available on the number of applications overdue for longer than three months; HSE, [Response to Deputy James Browne's Parliamentary Question](#) (4 November 2022).

<sup>250</sup> See sections 14–16, 18, 20, 22 of the *Disability Act 2005*. Families / caregivers can complain to a Complaints Officer, in the first instance, or appeal, to the Disability Appeals Officer, regarding the delay in conducting an AON within the timelines or the assessment itself. Complaints Officers, and the Disability Appeals Officer can make a recommendation (Complaints Officer) / determination (Disability Appeals Officer) for the HSE or an education service provider to complete an AON within a specified period. In 2021, the HSE received 508 complaints in relation to the AON process, a decrease of 55% on 2020. 35% of the complaints were recorded as resolved within 30 working days. See HSE, [Annual Report and Financial Statements 2021](#) (2022) p. 78. We note concerns raised previously about delays in the complaints system; Ombudsman for Children's Office, [Unmet Needs: A report by the Ombudsman for Children's Office on the challenges faced by children in Ireland who require an assessment of their needs](#) (2020) p. 14. In 2021, 80% (101) of determinations (126 in total) were upheld by the Disability Appeals Officer; Office of the Disability Appeals Officer, [Annual Report 2021](#) (2022) p. 9.

<sup>251</sup> Section 7 of the *Disability Act 2005* provides that “education service” means a service provided by a recognised school or centre for education (within the meaning in each case of the Education Act 1998) or by a person or body specified by the Minister for Education and Science who provides a programme of education, training or instruction and “education service provider” shall be construed accordingly”.

<sup>252</sup> Section 22 of the *Disability Act 2005*. If the HSE or education service provider fails to implement the recommendation / determination to complete an AON (within three months of the recommendation/determination, or if the recommendation/determination specified a date to complete the AON, within three months of that date), families / caregivers can apply to the Circuit Court for an order to direct the HSE or education service provider to implement the recommendation/determination. The appeals officer can also appeal to the Circuit Court for an order to implement their determination. There have been 176 applications for an enforcement order since 2018: 8 (2018); 53 (2019); 63 (2020); 52 (2021); HSE, [Response to Deputy Mark Ward's Parliamentary Question](#) (20 July 2022).

<sup>253</sup> HSE data shows that from 2017, “approximately fifty one Judicial Review were brought seeking Orders to compel the HSE to commence/complete the Assessment of Need for a particular Applicant where there had been delays in the statutory timeframes.”; HSE, [Response to Deputy Gary Gannon's Parliamentary Question](#) (5 October 2022).



caregivers have to go through the courts to ensure their child receives an assessment of need and the required support.<sup>254</sup> We note that there may be an inequity in terms of who can access the complaints procedure / court system in order to vindicate the rights of the child, which can reinforce social advantage / disadvantage.<sup>255</sup>

While the courts have found the statutory complaints mechanism to be reasonable,<sup>256</sup> it is undoubted that the need for children and families / caregivers to go through this process lengthens the timeframe<sup>257</sup> for receiving an AON report in circumstances where early intervention is key.<sup>258</sup> We note that the HSE does not contest the enforcement orders in the Circuit Court.<sup>259</sup> The HSE have stated that no case concerning delays in the AON process has been successfully defended; instead, in cases where the delays in the AON process are evident and if there is a breach of the statutory time limits for the commencement / completion of an AON, those cases are usually not defended but compromised at the earliest date.<sup>260</sup> There is significant legal costs for the State in relation to these cases,<sup>261</sup>

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<sup>254</sup> Children's Rights Alliance, [Report Card 2022](#) (2022) pp. 88–89.

<sup>255</sup> Ombudsman for Children's Office, [Unmet Needs: A report by the Ombudsman for Children's Office on the challenges faced by children in Ireland who require an assessment of their needs](#) (2020) p. 14

<sup>256</sup> See judgement of Faherty J in *J.F. & anor -v- Health Service Executive; K.K. & anor -v- Health Service Executive* [2018] IEHC 294. See also *C.M. (A Minor) -v- The Health Service Executive*, in which Barr J stated that "I am satisfied that the complaints procedure that has been established by the Act of 2005, constitutes a reasonable and efficient means of dealing with the majority of complaints that are likely to arise in connection with an assessment of needs, or a service statement. It provides a relatively fast and cheap mechanism for having these matters resolved"; [2020] IEHC 406, para. 57.

<sup>257</sup> However, we note from reference by Barr J to a sworn affidavit of the legal representatives of the HSE in the High Court case of *C.M. (A Minor) -v- The Health Service Executive* that the "length of time it took to obtain return dates before the Circuit Court in fourteen cases that had been lodged in the period September – October 2019, wherein the average delay between issuing the motion and obtaining a return date was in or about three weeks"; [2020] IEHC 406, para. 56.

<sup>258</sup> We note that the High Court has recognised that while the statutory process is fit for purpose, it is unreasonable for a person who availed of the statutory complaints mechanism to be subject to further delay, due to the deficiencies of the complaints process, in accessing an AON when early intervention is key; Faherty J in *J.F. & anor -v- Health Service Executive; K.K. & anor -v- Health Service Executive* [2018] IEHC 294, para. 73.

<sup>259</sup> The HSE has stated that it "does not resist these enforcement orders"; HSE, [Response to Deputy Mark Ward's Parliamentary Question](#) (20 July 2022). See also comments by Gareth Noble, a solicitor practicing in the area of child rights, who has noted that in his experience when he brings cases of behalf of children and families / caregivers to the Circuit Court "the HSE never defends its positions. It concedes on the first day."; [Joint Committee on Children, Disability, Equality and Integration debate – Children's Unmet Needs: Discussion](#) (8 December 2020).

<sup>260</sup> HSE, [Response to Deputy Gary Gannon's Parliamentary Question](#) (5 October 2022).

<sup>261</sup> From 2018–2021, the State did not pay any damages/settlements to applicants in connection to enforcement orders in the Circuit Court. The average cost of a Circuit Court case is €4,000 + VAT; HSE, [Response to Deputy Pauline Tully's Parliamentary Question](#) (5 April 2022). The HSE has reported legal costs of €1,118,820 from 2018 to 2021; HSE, [Response to Deputy Mark Ward's Parliamentary Question](#) (20 July 2022). Since 3 January 2020, the State Claims Agency has paid third-party legal costs of €1,323,000 on behalf of the

which could be better directed towards resourcing the AON process in the first place.<sup>262</sup> We need to avoid placing children, families and caregivers within an adversarial system to vindicate the rights of the child when there is an adequate statutory AON process that could be appropriate and effective if resourced adequately.<sup>263</sup>

The court process is an incredibly stressful and unnecessary hardship to impose on families / caregivers only seeking to ensure their child's development. We consider that there needs to be research, including the collection and publication of data, on the experiences of children, families and caregivers interacting with the State Claims Agency ('SCA') regarding delayed AONs as the information on this interaction is sparse or not readily available. We consider that this is a significant data and evidence gap that is not consistent with human rights principles of accountability and transparency. The National Treasury Management Agency's 2021 Annual Report<sup>264</sup> on the SCA makes no reference to needs assessments and the data that is provided is not disaggregated to the degree necessary for the cases, including the experiences of families taking these claims, to be analysed. According to a Comptroller and Auditor General report, since 2012 the average time taken to finalise a clinical claim has increased by 17% to an average of just under five years.<sup>265</sup> However as this refers to all clinical claims, it is impossible discern how long delayed needs assessments claims are taking to complete. Further research is needed to ensure that the system of provision for state claims is transparent, appropriate, and efficient and does not exacerbate

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HSE in relation to the AON process; Houses of the Oireachtas, [Response of the Minister of State at the Department of Health to Deputy David Cullinane's Parliamentary Question](#) (26 April 2022).

