



The Ombudsman for Children's Office submission to the Department of Education and Skills with respect to its Discussion Paper on a Regulatory Framework for School Enrolment.

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Ombudsman for Children's Office

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Introduction

The Ombudsman for Children's core statutory functions are set out in the Ombudsman for Children Act, 2002. They include the traditional ombuds-role to investigate complaints in relation to the actions of public bodies that have or may have adversely affected a child or group of children. In carrying out this function, the OCO is required by the 2002 Act to be both independent and impartial. In addition to investigating complaints made by or on behalf of children, the Ombudsman for Children can initiate investigations of her own volition. In the context of investigating complaints, the Office must have regard to the best interests of the child and is obliged to give consideration to the wishes of a child in so far as is practicable and in accordance with the age and understanding of the child.

In addition to its role to investigate complaints, the OCO has a broad and versatile statutory remit to promote the rights and welfare of children, without prejudice. Provided for under Section 7 of the 2002 Act, the Office's obligations in this regard include:

- encouraging public bodies to develop policies, practices and procedures that promote children's rights;
- giving advice at Ministerial level on legislative and public policy developments relating to the rights and welfare of children;
- consulting with children and highlighting issues relating to their rights and welfare that are of concern to children themselves; *and*
- raising awareness of matters relating to the rights and welfare of children, including the principles and provisions of the UN Convention on the Rights of the Child.

The Ombudsman for Children welcomes the opportunity to provide a submission to the Department of Education and Skills on this extremely important issue affecting the every day lives of thousands of children throughout the country.

The choice of school and the manner in which those decisions are made is an issue of great importance for children in this country. We hope to inform the discussion and contribute effectively to the development of future policy in this area.

Having considered the Department's discussion paper on the matter, we make the following initial comment by way of informing and influencing the overall consideration of the issues.

- To be fully effective a new policy would need to be closely allied to a good complaints handling policy & culture in schools; the Ombudsman for Children's long-standing public calls for decisive action in this area are well recorded (most recently in her 2010 Annual Report);
- Reference is made throughout the paper to the option of setting out in regulation the selection criteria to be applied in particular circumstances. We believe that this has the potential to underpin the fairness and transparency of the process, as well as enhancing the quality of decision-making and providing a common basis for explaining the rationale for refusals to parents and children; and
- We echo the sentiment evident in the paper concerning the importance of local decision making, meaningful appeals mechanisms, and external capacity to intervene in the interests of children. Similarly, we note reference to a possible requirement to undertake some level of consultation with the local school community on the matter of admissions policy.

In simple terms it is our view that any policy or legislative outcomes regarding discussion on enrolment should seek to:

- address the issues of fairness and equality;
- be clearly communicated to those involved; and
- be guided by consideration of the best interest of the child.

It is clear from the submission process that all other stakeholders and bodies have been given an opportunity to inform the discussion on the various roles, responsibilities and issues that exist in relation to school enrolment. We have based our submission on the work of our Office having regard to our obligations and powers under our primary legislation, the Ombudsman for Children Act, 2002, and our experience to date.

The approach of this Office

Since the establishment of this Office in 2004, we have received thousands of complaints from children or adults on their behalf in relation to the administrative actions of schools, public bodies and hospitals.

The basic function of the Ombudsman for Children is to provide a free, independent, complaints handling forum which is a viable and expedient alternative to court litigation or otherwise. It is also a natural consequence of the role that we have in promoting better administrative practice amongst public bodies, that parents and children contacting us often detail their experiences regarding the clarity, communication and the basic ease of access to redress mechanisms when they have a cause of concern.

To that end, the Ombudsman for Children's Office is always keenly interested and proactive in ensuring that important issues affecting the lives of children and their families have an appropriate forum which advocates may access on their behalf. If we are unable to intervene directly, we generally try to redirect those contacting us to more appropriate redress mechanisms if possible.

In light of the express exclusions in the 2002 Act, we have closely monitored and observed the most recent jurisprudence and developments in relation to the role and remit of the Section 29 Appeals Committee and the Department of Education and Skills in relation to same.

OCO Investigative Remit

In accordance with the Ombudsman for Children Act 2002, this Office provides an independent and impartial complaints handling service. Under Section 8 and 9 of this Act, this Office can investigate complaints relating to the administrative actions of a public body, school or hospital where it appears that the action complained of has, or may have, adversely affected a child. When carrying out its complaints and investigations function, this Office is neither an advocate for the child nor an adversary to the public body complained about.