<sup>262</sup> We note comments from Meenan J in the High Court case of *R.C. & Anor -v- Health Service Executive*, which concerns the requirement for an AON report to set out the diagnosis of the child, that it was "hard to avoid the conclusion that the resources spent in dealing with these proceedings [Judicial Review] and the earlier two [three sets of Judicial Review proceedings might have been better applied"; [2022] IEHC 652, para. 26. We also note recent comments by Meenan J after the settlement of approximately 20 AON cases that he wanted to see efforts by the State to put in a place a system or process that will help avoid or reduce the number of judicial review actions concerning the AON being taken in the first place as AON actions are invariably settled at an early stage in the proceedings: RTÉ News, [Judge welcomes settlements in assessment of needs cases](#) (25 January 2023).

<sup>263</sup> The Committee on the Rights of the Child have recommended that the State "Revise the standard operating procedure for Assessments of Need by the Health Service Executive to include diagnoses, in line with the Disability Act; and decrease the waiting time for such assessments and diagnoses, with a view to ensuring their prompt access to the necessary services and support, including by urgently addressing the shortage of staff and qualified experts": Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023) para. 29(b).

<sup>264</sup> National Treasury Management Agency, [Annual Report 2021 – State Claims Agency Extracts](#) (2022).

<sup>265</sup> Office of the Comptroller and Auditor General, [Management of the Clinical Indemnity Scheme](#) (2022) para. 20.7.

the hardship of children, families and caregivers who do not receive a needs assessment in a timely fashion and are required to pursue remedies.

**34. The Commission recommends the State undertake a modelling study<sup>266</sup> using best available, current data to quantify and then adequately resource the Assessment of Need process, under part 2 of the *Disability Act 2005*, to ensure that reports are completed within the statutory timeframes.**

**35. The Commission recommends that data provided by the State Claims Agency be disaggregated across claims to ensure the different pathways of each type of claim the Agency receives can be analysed; and that research be conducted into the experiences of children, families and caregivers who bring claims for delayed needs assessments.**

**36. The Commission recommends that the State re-evaluate its approach to the provision of disability supports and services to ensure that mediation is the preferred method of dispute resolution and as far as practicable avoid entering into litigation.**

### **Inclusive educational community**

An important aspect of providing inclusive education is developing an inclusive educational community, which identifies and pro-actively addresses the needs of students, parents / caregivers, and staff through direct engagement and consultation. This requires not just teaching, administrative and ancillary staff to develop knowledge and expertise of disabled student's educational needs but also members of boards of management, sessional teaching and support staff, transport providers and escorts.<sup>267</sup>

The DAC has raised concerns around a lack of disabled teachers and the absence of spaces in school settings for disabled students to find each other, interact and support one another. The opportunity for disabled students and their peers to be taught by a disabled

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<sup>266</sup> Modelling studies are used widely to help inform decisions about policy. A model is an analytical methodology that accounts for events over time and across populations, and is based on data drawn from primary or secondary sources. Conceptual models are pieced together to make sense of something bigger. Constructing a model of a system based on the best available evidence allows for a better understanding of what the system might look like. See [Modelling Studies](#), Journal of Health and Medical Economics; Rainer Hegselmann et al.(eds), *Modelling and simulation in the social sciences from the philosophy of science point of view* (Springer Science & Business Media, 1996).

<sup>267</sup> National Council for Special Education, [Policy Advice on Special Schools and Classes: An Inclusive Education for an Inclusive Society?](#) (2019) p. 36.

teacher is important for embracing the diversity in Irish society and ensuring it is reflected within an inclusive education system. Further, the provision of dedicated spaces or initiatives (such as clubs) for disabled students to interact with each other is critical for their inclusion within the education system.

Schools are currently mandated for their boards of management to contain two community members who ‘possess skills complementary to the Board’s skill requirements’ but this is not a legal requirement, and does not guarantee the representation of the interests of disabled children with educational needs.<sup>268</sup> As the functions of the board of management include making reasonable provision and accommodation for disabled students,<sup>269</sup> we are of the view that all board members should have a proportionate expertise on disabled student’s educational needs and supports, and ableism.<sup>270</sup> Initial and ongoing training should be provided to boards members on inclusive education. We further consider that at least one of the two community members to be appointed should be a disabled person who has required educational support. This member should be supported to participate in the activities of the board.

A central aspect of ensuring inclusive education is to ensure educational settings are accessible. This does not just mean making the building accessible but also ensuring that the streetscape and school transportation are accessible.<sup>271</sup> The education environment should be built or adapted in accordance with the principles of universal design.<sup>272</sup> The CRPD Committee have set out that States should prohibit the building of education infrastructure that is inaccessible and should “establish an efficient monitoring mechanism and time frame for rendering all existing education environments accessible.”<sup>273</sup>

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<sup>268</sup> Department of Education, [Governance Manual for Primary Schools 2019-2023](#) (2019) pp. 13, 62.

<sup>269</sup> Section 15 of the *Education Act 1998*.

<sup>270</sup> We note that the AslAm EPSSEN working group broadly agreed that school boards should have one member who represents students with special educational needs; AslAm, [Reforming the Education for Persons with Special Educational Needs Act 2004 – A Green Paper from AslAm](#) (2021) p. 19.

<sup>271</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 22.

<sup>272</sup> In line with CRPD Article 9 and CRPD Committee General Comment No. 2: Committee on the Rights of Persons with Disabilities, [General Comment No.2 – Article 9 Accessibility](#), CRPD/C/GC/2 (22 May 2014).

<sup>273</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 22.

Reasonable accommodation is of fundamental importance in creating inclusive communities as it involves moving away from generalised and prescriptive supports towards meeting the specific needs of the member of the inclusive educational community.<sup>274</sup> Under Irish law, the denial of reasonable accommodation is a form of discrimination against disabled people.<sup>275</sup> The exception to this is that currently, service providers, in this instance those providing educational facilities/services, may waive their obligation to provide reasonable accommodation if they can demonstrate that the accommodation would cause them to incur more than a 'nominal cost'. While this is a defence provided by law, the CRPD Committee has stressed that limiting the inclusion of a disabled child by alleging a disproportionate and undue burden, a threshold considerably higher than nominal cost, is prohibited by Article 24.<sup>276</sup> Families seeking reasonable accommodation must also prove that it would be otherwise impossible or unduly difficult to access education in the school, which is a clear conflict with CRPD's requirement that rights should be exercisable on an equal basis with all others.<sup>277</sup> School staff also face issues in accessing reasonable accommodation. While the burden threshold for refusal is higher, under the *Employment Equality Act 1998*, the refusal of reasonable accommodation does not amount to discrimination.<sup>278</sup> This may constitute a denial of effective remedy as required by EU law<sup>279</sup>, is in conflict with CRPD<sup>280</sup> and cannot be reconciled with the desire to develop inclusive schools and communities.

**37. The Commission recommends that all members of an inclusive educational community receive training on ableism, inclusive education and disabled student's educational needs.**

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<sup>274</sup> For more of our positions on the legal provision of reasonable accommodation see: IHREC, [Submission to the Review of the Equality Acts](#), (2021) pp. 53–56, 58–59.

<sup>275</sup> In the context of goods and services: *Equal Status Act 2000*, Section 4.

<sup>276</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 18.

<sup>277</sup> Lucy-Ann Buckley and Shivaun Quinlivan, 'Reasonable accommodation in Irish equality law: An incomplete transformation' (2021) 41(1) *Legal Studies* 17.

<sup>278</sup> *Nano Nagle v Daly* [2019] 3 IR 369, para. 82 (MacMenamin J).

<sup>279</sup> Framework Employment Directive 78/2000, Article 17; Sets out that remedies and sanctions must be effective proportionate and dissuasive.

<sup>280</sup> CRPD Article 2; expressly describes the denial of reasonable accommodation as discrimination.

38. The Commission recommends that boards of management have a least one dedicated representative for disabled students with educational needs. This board member should have access to the supports required to participate fully and effectively in the activities of the board.
39. The Commission recommends that the State and teaching colleges address the low number of disabled teachers currently working in the education system. The State should set ambitious and measurable targets for significant initial and year-on-year increases in enrolment and graduation of disabled teachers, and provide career assistance to ensure employment, retention and progression. The targets should reflect the diversity of Irish society based on Census 2022 data.
40. The Commission recommends that educational settings should ensure that there are dedicated spaces and, or initiatives for disabled children to interact with and support one another.
41. The Commission recommends that new educational settings be built in accordance with universal design principles, to facilitate the needs of disabled students.
42. The Commission recommends that the current legislative provision on the right to reasonable accommodation in the provision of services and employment is made fully compliant with the Convention on the Rights of Persons with Disability and obligations under European Union law as part of the ongoing review of the *Equality Acts*.

### Inclusive curriculum, pedagogy and assessment

Inclusion is central to a human-rights based approach to education.<sup>281</sup> To effectively realise the right to inclusive education, Ireland's national curriculum must be grounded in an understanding of diversity and relevant to the unique needs of individual students.<sup>282</sup> The

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<sup>281</sup> Inclusion is a central tenet of our Strategy Statement, which prioritises the eradication of racism, ableism and sexism. IHREC, [Strategy Statement 2022-2024](#) (2022) p. 15.

<sup>282</sup> The CRPD Committee has highlighted that inclusive education must be grounded in building educational environments in which the approach to learning, the culture of the educational institution and the curriculum itself reflect the value of diversity; Committee on the Rights of Persons with Disabilities, [General comment No. 4 \(2016\) on the right to inclusive education](#), CRPD/C/GC/4 (25 November 2016) para. 16.

European Agency for Special Needs and Inclusive Education has highlighted that inclusion and equity should not be seen as separate policies, but rather as principles that inform all national policies, with a final requirement on States to establish a single national curriculum and assessment framework that includes all students.<sup>283</sup> To support the diversity of students, there will be a need for more personalised pedagogies and for assessments to be used to adapt the curriculum and teaching approaches.<sup>284</sup> In order to ensure flexibility to meet all students' requirements, accommodations or adaptations will be needed that maintain curriculum standards and expected outcomes, but focus on processes to enable participation and improve access to learning materials.<sup>285</sup>

### National curricula and inclusion

As part of its mandate, the National Council for Curriculum and Assessment ('NCCA') advises the Minister on the curriculum and assessment for early childhood education, primary and post-primary schools, and the assessment procedures used in schools and examinations on subjects which are part of the curriculum.<sup>286</sup> Under Section 27 of the Act, the NCCA has a statutory duty to consult the NCSE prior to providing this advice.<sup>287</sup> We welcome this provision and stress the importance of prioritising the needs of all students in the design, development and review of all national curricula across all education sectors. It is equally important that the language used in successor national curricula reflects Ireland's national and international human rights obligations for the right to inclusive education.<sup>288</sup>

We note that the NCSE is given a number of statutory functions under Section 20 of the EPSEN Act, including to advise the Minister in relation to any matter relating to the

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<sup>283</sup> European Agency for Special Needs and Inclusive Education, [Agency position in inclusive education systems: Background information paper on the Second Edition](#) (2022).

<sup>284</sup> European Agency for Special Needs and Inclusive Education, [Key Principles: Supporting policy development and implementation for inclusive education](#) (2021) p. 19; European Agency for Special Needs and Inclusive Education, [Agency position on inclusive education system](#) (2022) p. 2.

<sup>285</sup> Strategic Goal 1.1: Develop curriculum and assessment advice that actively promotes and supports inclusive education enabling all young people to progress in their learning and to feel valued, motivated and fulfilled in their experience of learning. See NCCA, [Strategic Plan 2022-2025](#) (2022) p. 17

<sup>286</sup> Section 41 of the *Education Act 1998*.

<sup>287</sup> Section 27 of the EPSEN Act.

<sup>288</sup> For example, the current 1999 Primary National Curriculum, to be succeeded by the new Primary Curriculum Framework in early 2023, makes no specific reference to the right to inclusive education. See Curriculum Online, [Primary School Curriculum: Introduction](#) (1999). The Minister has indicated that the new Primary Curriculum Framework should be published in early 2023. Houses of the Oireachtas, [Dáil Éireann Debate, Tuesday - 11 October 2022: School Curriculum](#) (2022)



education of children and others with disabilities.<sup>289</sup> The NCSE has been undertaking a policy consultation on the educational provision that should be in place for disabled students with educational needs, with a view to making recommendations around the continued use of special schools and classes,<sup>290</sup> although we regret the ongoing delay in publishing such advice, noting the initial timeline of early 2022 has long since elapsed.<sup>291</sup> We further note that the NSCE Statement of Strategy 2022–2026 has yet to be finalised, with the previous Statement of Strategy expiring at the end of 2021.<sup>292</sup>

In carrying out their respective functions, the NCCA and NCSE must fulfil their positive duty under the Public Sector Duty.<sup>293</sup>

**43. The Commission recommends that the national curriculum be reviewed regarding pedagogy, content and assessment in light of Ireland’s national and international human rights obligations on the right to inclusive education, with a focus on incorporating diversity and an understanding of the unique needs of all individual learners.**

**44. The Commission recommends that when designing, developing and reviewing national curricula, the National Council for Curriculum and Assessment and the National Council for Special Education must have regard to their Public Sector Duty obligations to include equality and human rights considerations.**

**45. The Commission recommends that the National Council for Special Education publish its delayed Statement of Strategy 2022–2026 to demonstrate how it is exercising its statutory functions under the *Education for Persons with Special Educational Needs Act 2004* in line with Ireland’s international and human rights obligations.**

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<sup>289</sup> Section 20 of the EPSEN Act.