Schools

Our investigative role is quite specific when it comes to addressing the types of school complaint we may look at. Under Section 9 of our Act, the Ombudsman for Children may investigate any action by or on behalf of a school in connection with the performance of its functions under Section 9 of the Education Act 1998. That includes the function to

establish and maintain an admissions policy which provides for maximum accessibility to the school.

Department of Education and Skills

This Office may investigate the administrative actions of the Department where it appears that those actions may have had an adverse effect on that child. Our intervention can occur in response to a complaint received or on our own volition having regard to the circumstances. Our investigative remit is exercised in accordance with the criteria as set out in the provisions of the Act. There is however a number of administrative actions and bodies which our primary legislation expressly states we may not investigate.

Schedule 1 of the 2002 Act expressly sets out the public bodies which are subject to investigation. This list includes the Department. At Part 2 of that schedule, it is stated that the reference to the Department does not include a reference to an appeals committee within the meaning of Section 29 of the Education Act 1998.

Experience of the Ombudsman for Children's Office

Notwithstanding the express provisions in our Act, we have steadily received complaints, totaling over 100 since 2004 into the issue of how school enrolment policies are devised and implemented and the actions of the Department of Education and Skills and individual schools in relation to same.

The issue of enrolment in school is, for the majority of parents/guardians and children an event that occurs as per expectation on understanding of the school admissions or enrolment policy in place. That is not to say, that each desired school place is met in each instance, rather the process which occurs is understood and families are reasonably able to make informed choices about the schools that they wish to attend with respect to ethos of the school, supports available etc. It may also help to inform decisions about where they choose to live.

While this Office may have a role in examining policies and procedures adopted by schools, we are not in a position to adjudicate upon the decisions made in accordance or otherwise with a school's policy and direct that a school provide a place to a child. It is our understanding that only the Department of Education and Skills which can make that determination should such a course of action be warranted.

In the first instance, the Ombudsman for Children's Office will attempt to determine if the matter can be resolved locally through internal complaints or grievance procedures or alternative dispute resolution. Therefore, we would not intervene in the determination of complaints where there was an established redress mechanism in place through complaint to the individual Board of Management and a possible Section 29 appeal if required.

Such a position also makes sense having regard to the capacity of the Office and the sheer volume of potential complaints to be received and the acute nature of the time scales involved. As a result, it is not our practice to directly intervene in every complaint received that pertains to enrolment; rather we advise on the local redress available and promote the early resolution of same.

Emerging issues

There are occasions when the complaint received highlights an issue of concern that needs to be addressed through investigation or by highlighting the issue directly with the public body involved.

From our experience to-date, a number of issues are emerging from our complaints work that should inform any discussion on how future enrolment policy, practice and monitoring should develop. Where appropriate, details of complaints received and considered by the Office have been included in an effort to best illustrate those same issues.

Issue 1 Transparency and fairness of Section 29 Appeals process

In her Annual Report of 2010, the Ombudsman for Children highlighted the issue that a lack of clarity of rationale provided with respect to decisions which are made can sometimes add frustration and mistrust to the negative impact of the decision itself. Conversely, it also may serve to detract from a decision which may have been made on perfectly legitimate grounds in full compliance with policy.

An example of the former may be seen through a complaint received regarding the administrative actions of a school and the subsequent manner in which the appeal decisions were made by the Section 29 appeal committees. In the case concerned, the circumstances facing the parents(Family A) were similar to that of another family (Family B) who were seeking a place for their children in the same secondary school, which was over subscribed for that year. Unsuccessful in their Section 29 appeal which had concluded, Family A offered their help by way of sharing the submission documentation they used to Family B who were also appealing the school's decision under Section 29. According to Family A, what happened next only served to exacerbate the feeling of inequity and unfairness in the system. They became aware that a point of procedure raised and relied upon in their own unsuccessful submission was a key element identified by the Section 29 Appeals Committee in upholding Family B's appeal, which resulted in their child obtaining a place in the school. Family A contends that the appeal submissions were made on the same grounds but were determined by two different committees.

It is important to state that the issue of complaint for the complainants was not the awarding of a placement in school to another child, nor did they seek to disentitle any successful child in those circumstances. Their concern rested with their subsequent inability to obtain clear guidance or detail from the Department with respect to the operation of the Section 29 Committees or how they are instructed to adjudicate uniformly and fairly upon school enrolment policies and decisions. Family A mitigated their circumstances at the earliest possible juncture and their child now attends a different school.