<sup>290</sup> Children’s Rights Alliance, [Report Card 2022](#) (2022) pp. 81–82

<sup>291</sup> The publication is unavailable on the NCSE website at time of submission (January 2023)

<sup>292</sup> See Strategic Goal 3.3. NCSE, [Corporate Governance Guide](#) (2022) p. 77.

<sup>293</sup> We regret that no assessment or action plan have been set out in the NCCA’s Strategic Plan 2022-2025 in line with its obligations under Section 42 of the IHREC Act 2014. See National Council for Curriculum and Assessment, [Strategic Plan 2022-2025](#).



## Irish Sign Language

Irish Sign Language ('ISL') became a recognised national language in 2020.<sup>294</sup> Achieving the implementation of the legislation and the cultural shift to realise ISL as one of our national languages will require ongoing measures.<sup>295</sup> Particular attention is required to the educational supports required for students who are Deaf and whose primary form of communication is ISL.<sup>296</sup> In March 2022, a Scheme was announced to provide in-school support for students who are Deaf and whose primary form of communication is ISL.<sup>297</sup> We welcome this initiative,<sup>298</sup> but note the need for the State to provide sufficient training, resources and supply of sign language interpreters<sup>299</sup> to fulfil obligations under CRPD Article

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<sup>294</sup> The commencement of the *Irish Sign Language Act 2017*, recognising Irish Sign Language as a native language of the State, was delayed until Act's commencement deadline of December 2020. Section 5 of the Act requires the Minister to establish a scheme to provide ISL classes for parents, siblings, grandparents, guardians and persons acting in *locus parentis* to Deaf children. The Act does not provide, however, any specific supports to Deaf parents and care givers to engage in a Deaf or hearing child's educational settings. See Department of Children, Equality, Disability, Integration and Youth, [Minister Rabbitte announces commencement of the Irish Sign Language Act 2017](#) (press release, 23 December 2020). See also Section 5 of the *Irish Sign Language Act 2017*.

<sup>295</sup> The NDA have carried out a review of the ISL Act and have found that "the ISL Act is not yet operating as intended, with significant gaps in knowledge and understanding of the responsibilities of public bodies under the Act. ... Considerable effort is required to achieve the level of ISL access envisioned when the Act was created, and needed by the ISL community"; National Disability Authority, [Report on the Operation of the Irish Sign Language Act 2017: Executive Summary](#) (December 2021, report only made publicly available in January 2023) p. 1. See also National Disability Authority, [Sign Language and the UNCRPD](#) (2022).

<sup>296</sup> The NDA have noted that there are significant gaps in the implementation of the ISL Act 2017 in education and that urgent action is required to "ensure children whose primary language is ISL are enabled to achieve to their full potential, in school and beyond." See National Disability Authority, [Report on the Operation of the Irish Sign Language Act 2017: Executive Summary](#) (December 2021) pp. 4–5.

<sup>297</sup> Under Section 5 of the ISL Act 2017, the Minister for Education is required to establish a scheme to provide ISL support for children who are attending school and whose primary language is ISL. This new scheme proposed aims to fulfil this obligation: Department of Education, [Ministers Foley and Madigan announce establishment of a scheme to provide Irish Sign Language Support for children whose primary language is Irish Sign Language \(ISL\) and who are attending recognised schools](#) (press release, 2 March 2022). See also Department of Education, [Irish Sign Language \(ISL\) Scheme](#) (2022). The NDA's report on the operation of the ISL Act 2017 was submitted before the announcement of this scheme; however, we note that in its report it recommended that the State "establish a scheme under Section 5(b) in consultation with the ISL community and informed by a proposed amendment to Section 5(b), and previously delivered NCSE advice on Section 5(b), to provide ISL support for children attending recognised schools. Amend Section 5(b) to clearly state the purpose of the scheme for children in recognised schools to include: access to ISL language development; full access to the curriculum through fluent ISL; access to peer communication; and, access to other educational supports are provided to all students, such as psychological services. See National Disability Authority, [Report on the Operation of the Irish Sign Language Act 2017](#) (December 2021) p. 51.

<sup>298</sup> IHREC, [Ireland and the Rights of the Child: Submission to the Committee on the Rights of the Child on Ireland's combined fifth and sixth periodic reports](#) (2022) p.65.

<sup>299</sup> For the Scheme to be capable of providing a quality service for deaf students and their families, it must include the appointment of deaf tutors, native ISL signers, support & supervision services, and CPD for tutors. Supports should include age-appropriate curriculum guidance, mechanisms to review and share good practices and guidance for families on the curriculum that is provided. Education for deaf and hard of hearing students

9.<sup>300</sup> Teachers and members of the educational community<sup>301</sup> should be required to attain a high level and to maintain continued professional development of ISL ability, and should be provided with training that gives them an insight into the life of a Deaf person from a cultural perspective.<sup>302</sup> In this regard, an in-depth modelling study is essential to identify the training, resources and supports required to fully implement the ISL Act for Deaf students, and parents / caregivers, which should then be published in a timely manner and in accessible formats.

Under CRPD Article 24.3, the State is required to enable Deaf persons to learn life and social development skills, to facilitate their full and equal participation in education, and to assist in promoting their linguistic identity as members of the Deaf community<sup>303</sup>. The State must take action to deliver a clear strategy to educate and train Deaf people to become teachers, and to deliver education to children through ISL, as this is an essential step in providing strong linguistic environments for Deaf students and for enhancing their development.<sup>304</sup>

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should be “accessible, targeted at the individual learner, and at the same level as that of their hearing peers”. See Irish Deaf Society, [Irish Deaf Society Education Policy Paper](#) (September 2022) pp.3–4.

<sup>300</sup> CRPD Article 9 states that State Parties are required to take appropriate measures to ensure persons with disabilities have “access on an equal basis with others” to information and communications.

<sup>301</sup> This includes not only administrative and ancillary staff, but also members of boards of management, sessional teaching and support staff, transport providers and escorts.

<sup>302</sup> Section 5 of the ISL Act 2017 determines that the Minister of Education and Skill shall determine the minimum qualifications for teachers of deaf students. This is concerning, as a failure to explicitly define appropriate sign language proficiency levels for teachers is an issue that frequently contributes to the inferior education of deaf learners. See International Journal of Inclusive Education, ‘*Intersectional Inclusion for Deaf Learners: Moving Beyond General Comment no. 4 on Article 24 of the United Nations Convention on the Rights of Persons with Disabilities*’ (2018) p. 694. We note that the NDA have recommended the State “determine the number of placements required in higher education institutions to sufficiently provide for ISL training to teachers of children who are deaf or hard of hearing, and ensure this number of placements are established” and “establish minimum qualifications for teachers of children who are deaf or hard of hearing including minimum standards of ISL competence at a level sufficient to provide children with access to the curriculum through ISL.”; see National Disability Authority, [Report on the Operation of the Irish Sign Language Act 2017](#) (December 2021) p. 51. We also note with concern that in the [Comprehensive Review of the Special Needs Assistants Scheme](#) (2018), there has been no action to date on the recommendations of setting up a separate role of ISL communicators as distant from SNAs. In addition, the concerns have been raised with us that there is an assumption included in the review report (Key Finding no. 3) that ISL communicators are only ideal for those Deaf children without cochlear implants, as children with them still need access to ISL.

<sup>303</sup> See Article 23 of the *United Nations Convention on the Rights of Persons with Disabilities*. The article goes on students should be taught in an environment that maximizes their academic and social development. See also Irish Deaf Society, [Irish Deaf Society Education Policy Paper](#) (September 2022) p. 5, where it states that mainstreams schools are not typically environments that support inclusion for deaf students. The deaf community defines inclusive education as meeting “the standard of having adequate access to and direct instruction in sign language, including instruction from deaf teachers”.

<sup>304</sup> Irish Deaf Society, [Irish Deaf Society Education Policy Paper](#) (September 2022) p. 6.

**46. The Commission recommends that Deaf persons and hard of hearing persons be included in the development and implementation of *the Irish Sign Language Act 2017* and in all policies and decision-making processes that pertain to them and their education.**

**47. The Commission recommends as matter of priority that the State undertake a comprehensive modelling exercise, which identifies the actions needed and funding required to ensure the timely provision of training, resources and supports to fully implement the *Irish Sign Language Act 2017*.**

### Expulsions, suspensions and use of reduced timetables

Through the work of our DAC, we have become concerned by reports of increased suspensions and expulsions in special schools and also of withdrawal decisions being made in schools without knowledge of the student's disability. Given the often ableist, neuro-typical nature of codes of conduct<sup>305</sup> this raises the possibility that students are being excluded on the basis of their disability which is a breach of CRPD Article 24.<sup>306</sup> The significant consequences such decisions have for disabled children<sup>307</sup> highlights the urgent need for training for and diversity of members of the educational community, including for members of boards of management.<sup>308</sup>

Reduced timetables are often the first step towards suspending or expelling students. We have repeatedly raised concerns about the use of reduced timetables for disabled students, with reports of some schools opting for reduced timetables as a response to challenging

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<sup>305</sup> "In instances where authorities respond to situations where an autistic student is exhibiting 'challenging behaviour' with disciplinary measures, this can lead to an increased further risk of exclusion." See AsIAM, [Inclusion in our Special Classes and Special Schools](#) (2020) pp. 12–13.

<sup>306</sup> CRPD Article 24 2(a), "Persons with disabilities are not excluded from the general education system on the basis of disability and that children with disabilities are not excluded from free and compulsory primary education or secondary education on the basis of their disability."

<sup>307</sup> For more on exclusion see: Murphy et al., 'Inclusive education and the law in Ireland' (2022) *International Journal of Law in Context* 1–21, p. 14.

<sup>308</sup> See comments of Adam Harris "On boards of management, one of the concerns AsIAM.ie has had for some time is that they are often asked to make significant decisions on opening autism classes, suspensions and expulsions. The role of a board of management is to oversee the activities of a principal and hold him or her to account from a governance point of view. We are concerned that very few boards of management have a representative of parents with a child with special needs or include a person with that expertise." See Houses of the Oireachtas, [Joint Committee on Education and Skills debate – Use of Reduced Timetables: Discussion \(resumed\)](#) (13 June 2019).

behaviour, particularly those from educationally disadvantaged backgrounds, when there is a lack of learning supports available, and other schools using them as a disciplinary method.<sup>309</sup> Recent research demonstrates that approximately one quarter of national schools report students being placed on reduced timetables, and that one in four disabled students have been put on shorter school days.<sup>310</sup> The inappropriate use of reduced timetables prevents access to school and impedes on the right to education.<sup>311</sup>

We note that the Department's recent Guidelines to provide information to school authorities, parents and guardians on the use of reduced timetables, and that the Guidelines further provide for data collection over the use of reduced timetables.<sup>312</sup> While we welcome this important safeguard, there is no indication that this data will be disaggregated to monitor disproportionate effects on structurally vulnerable groups<sup>313</sup>. In line with Ireland's obligations under CRC, children must have access to this information in

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<sup>309</sup> Evidence demonstrates that schools are opting for reduced timetables as a behaviour management tool with little recognition that challenging behaviour or poor emotional regulation can be an indicator that a child is experiencing toxic stress and has unmet needs. The Children's Rights Alliance has identified the need for additional educational psychologists and specialised teacher training to mitigate the excessive use of reduced timetables. As of February 2022, there were approximately 221 education psychologists supporting over 4000 primary and secondary schools across Ireland. See Children's Rights Alliance, [Report Card 2022](#) (2022) p. 63; Joint Oireachtas Committee on Education and Skills, [Interim Report on the Committee's Examination on the Current Use of Reduced Timetables](#) (2019). There is no final report by the Committee whose work ceased with the dissolution of the 32<sup>nd</sup> Dail in January 2020. See also Inclusion Ireland, [Education, Behaviour and Exclusion: The experience and impact of short school days on children with disabilities and their families in the Republic of Ireland](#) (2019). See concerns raised by IHREC in its recent parallel report to the Committee on the Rights of the Child: IHREC, [Ireland and the Rights of the Child: Submission to the Committee on the Rights of the Child on Ireland's combined fifth and sixth periodic reports](#) (2022) p. 85.

<sup>310</sup> Dymrna Devine et al., *Children's School Lives: An Introduction*, Report No.1, (University College Dublin 2020) 17.

<sup>311</sup> Children's Rights Alliance, [Report Card 2022](#) (2022) p. 64.

<sup>312</sup> The Guidelines list a set of requirements that must be met by schools before the decision to subject a child to a reduced timetable, including that reduced timetables are limited to a period of no more than six school weeks without review, require further notification to Tusla, and that a reduced school day cannot be carried forward from one academic year to the next. See Department of Education, [Guidelines for the use of Reduced School Days in Schools](#) (2021). The Committee on the Rights of the Child have recommended that the State "Ensure the effective implementation of the guidelines on the use of reduced timetables, and develop measures to address their overuse, with a view to preventing their disproportionate use on ... children with disabilities": Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023) para. 37(f).

<sup>313</sup> For the purpose of this submission, we define a structurally vulnerable person as someone who is particularly vulnerable to violations of their rights due to political, economic, social and cultural structures. Instead of focusing on the personal characteristics of individuals and groups and viewing them as lacking agency, 'structural vulnerability' refers to the structures in place which render certain sectors of the population particularly vulnerable to human rights abuse.

order to protect and vindicate their rights, particularly those that are placed on a reduced timetable.

- 48. The Commission recommends that the root causes underpinning the use of reduced timetables, notably the lack of learning supports, educational psychologists and specialised training for teachers, are addressed, including through engagement with children and their families / caregivers. The Commission recommends the State develop concrete actions, with specific timeframes for delivery, to address the root causes of the use of reduced timetables.**
- 49. The Commission recommends that schools be mandated and resourced to include disaggregated equality data, including on impairment grounds, when discharging their reporting duties on the use of reduced timetables to Tusla.**
- 50. The Commission recommends that the Department of Education publish an accessible, child-friendly version of the Guidelines for the Use of Reduced School Days in Schools to ensure that children are aware of their rights in relation to their education and the use of reduced timetables, and are able to better participate in decision-making processes affecting their lives.**

## Use of restraint and seclusion practices

The use of seclusion and restraint practices<sup>314</sup> in schools affects disabled students in Ireland.<sup>315</sup> This is particularly concerning given the lack of updated figures on its use in

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<sup>314</sup> While there is no definition for restraint provided in statute for an education environment, it is defined in the context of residential care as “the use of trained staff to hold a child to hold a child or young person to restrict their movement in order to prevent serious harm. See Special Residential Services Board, [Best Practice Guidelines in Use of Physical Restraint](#) (2005) p. 1; In terms of seclusion, it has been defined as “confining student alone in an enclosed space in which the student is prevented from leaving”. See Disability Rights North Carolina, [Seclusion and Restraint in Schools](#) (May 2021).