This Office is of the view that the issues raised in this case with respect to the transparency and fairness of an appeals structure in place is an issue that should be considered in any constructive discussion on enrolment both in respect to the perception of decisions which occur and the actual application of same.

Issue 2 Children in Care

This Office received a complaint regarding the difficulties faced by the HSE and the various professional advocates acting on behalf of a child in care in seeking enrolment in a number of local schools.

This Office is aware that it is not uncommon for a parent to seek to enroll their child in a number of schools in an effort to ensure that a place is obtained that facilitates all (or as much as possible) of their choice criteria. In some cases, the child proceeds to their school of choice as matter of course and extra concurrent applications are not needed. In other cases based, on known numbers and demand on school places, it has almost become instilled as perceived wisdom to do so.

For children in care the HSE fulfils the role of parent. In this instance, a statutory obligation was placed on the HSE who had to address the immediate and long term care needs and also engage with the relevant authorities to obtain a school place for the child.

In the case concerned, over twenty schools had refused enrolment based on their admissions policy. There were also multiple appeals initiated through the Section 29 process. Eventually a school place was obtained but not until a substantial amount of the school year had passed. Our Office's approach was not to examine the action of each school, rather it is to seek how advocates working on behalf of the child, including those within the HSE, may be assisted in their efforts to access education placement for children in their care in a timely and efficient manner that considers the best interests of the child.

A crucial dimension to the Office's investigation was the need to understand how a system of redress which may only ever be invoked in a small number of cases may also address the difficulties and concerns of an even smaller number of children in care. This Office is of the view that the highlights for attention how children who may be in a vulnerable position due to their care status, or their particular educational needs are facilitated in the system in seeking a school placement.

Issue 3 Children with Special Needs

Last year this Office received and dealt with over 1200 complaints in total. A large proportion of these, approximately 35 % are brought on behalf of children with special needs. Issues facing families in those circumstances with respect to their interaction with public bodies and services fall within the general categories of health and education. As a result of the geographic variation which exists with respect to therapeutic supports and resources which may be available publicly or otherwise, access to and the choice of school in those circumstances is often the most important decision facing families in those circumstances.

This Office is of the view that the approach to be taken by public bodies in addressing those policy decisions and actions should have the best interests of the child as the paramount consideration.

It is a simple fact that not all schools are the same and that choices on which school to attend are actively made on those differences. There will always be a need for a degree of choice to allow those decisions to be freely made. For some families of children with special educational needs that decision to be made is of paramount importance and ideally, most likely has been planned for years in advance in conjunction with the relevant professional helping families and children with that choice and eventual transition.

This Office is acutely aware of the current economic climate and the resultant policy and resource decisions being made will become an increasing factor for such families seeking to enrol their children in school. For those families, issues such as transport, special equipment, special resources teachers/ classes and the availability of special needs assistants, along with the local supports which may be available through the HSE or elsewhere, will play an ever increasing role in the choice that is made. It is unclear to this Office how the impact of such resource decisions will be felt within that system both on a short and long term basis. It is the aim of this Office to encourage public bodies making decisions on behalf of children to ensure that the impact of such actions is clearly understood and assessed before hand. This is work that we will continue to do.

Through our investigative work, we adduce evidence on how families and schools are currently addressing the needs of children. It should be stated that in the majority of complaints received by the Office, schools accept and embrace such pupils attending and it is often the case that it is they, in conjunction with parents, who are contacting us raising concerns and complaints about services or supports available to the child.

It is a concern for this Office that schools with a strong tradition or specialisation in educating children with special needs in advance of the oncoming school term would take a position where they are contacting families, who have successfully enrolled their child with special needs, advising that a diminished time table is being offered as a result of reduced resources. In the most extreme scenarios, those families are being advised that the school will not accept the successful applicant child at all without such resources in place. We are of the view that this places families, and in particular children, in the most invidious position of being in the centre of a resource issue or row that is not of their making but immediately adversely affects them.

We are also concerned that schools may be reluctant to open up to welcoming children with special educational needs as there may be a perception that resources or supports will not be forthcoming. This may lead to a culture or a practice in schools, which may not be reliant on or needing such extra resource that those children are not openly included or welcomed.

This Office would submit that a critical element in any open and meaningful consideration within the Department on how enrolment policies should be formulated and overseen, should address how children with special educational needs are treated fairly. The approach to be taken should have the best interests of the child as the paramount consideration. The focus should be on ensuring that the issues identified and recognised as being in the best interests of those children become part of the everyday enactment of a school's enrolment policy.