<sup>315</sup> In 2018, a report was published highlighting the experiences of fourteen families who shared stories of children being held face down; left in seclusion every day for up to one year; left unattended in dark rooms without handles and locked into a toilet. See Inclusion Ireland, [Shining a Light on Seclusion and Restraint in Schools in Ireland: The Experience of Children with Disabilities and their Families](#) (2018). International research suggests far higher rates of disabled children affected by seclusion and restraint than any other group. A recent study in the US found that in schools with reported use of restraint or seclusion at least 10 times, disabled students were 200% more likely to be subject to restraint or seclusion relative to their peers. See Bollmer et al., ‘Methods for assessing racial/ethnic disproportionality in special education: a technical assistance guide’ (rev. ed., 2014). Restraint and seclusion also damage therapeutic relationships, re-traumatise people who have a history of trauma or abuse, and can cause fear and loss of dignity. See Mental Health

schools,<sup>316</sup> and that these practices have been further attributed to the absence of specialised training for teachers working with disabled students with educational needs.<sup>317</sup> We note that the Department's long-awaited guidelines on the prevention and management of challenging behaviours have yet to be published.<sup>318</sup>

While limited research exists in the Irish context, evidence has identified an array of instances in which seclusion and restraint practices by teachers in educational environments has had damaging effects on disabled students, with specific concerns raised over the number of schools threatening suspension, expulsion and the withdrawal of services from structurally vulnerable families if parental / guardian consent is not provided for these practices.<sup>319</sup> International research highlights that even in instances where children are not found to have incurred physical injuries from the use of seclusion and restraint, there exists a risk of traumatisation and re-traumatisation during and after these practices.<sup>320</sup>

Given the absence of comprehensive data over the use of restraint and seclusion, it is imperative that the Department undertake immediate research on the use of seclusion and

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Commission, [Annual Report 2017](#) (2018) p. 54. The practice of secluding and restraining children was historically thought to be an effective measure to deter children from harming themselves. Despite there now being evidence to the contrary, there are still alarmingly high rates of their use today. Even in instances where children aren't found to have incurred physical injuries, they "are at risk of traumatization and re-traumatization during and after the use of seclusion and restraint". See COPAA, [Trauma-Informed Care: Child Safety Without Seclusion and Restraint](#) (2015).

<sup>316</sup> There is no recorded data in Ireland detailing the use of seclusion and restraint. At present, schools are not legally required to record or report when these restrictive practices are used, nor is there any independent oversight or monitoring mechanism. This is in contrast to the legislative basis governing the use of restraint and seclusion in approved centres under the *Mental Health Act 2001*. See Inclusion Ireland, [Shining a Light on Seclusion and Restraint in Schools in Ireland: The Experience of Children with Disabilities and their Families](#) (2018) pp. 10–14.

<sup>317</sup> Houses of the Oireachtas, [Joint Committee on Education and Skills: Interim Report on the Committee's Examination on the Current Use of Reduced Timetables](#) (2019) p. 5. No final report was published as the Joint Committee ceased its work with the dissolution of the 32<sup>nd</sup> Dail in January 2020.

<sup>318</sup> In 2018, the NCSE called for the immediate preparation and publication of guidance for schools on the management of extreme challenging behaviours and restrictive practices. The NCSE has previously called for such guidelines in 2012 and 2016; see National Council for Special Education, [Comprehensive Review of the Special Needs Assistant Scheme: A New School Inclusion Model to Deliver the Right Supports at the Right Time to Students with Additional Care Needs](#) (2018) pp. 52–53; IHREC, [Comments on Ireland's 16th National Report on the implementation of the European Social Charter](#) (May 2019) p. 37. In October 2022, Josepha Madigan TD, Minister of State at the Department of Education, noted that, following a consultation process, a final draft of the guidelines are being considered by the Department: Houses of the Oireachtas, [Response to a Parliamentary Question on Special Educational Needs](#) (18 October 2022).

<sup>319</sup> See Autistic Rights Together, [Statement on the Continued Use of Physical Restraint Systems and Seclusion in Irish Special Needs Schools](#) (2015).

<sup>320</sup> See COPAA, [Trauma-Informed Care: Child Safety Without Seclusion and Restraint](#) (2015).

restraint in schools, and that this research is informed by a human-rights based and participatory approach. Such practices can amount to indirect discrimination as they impede a child's right to inclusive education,<sup>321</sup> particularly where they are used as a result of an unreasonable requirement or condition that disadvantages the child because of his or her disability.<sup>322</sup>

We note that the UN Committee on the Rights of the Child has recommended that: "the State "Explicitly prohibit the use of restraint and seclusion in educational settings".<sup>323</sup>

**51. The Commission recommends that the Department of Education publish without any further delay its guidance on the use of seclusion and restraint practices.**

**52. The Commission recommends that the State collects, uses and publishes quality, accessible data in a timely manner on the rates and character of seclusion and restraint of disabled students in education settings; and commissions and publishes independent research into the use of such seclusion and restraint practices.**

**53. The Commission recommends that the State undertake a review of the impacts of restrictive measures, including seclusion and restraint, on disabled students and the right to inclusive education. This review should be carried out by a human rights specialist with expertise in disability and children.**

**54. The Commission recommends that the State ensure the provision of specialised training to teachers and other members of the educational community working with students with educational needs to tackle the use of seclusion and restraint measures on disabled students in schools.**

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<sup>321</sup> Section 7 (2) of the *Equal Status Acts* states "an education establishment shall not discriminate in relation to the enrolment or access of a student to a school or a course, place terms or conditions on the participation of students or in the application of sanctions (including expulsion) which may restrict a student's participation in education".

<sup>322</sup> See Inclusion Ireland, [Shining a Light on Seclusion and Restraint in Schools in Ireland: The Experience of Children with Disabilities and their Families](#) (2018).

<sup>323</sup> [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023) para. 37(h)



**55. The Commission recommends that the State address the UN Committee on the Rights of the Children’s Concluding Observation that the State: “Explicitly prohibit the use of restraint and seclusion in educational settings.”**

## **Mental health services**

We have serious concerns about the significant lack of appropriate children’s mental health services in Ireland, which may be a significant barrier to disabled students benefiting from an inclusive education. As of September 2022, 3,800 children were on the waiting list for Child and Adolescent Mental Health Services (‘CAMHS’).<sup>324</sup> We note the publication of the national mental health policy ‘Sharing the Vision’ in 2020.<sup>325</sup> However, mental health services for children continue to be wholly inadequate,<sup>326</sup> with available funding insufficient

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<sup>324</sup> Across a sample of clinical files, the Mental Health Commission found that 4% children were waiting for over 12 months for an assessment appointment and 28% were waiting for more than 3 months; see Mental Health Commission, [Independent Review of the provision of Child and Adolescent Mental Health Services \(CAMHS\) in the State by the Inspector of Mental Health Services Interim Report](#) (January 2023) pp. 4, 16. The Mental Health Commission reported that the total number of admissions of young people to approved inpatient mental health service centres in 2021 was 504. This compares with a total of 486 admissions in 2020 and 497 in 2019. See Mental Health Commission, [Annual Report 2021](#) (2022) p. 32.

<sup>325</sup> Department of Health, [Sharing the Vision: A Mental Health Policy for Everyone](#) (2020). We note that the Department of Health has launched the [Sharing the Vision Implementation Plan 2022-2024](#) as of March 2022. We emphasise the repeated failure to implement mental health policies in Ireland. A Vision for Change was first launched in 2006 and was marked by incomplete and uneven implementation: see [Mental Health Reform submission on review of A Vision for Change](#) (2017), p. 3. In Mental Health Reform’s [Pre-Budget 2022 Submission](#) (2021), they note that they want to see a clear focus on the implementation of Sharing the Vision, as implementation of policy commitments has progressed slowly to date. Concerns have also been raised about deficits in the availability of key mental health staff across the health service, which could act as a barrier to implementation: see National Implementation and Monitoring Committee Steering Committee Quarterly Report Analysis, [Sharing the Vision Implementation Status Report: Quarter 3](#) (2022).

<sup>326</sup> Note that in the Children’s Rights Alliance, [Report Card](#) (2022) p. 110, Ireland received an ‘E’ Grade in relation to Children in Adult Psychiatric Facilities, identifying a number of issues in relation to CAMHS such as long waiting lists for treatment, poor investment and workforce recruitment, and retention issues. The Mental Health Commission’s [Annual Report 2021](#) (2022) found that there were 32 children admitted to nine adult units in 2021. All of the 10 services inspected on the admission of children to adult services in 2021 were found to be non-compliant with the code of practice. Reasons for non-compliance included services not providing age-appropriate facilities and a programme of activities appropriate to age and ability.



to meet current needs,<sup>327</sup> and gaps in care between private and publicly funded services.<sup>328</sup> Our concerns have been further exacerbated by the recent findings from the South Kerry CAMHS review<sup>329</sup> and the Inspector of Mental Health Services interim report on CAMHS.<sup>330</sup> The CRC Committee have called for the State to significantly increase resources for mental health services, ensure regular follow-up of children in treatment and explicitly prohibit the practice of placing children with mental health issues in adult psychiatric units.<sup>331</sup> The CRC Committee also previously called on the State to consider establishing a mental health advocacy and information service that is specifically for children, and accordingly accessible and child-friendly.<sup>332</sup>

The pandemic has had a negative impact on children's mental health and their access to services,<sup>333</sup> with problems such as depression, anxiety and social isolation worsening due to Covid-19 restrictions.<sup>334</sup> Studies have found that large percentages of disabled children have

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<sup>327</sup> In 2021, Ireland's national mental health budget represented only 5.1% of the total health budget, despite Sláintecare's target of ring fencing 'at least 10% of the health budget to mental health': See Committee on the Future of Healthcare, '[Sláintecare Report](#)' (2017), p. 142. See generally, Mental Health Reform, [Pre-Budget Submission 2022](#) (2021). We note that in July 2022 additional funding has been allocated for mental health services for women and girls: Department of Health, [Ministers Donnelly and Butler announce additional €1.9m in funding for women's mental health services through the Women's Health Fund](#) (press release, 15 July 2022). We note that the overall percentage of the health budget spent on mental health decreased in Budget 2023.

<sup>328</sup> Mental Health Commission, [Annual Report 2021](#) (2022).

<sup>329</sup> HSE, [Report on the look-back review into child and adolescent mental health services county MHS area A](#) (2022). This Report found that a doctor caused significant harm to children he had treated by prescribing them inappropriate medication. The CRC Committee has previously cautioned against over-medicalisation and institutionalisation. See Committee on the Rights of the Child, [General comment No. 15 \(2013\) on the right of the child to the enjoyment of the highest attainable standard of health \(art. 24\)](#), CRC/C/GC/15 (2013), para. 38.

<sup>330</sup> Mental Health Commission, [Independent Review of the provision of Child and Adolescent Mental Health Services \(CAMHS\) in the State by the Inspector of Mental Health Services Interim Report](#) (January 2023).

<sup>331</sup> Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6 (7 February 2023) para. 32.

<sup>332</sup> Committee on the Rights of the Child, [Concluding observations on the combined third and fourth periodic reports of Ireland](#), CRC/C/IRL/CO/3-4 (2016) para. 54(c).

<sup>333</sup> See Chapter 2 of Professor Conor O'Mahony, [Fourteenth Report of the Special Rapporteur on Child Protection](#) (2022). See also Katriona O'Sullivan et al., [A Qualitative Study of Child and Adolescent Mental Health during the COVID-19 Pandemic in Ireland](#) (2021) 18 International Journal of Environmental Research and Public Health 1062; and YoungMinds, [Coronavirus: Impact on young people with mental health needs](#) (Survey 4: February 2021).

<sup>334</sup> The Growing Up in Ireland study reported in March 2021 that one in five 12 year olds scored in the low mood range: ESRI, [Growing Up in Ireland: Key findings from the special COVID-19 survey of Cohorts '98 and '08](#) (2021), p. 6. Mental Health Reform has published a number of recommendations in relation to mental health and Covid-19, noting a need for adequate resourcing to ensure high quality mental health services, increased staffing, ensure timely access to mental health services and supports, and deliver legislation that protects mental health, human rights and public health: See Mental Health Reform, [Mental Health and Covid-19: The Opportunity to Resource, Rebuild, and Reform Ireland's Mental Health System](#) (2021) pp. 12-14.

seen their mental health deteriorate<sup>335</sup> as a result of the pandemic, and that it has had damaging consequences for those who require consistency and routine.<sup>336</sup> There have also been many documented incidences of disabled students' behaviours and social skills having regressed as a result of Covid-19 restrictions.<sup>337</sup>

**56. The Commission recommends that the State urgently address the mental health needs of children in Ireland, through full implementation of national policies to improve the capacity and quality of services,<sup>338</sup> increased funding provision and by responding to emerging needs due to the impact of the pandemic.**

**57. The Commission recommends that the State should explicitly prohibit children from being admitted to an adult approved inpatient facility.<sup>339</sup>**

**58. The Commission recommends that the State establish an accessible and independent child specific mental health advocacy and information service.**

**59. The Commission recommends that those working with children within mental health services, in particular children from structurally vulnerable groups,<sup>340</sup> should receive adequate training, underpinned by the principles of both the Convention on the Rights of Persons with Disabilities and Convention on the Rights of the Child.**

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<sup>335</sup> 40% of parents with disabled children have described witnessing their children's behaviour and mental health deteriorate as a result of the pandemic. See European Agency for Special Needs and Inclusive Education, [Inclusive Education and the Pandemic – Aiming for Resilience](#) (2022) p. 46.