This Office expects that such a full and open consideration on how such inclusion is ensured or promoted would include analysis of such issues as:

- an understanding and review of how redress is sought and provided currently;
- the experience of families today in seeking to access the optimum education provision for their children;
- the experience of schools in addressing same;
- the experience of schools in seeking and utilising resources for children with special needs;

- promoting the benefits of inclusiveness and how it may be incentivised;
- possible use of a quota system in school enrolment policies to positively promote such children's inclusion; and
- the mechanism by which resources and supports are allocated with respect to children with special needs.

Issue 4 Monitoring and Guidance of school enrolment policy

It is the stated aim of this the Ombudsman for Children's Office to promote and encourage the local resolution of enrolment disputes where ever possible. In simple terms, the starting point in seeking to resolve any issue is to look firstly to the enrolment or admissibility policy in place and then address difficulties with the local complaint procedures in place.

In non-legal terms, an enrolment policy seeks to prioritise one group of children over another with respect to a defined number of school places. To that end, a school may organise itself to meet the needs of a group of children with a defined ethos or culture. Because of the changing needs of society and the community which it serves, the policy needs to be internally reviewable to address those changes yet robust enough to withstand challenge to allow schools to go about their business which is improving the lives of children.

If decisions made are not clearly understood or anticipated, then that perception of inequity develops into a feeling of having not been treated fairly or possibly that a family has been improperly discriminated against. Issues with how that policy is implemented are to be addressed through local procedures. Issues regarding fairness and equity in how that policy is formulated and implemented may, depending on the circumstances, attract legal challenge.

An issue of concern which is emerging relates to the level of monitoring and guidance provided to schools with respect to those policies. In some investigations of complaints received, it is not clear what the defined policy on enrolment is with respect to the school or how oversight of that has occurred. In others, decisions being made with respect to proposed changes to catchment areas due to increase and fluctuation in the numbers of children of school-going age have proved problematic and there is a question as to the guidance available to schools and education authorities in those circumstances.

It would appear better practice, to seek to ensure the fairness and equity of a policy in place in the first instance by also considering the best interests of children rather than issues of inequity or discrimination to be actioned and resolved through unsuccessful Section 29 Appeal and possibly to the High Court seeking relief. There are the obvious costs and access implications on all sides. Equally, because of the defined school year and the age of the child, issues may not be resolved in a time frame to the full benefit of the child or the school. Also inherent flaws or inconsistencies in policies which should be addressed may not be perfected rather it is resolved on an individual basis for those in a position to access such redress.

The Ombudsman for Children's Office would respectfully submit that if the enrolment policy in place in a school is the 'go-to' document when there is a dispute, then a degree of oversight and guidance is required to ensure that those policies are fair and transparent in

the first instance. This should help schools and families by reducing the need for unnecessary appeals and Court applications.

Conclusion

This Office will continue to receive and examine complaints in relation to the administrative actions of schools and public bodies in relation to matters that have an adverse effect on children. We will determine our role in accordance with the provisions of our Act and the discretion afforded under same. Such discretion will always be exercised against the backdrop of our understanding of the guidance that is provided to schools in the formation and administration of enrolment policy and the availability of an effective system of redress should children encounter difficulty in relation to same.

It would appear that the vast majority of school enrolment decisions occur without incident or cause for query as schools and families go about their day-to-day activities. As a result of our primary legislation, the work of this Office goes beyond the traditional role of an Ombudsman in the provision of a free, independent complaints handling service. In addition to being statutorily mandated to consider the best interests of children through our investigations, we also have a statutory role in advising Government on policy and legislation affecting children and to encourage public bodies to develop policies, practices and procedures designed to promote the rights and welfare of children. While intervention through investigation may inevitably be required and appropriate on an individual complaint, the overall aim of our Office is to ensure that the fairness and equity of a system is addressed by the public body or schools in the first instance as the best interests of children are considered fully. We are of the firm view that allied to effective enrolment policy should be good complaints handling policy and culture.

We seek to promote the local resolution of complaints or disputes wherever possible and appropriate. A regulatory framework which not only permits, but promotes this approach is imperative. It is our view that the enrolment policies of schools should be fair and inclusive to those wishing to attend.

In times of population growth and increasing numbers of children attending school, we strongly encourage the Department of Education and Skills to consider the above submission in ensuring the fairness and equity of school enrolment and how issues may be resolved.