<sup>336</sup> 76.5% of disabled children have seen their routine severely affected, which can be harmful for those within the autism spectrum disorder community for whom maintaining routine is especially important. See Ayse Yesil, Buse Sencan, Emel Omercioglu, and Elif Ozmert, [The Impact of the COVID-19 Pandemic on Children With Special Needs: A Descriptive Study](#) (2022).

<sup>337</sup> See generally IHREC, [The Impact of COVID-19 on People with Disabilities](#) (2020)

<sup>338</sup> We note that the Mental Health Commission, in collaboration with the Health Information and Quality Authority, is developing National Standards for the Care and Support of Children using Health and Social Care Services. These will be the first such standards developed in Ireland to apply to both health and social care settings and will be published in 2022, following Ministerial approval. See Mental Health Commission, [Annual Report 2021](#) (2022) p. 36.

<sup>339</sup> This could be provided for through the *Mental Health (Amendment) Bill*.

<sup>340</sup> We note that Autistic people have been excluded from a nationwide CAMHS Audit: [AslAm Calls on Minister for Mental Health to Include all Autistic People in Nationwide CAMHS Audit](#) (press release, 19 July 2022).

## Impact of the pandemic

The State is obliged under CRPD to ensure the protection and safety of disabled persons in situations of risk.<sup>341</sup> While the pandemic has had a disruptive impact on all those in education<sup>342</sup>, it has disproportionately affected disabled students,<sup>343</sup> with many students unable to access requisite supports and assistive technologies.<sup>344</sup> The pandemic has reinforced the existing digital divide in Ireland,<sup>345</sup> with research revealing that a gap in access to ICT was a salient issue for schools in implementing distance learning.<sup>346</sup> Research highlights that access to information and communications technology,<sup>347</sup> high-speed internet,<sup>348</sup> and basic digital skills<sup>349</sup> are unequal among children in Ireland, particularly children with intellectual disabilities.<sup>350</sup> Some disabled children also face barriers in finding

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<sup>341</sup> CRPD Article 11. We have prioritised future-proofing in our Strategic Priorities to respond to crises that threaten rights, to provide equality and human rights assistance to those most affected, and to identify protective measures to forestall equality and human rights abuses in the event of future crises. See IHREC, [Strategy Statement 2022–2024](#) (2022) p. 17.

<sup>342</sup> Inclusion Ireland’s survey of 733 parents found there are huge barriers to educating at home for parents, identifying issues of access to educational materials, technology and broadband; inconsistent supports from schools; and an absence of State education support for working parents. With many students unable to access requisite supports and assistive technologies. See Inclusion Ireland, [The Implications of COVID-19 on the Education of Pupils with Intellectual Disabilities and Autism](#) (2020).

<sup>343</sup> See IHREC, [Submission to the Oireachtas Joint Committee on Justice, COVID-19 and Civil Liberties](#) (2021); IHREC, [Ireland and the Rights of the Child: Submission to the Committee on the Rights of the Child on Ireland’s combined fifth and sixth periodic reports](#) (2022).

<sup>344</sup> See IHREC, [Submission to the Oireachtas Special Committee on COVID-19 Response:: the Impact of COVID-19 on People with Disabilities](#) (2020) p. 10.

<sup>345</sup> “The gap between individuals, households, businesses and geographic areas at different socioeconomic levels with regard to both their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities”; OECD, [Understanding the Digital Divide](#) (2001), p. 5.

<sup>346</sup> See ESRI, [Learning for all? Second-Level Education in Ireland during Covid-19](#) (June 2020) pp. 19-21, 32-33.

<sup>347</sup> 72% of youth workers observed a lack of digital access among young people, affecting provision of mental health, arts, extra-curricular, and other youth services. See National Youth Council of Ireland, [Youth Work and Covid-19](#) (2021) p. 5. 2018 PISA data suggests that for those from the bottom quartile of the socio-economic distribution, only 73% of students reported having a computer they could use for schoolwork at home, lower than the OECD average of 78%. See OECD, [Ireland Country Note](#) (2020) p. 4.

<sup>348</sup> In 2019, 23% of Irish premises did not have high-speed broadband. See ESRI, [Learning for all? Second-level education in Ireland during the COVID-19 pandemic](#) (2020) p. 3.

<sup>349</sup> The EU Commission’s annual Digital Economy and Society Index in 2020 ranked Ireland 18th of the 28 EU States for the percentage of individuals with at least basic digital skills. See Accenture, [Bridging the Gap – Ireland’s Digital Divide](#) (2020) p. 13. 57% of individuals in ‘two-adult & dependent children’ households have used word-processing recently, compared to 44% of one parent families. See National Economic and Social Council, [Digital Inclusion in Ireland: Connectivity, Devices & Skills](#) (2021) p. 15.

<sup>350</sup> In May 2020, a survey of 1,064 parents of children with intellectual disabilities showed that 11% had no access to any technology at all for schoolwork, and 45% did not have high-speed broadband. See National Economic and Social Council, [Digital Inclusion in Ireland: Connectivity, Devices & Skills](#) (2021) p. 19.

accessible devices, software and online services<sup>351</sup> that cater to their individual needs.<sup>352</sup> In line with Ireland’s obligations under CRPD and CRC<sup>353</sup>, the State must take active steps to ensure that sufficient supports, including assistive devices, applications and software, are made available to disabled students to help bridge this digital divide and to ensure that disabled students are able to realise their right to education<sup>354</sup>. There is a need to take account of the impairment of the student and any intersecting ground – such as socio-economic status, race, nationality, ethnicity and living in a rural location – in the provision of supports such as assistive technologies to ensure equitable access.

**60. The Commission recommends that the State researches the impact of the pandemic on disabled students and invests in a programme of mitigation measures that are designed with the active involvement of disabled students, their families / caregivers, and experts in inclusive education.**

**61. The Commission recommends that the State conducts sufficient future-proofing measures to ensure that it can respond pre-emptively to crises that can disproportionately affect disabled students.**

**62. The Commission recommends that the State should ensure the adequate provision of assistive devices and reasonable accommodation, where there is a need for such intervention.**

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<sup>351</sup> If an inaccessible online platform is being used for teaching purposes, an alternative should be sourced to ensure inclusion and equity within the educational environment. Centralised advice and standard requirements on providing online services to groups with varying abilities would be an assistive tool for education providers who wish to adopt an online platform into their teaching. See NESC, [Digital Inclusion in Ireland: Connectivity, Devices & Skills](#) (June 2021) pp. 3, 16.

<sup>352</sup> Recent research highlights that the most reported barriers to accessing assistive digital technologies for persons with intellectual disabilities were related to lack of funding and cost, lack of awareness, and inadequate assessment. See Boot et al., Access to assistive technology for people with intellectual disabilities: a systematic review to identify barriers and facilitators (2018) *Journal of Intellectual Disability Research*, 62 (10), p. 900.

<sup>353</sup> CRPD Article 24.2 and CRC Article 28.1 (b).

<sup>354</sup> Disabled children have the same right to education as all other children and shall enjoy this right without any discrimination and on the basis of equal opportunity, see CRC Article 28. For this purpose, “effective access of children with disabilities to education has to be ensured”, even if there is a need for modification to school practices, see Committee on the Rights of the Child, [General Comment No. 9: The rights of children with disabilities](#), CRC/C/GC/9 (27 February 2007) para. 62.





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